ARKANSAS DEPARTMENT OF EDUCATION
SPECIAL EDUCATION SECTION

[ ] AND [ ] **PETITIONERS**
AS PARENTS OF [ ]

VS. **NO. H-16-36**

LITTLE ROCK SCHOOL DISTRICT **RESPONDENT**

HEARING OFFICER'S FINAL DECISION AND ORDER

Issues and Statement of the Case

Issues:

The Parents maintained that the Little Rock School District (LRSD) violated the IDEA (Individuals with Disabilities Education Act) denying [ ](Student) a Free Appropriate Public Education (FAPE) through the following actions:

(a) failure to provide an appropriate Individualized Education Program (IEP) and related services, including, but not limited to failure to provide appropriate goals and objectives to address the Student's disabilities, academic deficits, and adaptive behavior deficits, communication deficits; failure to provide an appropriate Behavior Support Plan; and failure to provide appropriate social skills instruction;

(b) failure to provide evidenced based methods and interventions to teach the Student and address his social, communicative, behavioral and academic needs;

(c) changing the Student's placement through send homes, suspensions, and out of class time as a result of an overall failure to address the Student's behavior and by changing the Student's need for direct PT services without due process;

(d) failure to educate the Student in the Least Restrictive Environment;

(e) failure to conduct a Functional Behavior Assessment when the Student's behavior interfered with his ability to remain in the classroom;

(f) failure to address the Student's severe academic deficits on statewide testing and failing grades resulting from the lack of academic instruction;

(g) failure to provide appropriate ABA strategies and other Evidence Based Practices in educating the Student; and

(h) failure to implement the services and supports on the Student's IEP, however grossly deficient - specifically with regard to ST, OT, and PT.

The Parents also raised issued under Section 504 of the Rehabilitation Act of 1973. The hearing officer dismissed these claims as they are not cognizable in a hearing under the IDEA and he does not have jurisdiction.

Procedural History:

On March 7, 2016, a request to initiate due process hearing procedures was received by the Arkansas Department of Education (hereinafter referred to as the "Department" from [ ] and [ ] (hereinafter referred to as "Parent" or "Parents"), the Parents and legal guardians of [ ] (hereinafter referred to as "Student"). The Parents requested the hearing because they believe that the Little Rock School District (hereinafter referred to as "District" or "LRSD") failed to comply with the Individuals with Disabilities Act (20 United Stated 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 District filed a motion to continue on April 5, 2016. The Parents did not object to a continuance and the hearing was continued until May 16, 2016, and three sessions were held, however, the hearing was not completed. The hearing was rescheduled until June 27, 2016. On June 23, 2016, the hearing was continued on motion of the District due to the unavailability of a witness. The hearing was continued until August 2, 2016. On July 28, 2016, the Parents' counsel moved to continue due to a conflict in scheduling. The District did not object. The hearing was continued until August 26, 2016. On August 26, 2016, the Parents filed an unopposed motion to continue. The hearing was continued until September 9, 2016. The hearing was concluded on September 9, 2016, after which time the record was closed and closing statements were waived in lieu of submitting Post Hearing Briefs. The Post Hearing Briefs were initially due on October 25, 2016. However motions to extend dates were granted until November 4, 2016, at which time the parties submitted the Briefs.

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 Khayyam M. Eddings, Attorney at Law of Little Rock, Arkansas.

FINDINGS OF FACT

1. The Student has Autism Spectrum Disorder and is a child with a disability as such is defined in 20 U.S.C. Section 1401(3). The Student also has Anxiety Disorder and Specific Learning Disabilities in Written Expression and Math Calculation.

2. The Student's disabilities impair his thought processes and sensory perceptions resulting in anxiety, impaired social interaction, and disruptive and avoidant behaviors.

3. Media Piggee began to work with the Student as his paraprofessional in February 2015, when he was in seventh grade. (Vol. I, p. 30).

