

**ARKANSAS DEPARTMENT OF EDUCATION
SPECIAL EDUCATION UNIT**

**RE: XXXXXX XXXX
 as Parent of Student
 XXXXXX XSSS**

PETITIONER

VS. H-16-42

XXXXXXXXXXXX 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 2014-15 and 2015-16 by violating the due process and benefit standards of the IDEA by:

1. Failing to provide appropriate IEPs;
2. Failing to provide the Parent with meaningful participation in IEP meetings;
3. Failing to provided extended school years services (ESY);
4. Failing to provide meaningful instructions;
5. Failing to evaluate the Student for all of her suspected disabilities; and by
6. Not educating the Student in the least restrictive environment (LRE).

Relief sought by the Petitioner included:

1. Compensatory special education and related services (no amount specified);
2. Evaluations to assess the Student’s current level of functioning in all areas of suspected disabilities;
3. Develop an appropriate IEP to be implemented in the least restrictive environment;

4. Conduct a functional behavior assessment by a board certified behavior analyst;
5. Allow Parent access to the Student throughout the school day when requested; and
6. Declaration of the Parent having exhausted her administrative remedies as to her 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 April 27, 2016. (See Hearing Officer Exhibit 2)

Procedural History:

On April 27, 2016, a request to initiate due process hearing procedures was received by the Arkansas Department of Education (hereinafter referred to as the "Department") from XXXXXX XXXX (Petitioner) (Hereinafter referred to as "Parent"), the parent and legal guardian of XXXXXX XXXX (hereinafter referred to as "Student"). The Parent requested the hearing because she 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 May 27, 2016, 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 April 27, 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, 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 May 7, 2016. (See