4. When Piggee began working with the Student he was not going to class at all.

5. Before Piggee began working with the Student rather than attending some of his classes, he worked on his assignments in the special education classroom of Qwyla Green who was the special education teacher at Mann Middle School. (Vol. I, P. 31).

6. Green's classroom was used as a calming area for the Student; a provision included in his behavior plan. (Vol. I, pp. 42-43).

7. Piggee transitioned the Student back to the classroom where he received instruction and fell into the regular schedule. (Vol. I, pp. 30-31).

8. While the Student has had some instances of difficulty staying on task, completing assignments, and being argumentative with teachers, those teachers were generally successful in redirecting his behavior. (Vol. I, p. 31).

9. According to Piggee, when she began working with the Student in the 7th grade, she had tremendous difficulty getting him to stay on task and to pay attention to the teacher. Piggee noticed that the Student's behavior began to improve and testified that on most days "he goes into the classroom, he sits down, he takes his materials out, and he self-motivates himself to

get started." (Vol. I, p. 37).

10. Piggee reports that the use of incentives has worked well to help improve the Student's behavior. (Vol. I, p. 39).

11. For example, the Student loves popcorn. At the end of each week if the Student has successfully completed assignments, not argued with teachers and followed classroom objectives he is rewarded with this favorite treat of popcorn. (Vol. I, p. 39).

12. To illustrate, Piggee testified that while the Student would periodically blurt out during class at the beginning of the school year, that behavior eventually subsided. (Vol I, p. 51).

13. Also, when Piggee initially began working with the Student he would was frequently argumentative. That behavior and others like, stomping his feet, scratching, snatching things from teachers and disrupting others in class, all subsided as well. (Vol. I, p. 52-53).

14. Further, before Piggee began working with the Student he used the school's elevators to travel from one floor to another at school. (Vol. I, p. 34).

15. Piggee determined that the Student was capable of ambulating using stairs and therefore started the Student using the school's stairs to travel from one floor to another while at school. (Vol. I, p. 34).

16. Piggee would communicate with the Students' parents or his nanny on a daily basis regarding the events of his school day. (Vol. I, p. 48).

17. The Student's math teacher, Tina Blanks, echoed Piggee's observation that the Student's behavior significantly improved since the beginning of the 2015-16 school year. (Vol. II, p. 63).

18. According to Blanks, initially it was extremely difficult getting the Student to follow basic directives. (Vol. II, p. 63).

19. As the year progressed, however, the Student began to raise his hand and wait to be recognized. (Vol. II, p. 63).

20. When the Student needed a break he began to ask for a break and wait for a response. (Vol. II, p. 63).

21. He also began to "wait [his] turn," not interrupt others and walk to the teacher's desk to turn his papers in without disrupting others. (Vol. II, pp. 63-64).

22. Academically, in his math class, when school began in the 2015-16 school year, Blanks would use "pop-up" on the Smartboard. This was a process where she would start a math problem. She would then have a student to come up and complete the next step in the problem. Another student would then come to the Smartboard and complete the next step until the problem is completed.

23. At the start of the school year, the Student would refuse to participate in the activity. (Vol. II, p. 65).

24. By the second nine weeks of the school year, the Student would participate in the activity. ("I may have one to start, and if he goes up, he will complete the process. It's like, once he is up there, he is up there until he is finished." (Vol. II, pp. 64-65).

25. The Student was enrolled in Mindy Williams' pre-Advanced Placement (AP) English during the 2015-16 school year. (Vol. II, p. 93).

26. The Student was placed in pre-AP classes at Petitioners' request due to their class size. (Vol. II, p. 175).

27. Pre-AP English is more challenging than regular eighth grade English. (Vol. II, p. 104).

28. While the Student scored "below basic" on the 2015 PARCC assessment,

Williams does not believe that is an accurate representation of his ability and attributes his poor score to his dislike of computerized standardized testing. (Vol. II, pp. 93-94).

29. The Student's speech therapist Jody Cerrato, who proctored the Student's sixth grade Benchmark and eighth grade PARCC assessments, testified that the Student tested "quickly and efficiently." (Vol. III, p. 254).

30. According to Cerrato, the Student would finish each subtest during the assessments in half the time allowed although, because of his disability, the Student was afforded additional time to complete each assessment. (Vol. III, pp. 255-257).

31. In Cerrato's opinion, therefore, as quickly as he observed the Student answer the questions on the computerized standardized assessments, the assessments results are not a true reflection of the Student's ability. (Vol. III, pp. 259, 274).

32. According to Williams, the Student participated in her class proficiently and was able to do grade-level work in literacy and reading comprehension. (Vol. II, pp. 94-96).

33. Williams attributed the Student's poor grades in her class to his unwillingness to complete and turn in the assigned work even with the modifications afforded the Student in his IEP. (Vol. II, pp. 96, 107-108).

34. The Student's IEP allowed him an entire nine weeks grading period to complete and turn in assignments. (Vol. II, p. 197).

35. Williams testified that the Student participated in her English class willingly only when the class was reading topics related to his interest in science and history. (Vol. II, p. 96).

36. If asked at the beginning of the 2015-16 school year, Williams' opinion would have been that she believed that the Student would have been more appropriately placed in a "self-contained" English class because of the behaviors he exhibited at the start of the school

year. (Vol. II, p. 105).

37. Williams had also observed the Student screaming and yelling on the floor in a stairway as a seventh grader but never observed such behavior while the Student was an eighth grader during the 2015-16 school year. (Vol. II, pp. 112-114).

38. The Student was never disrespectful in Williams' class and attended nearly every class period. (Vol. II, pp. 112-114).

39. However, Williams, from her observation as the Student's teacher, believed that the Student could perform well in a regular English classroom; even more so than in an AP-English class because of the rigor in AP. (Vol. II, p. 104-105;115;124-125).

40. During the 2015-16 school year, Williams saw growth in the Student's reading fluency. (Vol. II, p. 119-122).

41. On September 11, 2015, Williams administered the STAR reader test to the Student. (Vol. II, p. 120; J.Exh. 223HH).

42. Williams again administered the STAR reader test to the Student again in January 2016. (Vol. II, p. 121).

43. In September 2015 the Student scored 498.

44. The Student scored 523 in January 2016, a positive point increase. (Vol. II, p. 121).

45. The Student's Lexile score, which measures reading, fluency, comprehension and vocabulary, increased 50 points between September 2015 and January 2016. (Vol. II, p. 122).

46. On January 21, 2016, Petitioner Jacoby contracted the LRSD Special Education Director Cassandra Steele to request assistance in finding someone to help motivate the Student. (Vol. III, p. 196).

47. The Parent also asked on Thursday, January 21, 2016, "also there may be a need to rearrange the setting for the Student's educational needs." (Vol. III, p. 197, LRSD Exh. 17).

48. At no time prior to January 2016 did the Parent tell Steele that she believed that the Student required changes to his classroom setting and instruction. (Vol. III, p. 215).

49. Steele responded to the Parent on Monday, January 25, 2016, confirming that she received the Parent's note and informing the Parent that she had contracted with Jennifer Nash, a board certified behavior analyst (BCBA), to consult with the Parent and the Student's IEP team. (Vol. III, p. 123, LRSD Exh. 18).

50. Also on January 25, 2016, Steele asked the Parent to schedule an IEP conference with the Student's IEP team to discuss her concerns and informed the Parent that she would attend. (Vol. III, p. 127, LRSD Exh. 19).

51. On January 26, 2016, the Parent sent an e-mail requesting an IEP meeting to be scheduled immediately.

52. In her e-mail she wrote that it was her hope to resolve her concern without due process. (Vol. III, p. 217-218, LRSD Exh. 21).

53. Steele responded to the January 26, 2016, e-mail an hour later informing the Parent that she had spoken with the behavior analyst and informed her that an IEP meeting was scheduled for 9:00 a.m. on Thursday, January 28, 2016, but that meeting may have to be rescheduled if the Parent insisted on attorneys being present. (Vol. III, p. 219-221, LRSD Exh. 22).

54. Steele later confirmed the LRSD's counsel's availability to meet on January 28, 2016. (Vol. III, p. 221, LRSD Exh. 24).

55. Petitioner's counsel, however, was not available on January 28, 2016. (Vol. III, p.

222, LRSD Exh. 27).

56. Had the January 28, 2016, IEP meeting taken place, Steele's expectation was that the LRSD would receive consent from the Parent for Nash to begin observing the Student to collect data and conduct a Functional Behavior Assessment. (Vol. IV, p. 171).

57. On Monday, February 2, 2016, the LRSD notified that Parent that it had scheduled an IEP meeting for Friday, February 5, 2016. (Vol. III, p. 223-224).

58. However, the Parent filed a due process complaint on February 1, 2016. (Vol. III, p. 223, 227).

59. The Hearing Officer takes judicial notice that on the date of the March 7, 2016, hearing, Petitioners dismissed their February due process complaint in case No. H-2016-32 and immediately filed the due process complaint in this matter. (Vol. IV, pp. 173-174).

60. On February 3, 2016, Steele wrote informing the Parents' counsel that the LRSD had requested consent from the Parent for the behavior analyst to observe the Student and start working with his IEP team to formulate a plan for the Student, and that the Parent had declined to provide consent. (LRSD Exh. 38).

61. However, the LRSD never received either Petitioners' consent for Nash to observe the Student or conduct a functional behavior assessment. (Vol. IV, pp. 172; 204-205; 207-208; 212).

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.

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 that 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).

An IEP is considered appropriate if it "provides instruction and support services which are reasonably calculated to confer educational benefits to the student" in the least restrictive environment. *Hampton Sch. Dist. v. Dobrowokski,* 976 F.2d 48, 54 (1st Cir. 1992). An IEP must contain both a statement of the child's "present levels of performance" and "a statement of the special education and related services and supplementary aids and services to be provided to the child." 20 U.S.C. Section 1414(d)(1)(A). IEP's must be revised not less than annually. See *id*. Section 1414(d)(4)(A).

Under federal law the benefit conferred by the IEP need not reach the highest attainable level or even the level needed to maximize the child's potential. *Zumwalt Sch. Dist. v. Clynes*, 119 F.3d 607, 612 (8th Cir. 1997), *cert. denied*, 523 U.S. 1137 (1998). An IEP can provide FAPE even though it "may not be the only appropriate choice, or the choice of certain selected experts, or the child's parents' first choice, or even the best choice," *Amann v. Stow Sch. Sys.,* 982 F.2d 644, 651 (1st Cir. 1992) (emphasis in original) (internal quotations omitted). Parents challenging the adequacy of an IEP must show that there was no reasonable probability that their child could benefit from it. *G. v. Timberlane Reg'l Sch. Dist.*, 2007 U.S. Dist. LEXIS 1544, *30 (D.N.H.,

January 4, 2007).

While Petitioner's argue that the Student's IEP were inappropriate, they fully participated in the development of Dylan's IEP and educational programming. They selected pre-AP classes for the Student rather than special education classes because they believed that the Student was too advanced for special education classes and their belief that the class size of the pre-AP classes would be more appropriate for him. (Vol. II, p. 174-176), (Vol. III, p. 272-273).

On January 21, 2015, Petitioner contacted the LRSD Special Education Director Cassandra Steele to request assistance in finding someone to help motivate the Student. (Vol III, p. 196). At this time, the Student was enrolled in advanced placement classes. Petitioner also asks on Thursday, January 21, 2016, "also there may be a need to rearrange the setting for the Student's educational needs." (Vol. III, p. 197, LRSD Exhibit 17). At no time prior to January 2016 did Petitioner tell Steele that see believed that the Student required changes in his classroom setting and instruction. (Vol. III, p. 215). Steele responded to Petitioner on Monday, January 25, 2016, confirming that she received Petitioner's note and informing Petitioner that she had contracted Jennifer Nash, a board certified behavior analyst, to consult Petitioner and the Student's IEP team. (Vol. III, p. 213, LRSD Exhibit 18). Also on January 25, 2016, Steele asked Petitioner to schedule an IEP conference with the Student's team to discuss her concerns and informed Jacoby that she would attend. (Vol. III, P. 217, LRSD Exhibit 19).

On January 26, 2016 Petitioner sent an e-mail requesting an IEP meeting to be scheduled immediately. (LRSD Exhibit 21).

Steele responded to the January 26, 2016, e-mail an hour later informing Petitioner that she had spoken with the behavior analyst and informed her that an IEP meeting was scheduled for 9:00 a.m. on Thursday, January 28, 2016 but that the meeting may have to be rescheduled if

the Parent insisted on attorneys being present. (Vol III, p. 219-221, LRSD Exhibit 22). Steele later confirmed that LRSD's counsel's availability to meet on January 28, 2016. (Vol. III, p. 221, LRSD Exhibit 24). Petitioner's counsel, however, was not available on January 28, 2016. (Vol. III, p. 222, LRSD Exhibit 27). Had the January 28, 2016 IEP meeting taken place, Steele's expectation was that the LRSD would receive consent from Petitioner for Nash to begin observing the Student to collect data and conduct a Functional Behavior Assessment. (Vol. IV, p. 171). However, the LRSD never received either Petitioner's consent for Nash to observe the Student or to conduct a functional behavior assessment. (Vol. IV, pp. 172; 204-205; 207-208; 212).

On Monday, February 2, 2015, the LRSD notified the Parent that it had scheduled an IEP meeting for Friday, February 5, 2016. (Vol. III, pp. 223-224). However, the Parent filed a due process complaint on February 1, 2016. (Vol. III, p. 223, 227). On the date of the March 7, 2016, hearing, Petitioners dismissed the February due process complaint in case No. H-2016-32 and immediately filed the due process complaint in the instant case. (Vol. IV, p. 173-174). On February 3, 2016, Steele wrote informing the Parents'counsel that the LRSD had requested consent from the Parent for the behavior analyst to observe the Student and start working on his IEP team to formulate a plan for the Student, and that the Parent had declined to provide consent. (LRSD Exh. 38).

As illustrated, the LRSD attempted to schedule an IEP meeting at the request of the Parent. She then refused to engage in a dialogue with the LRSD regarding the Student's education and instead immediately filed due process hearing complaint. (Vol. IV, p. 205).

In this matter, the Student's IEP was reasonably calculated to confer educational benefits. For example, Media Piggee began to work with the Student as his paraprofessional in February

2015 when he was in seventh grade. When Piggee began working with the Student, rather than attending some of his classes, he would work on his assignments in the special education classroom of Qwyla Green, who was the special education teacher at Mann Middle School. Piggee, however, transitioned the Student back into the classroom where he received instruction and fell into the regular schedule.

Further, according to Piggee, when she began working with the Student in the seventh grade, she had tremendous difficulty getting the Student to stay on task and to pay attention to his teachers. She testified that initially the Student would periodically blurt out during class at the beginning of the school year that behavior eventually subsided. (Vol. I, p. 51). The Student was initially frequently argumentative. That behavior and other like, stomping his feet, scratching, snatching things from teacher and disrupting others in class, all subsided as well. (Vol I, p. 52-53).

The Student's math teacher Tina Blanks echoed Piggee's observation that the Student's behavior significantly improved since the beginning of the 2015-16 school year. (Vol. II p. 63).

Blanks testified that initially it was extremely difficult getting the Student to follow basic directives. As the year progressed, however, the Student began to raise his hand and wait to be recognized. (Vol. II, p. 63). When he needs a break he began to ask for a break and wait for a response. (Vol. II, p. 63). He also began to "wait [his] turn," not interrupt others and walk to the teacher's desk to turn his papers in without disrupting others. (Vol. II, p. 63-64).

Academically, in his math class, when school began in the 2015-15 school year, Ms. Blanks would use "pop-ups" on the Smartboard. This was a process where she would start a math problem. She would than have a student to come up and complete the next step in the problem. Another student would then come to the Smartboard and complete the next step until

the problem is completed. At the start of the school year, the Student would refuse to participate in the activity. (Vol. II. 65). By the second nine weeks of the school year, Dylan would participate in the activity. ("I may have one to start, and if he goes up, he will complete the process. It's like, once he is up there, he is up there until he is finished.") (Vol. II, pp. 64-65).

The Student's English teacher Mindy Williams also testified to marked improvement in his behavior. For example, she observed the Student screaming and yelling on the floor and in a stairway as a seventh grader but never observed such behavior while the Student was an eighth grader during the 2015-16 school year. (Vol. II, p. 117-118). Furthermore, the Student was never disrespectful in Williams' class and attended nearly every class period. (Vol. II., p. 112-114).

Academically, Williams witnessed a 24 point increase in the Student's STAR reader results between September 2015 and January 2016. The Student's Lexile score, which measures reading fluency, comprehension and vocabulary, increased 50 points between September 2015 and January 2016. (Vol. II., p. 122).

While Dylan may not have been on grade level in reading, this shortcoming does not negate the substantial progress that he was able to achieve. Courts have long held an IEP "need not be designed to maximize a student's potential commensurate with the opportunity provided to other children. The requirements are satisfied when a school district provides individualized education and services sufficient to provide disabled children with some educational benefit." *M.M. ex rel. L.R. v. Special Sch. Dist. No. 1*, 512 F.3d 455, 461 (8th Cir. 2008), *cert. denied*, 555 U.S. 979 (2008).

Further, his speech therapist, Jody Cerrato testified that the Student was able to engage in turn taking and play interactive card games with his peers when he would not before. (Vol. III,

pp. 277-278. Here, the District complied with IDEA procedures regarding the Student's academic programming. The IEP and the services provided were "reasonably calculated' to allow the Student to "receive educational benefits." An IEP "need not be designed to maximize a student's potential commensurate with the opportunity provided to other children. The requirements are satisfied when a school district provides individualized education and services sufficient to provide disabled children with some educational benefit." *M.M. ex rel. L.R. v. Special Sch. Dist. No. 1*, 512 F.3d 455, 461 (8th Cir. 2008), *cert. denied*, 555 U.S. 979 (2008).

FUNCTIONAL BEHAVIOR ASSESSMENT - BEHAVIOR PLAN

Petitioners also asset that the Student was denied FAPE because the District did not adequately address the Student's behavior. Petitioners spent a considerable amount of time, particularly during testimony of Dr. Rich Mancil, contending that the District's failure to conduct a functional behavior assessment is a per se denial of FAPE.

Under the IDEA, an IEP team must, "in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." 20 U.S.C. Section 1414(d)(3)(B)(I). When the IEP team fails to take this sort of action, that failure can amount to a substantive denial of the child's FAPE. *See Neosho R-V Sch. Dist. V. Clark*, 315 F.3d 1022, 1028-29 (8th Cir. 2003). In *Neosho* the court concluded that a substantive violation occurred after the district court conducted an independent review and found that the IEP team failed to adopt or implement anything that would be "sufficient to amount to a cohesive behavioral management plan" and the record showed that the child made only "slight" or "*de minimis*" academic and social progress" and that any educational benefit that the child did receive was then "lost due to [the] behavior problems that went unchecked." *Id.* at 1029. Those are not the facts in this case.

The LRSD used a collection of instructional modifications and supports to manage the Student's behavior. (Vol. III, p. 15). For example, the Student was provided a "calming area" or "safe haven" when he needed a quiet place to take a break. The Student also had a behavior support plan that was created when he was enrolled at Pulaski Heights Middle School and was brought forward for use at Mann Middle School. (Vol. II, pp. 155-156; P. Exh. p. 112-113). Moreover, the positive behavioral interventions and supports, and other strategies used to address the Student's negative behaviors were effective. After Piggee began to work with the Student as his paraprofessional in February 2015 when he was in seventh grade the Student began attending his classes, whereas before he would not. The Student became more focused and on task and less argumentative.

In addition, the Student began to raise his hand in class and waited to be recognized rather than blurting out. (Vol. II, p. 63). When he needs a break he began to ask for a break and wait for a response. (Vol. II, p. 63). He also began participating in classroom activities when he would refuse before.

Further, his speech therapist, Jody Cerrato testified that the Student was able to engage in turn taking and play interactive card games with his peers when he would not before. Cerrato also testified that the Student was mush less aggressive than he was when he first came to Mann in 2014 and his refusals have subsided. (Vol. III, p. 276, 278). Further, the Parent reports that the Student does not engage in the kicking behaviors that he engaged in at Pulaski Heights and that since he has been at Mann, the Student comes home to report that he had a great day at school most days. (Vol. III, p. 181-182, 183).

While the IDEA and its implementing relations require the IEP team to consider the need for the use of "positive behavioral interventions and supports" in the case of a student with a

disability whose "behavior impeded his or her learning or that of others," the United States Department of Education, however, has refused to require such interventions and support be based on a functional behavior assessment:

> Section 300.234(a)(2)(I) follows the specific language in section 614(d)(3)(B)(I) of the Act and focuses on interventions and strategies, not assessments, to address the needs of a child whose behavior impedes the child's learning or that of others.
> Therefore, while conducting a functional behavioral assessment typically precedes developing positive behavioral intervention strategies, we do not believe it is appropriate to include this language in Section 300.324(a)(2)(I).

71 Fed. Reg. 46,683 (2006).

The Dept. of Education apparently endorses the largely elective nature of the decision when to conduct a FBA as part of an evaluation or reevaluation:

> The IDEA requires the IEP team "in the case of the child's behavior impedes his or her learning or that of others, [to] consider, when appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior." In addition, school districts should take prompt steps to address misconduct when it first appears. Such steps could, in many instances, eliminate the need to take more drastic measures. These measures also could be facilitated through the IEP and placement processes required by IDEA. For example, when misconduct appears, a functional behavioral assessment could be conducted, and determinations could be made as to whether the student's current program is appropriate and whether the student could benefit from the provision of more specialized instructional and/or related services, such as counseling, psychological services, or social-work services in schools.

OSEP Memorandum 97-7, 26 IDELR 981 (OSEP 1997).

Nevertheless, except in connection with a school district taking specified disciplinary actions, the IDEA appears to leave it up to the professional judgment of the district whether or not to conduct such an assessment. That is the implication of the directive to conduct functional behavior assessments contained in 34 C.F.R. Section 300.530(d)(1)(ii). Therefore, failure to conduct a functional behavior assessment is not a denial of FAPE if the LRSD implements strategies and supports to address the negative behaviors and the Student responded well to the

prompts and redirections given to him by teachers and paraprofessionals. *See C.F. v. New York City Dept. Of Educ.*, 57 IDELR 255 (S.D.N.Y. 2001); *D.R. v. Department of Educ., State of Hawaii*, 57 IDELR 217 (D. Hawaii 2011).

LRSD responded to the Student's behavioral incidents with effective strategies and supports. The Student's behavioral incidents and the District's responses to each are well documented, and the record is chock-full with testimony from his teachers and paraprofessional of his behavioral progress from the time he transferred to Mann from Pulaski Heights as a sixth grader.

TESTIMONY OF DR. MANCIL

LRSD's motion to strike or exclude Dr. Rich Mancil's testimony is granted for a violation of the witness sequestration order given by the Hearing Officer.

Rule 615 of the Arkansas Rules of Evidence provides:

> At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order on its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party that is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause.

Ark. R. Evid. 615. Dr. Mancil was not a party or officer or employee of a party. Moreover, there was no showing that Dr. Mancil's review of three days of transcripts of the testimony of the Student's teachers and paraprofessional was essential to the presentation of the Petitioners' case. The Arkansas Court of Appeals has defined a person whose presence is essential to the presentation of the case as "persons as an agent who handled the transaction being litigated or an expert needed to advise counsel in the management of the litigation." *Arkansas Power & Light*

Co. v. Melkovitz, 11 Ark. App. 90, 668 S.W.2d 37 (Ark. App. 1984). The *Melkovitz* court *Oliver B. Cannon & Son v. Fidelity and Cas. Co.,* 519 F.Supp. 668 (D. Del. 1981) where the court held that such a showing required "that a witness has such specialized expertise or intimate knowledge of the facts of the case that a party's attorney could not effectively function without the presence and aid of the witness or that the witness would be unable to present essential testimony without hearing the testimony of all other witnesses." *Id.* at 103, 668 S.W.2d at 45. Petitioner failed to make such a showing and could not because Dr. Mancil was scheduled to testify via telephone conference on the first day of the hearing because he was out of the state at the time. (Vol. I, p. 18).

Likewise, Rule 615 of the Federal Rules of Evidence provides:

> At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But his rule does not authorize excluding:
>
> (a) a party who is a natural person;
>
> (b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;
>
> (c) a person whose presence a party shows to be essential to presenting the party's claim or defense; or
>
> (d) a person authorized by statute to be present.

Fed. R. Evid. 615.

LRSD's motion to disqualify Dr. Mancil and strike his testimony for violation of the witness sequestration rule should be granted under the federal rules also. In *Miller v. Universal City Studios*, 460 F. Supp. 984 (S.D. Fla. 1978), the district judge refused to allow defendant's expert witness, to testify as an appropriate sanction for the witness' violation of the court's general Rule 615 sequestration order when he received transcribed portions of a prior witness'

testimony. As summarized in the district court opinion:

> the Rule was violated by Professor Sullivan with the intentional cooperation of defendants' counsel in that defendants' counsel provided Professor Sullivan with transcribed portions of the testimony of Gene Miller (the plaintiff) ....

Miller, 460 F. Supp. At 986 n. 1 (emphasis added). Analogous to the facts in *Miller*, transcripts of witnesses testimony were provided to Dr. Mancil by Petitioners' counsel. (Vol. IV, p. 9). On these facts alone, the offending witness in *Miller* was disqualified, and the disqualification was expressly found not to be error by the Fifth Circuit at 650 F. 2d at 1372-74. The following rationale for that court's holding is appropriate to these circumstances:

> The purpose of the sequestration rule is to prevent the shaping of testimony by one witness to match that of another, and to discourage fabrication and collusion. The opportunity to shape testimony is as great with a witness who reads trial testimony as with one who hears the testimony in open court. The harm may be even more pronounced with a witness who reads trial transcript than with one who hears the testimony in open court, because the former need only rely on his memory of the testimony but can thoroughly review and study the transcript in formulating his own testimony.

Miller, 650 F, 2d at 1373 (emphasis added). For the aforementioned reasons, the testimony of is Dr. Mancil should be stricken from the record and the hearing officer should not consider it.

ORDER

In that the Parent has provided insufficient evidence and testimony to warrant support of allegations of a denial of FAPE their request for the relief requested is hereby denied.

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:

January 10, 2017

SIGNATURE:

S/ Garry J. Corrothers
GARRY J. CORROTHERS,
HEARING OFFICER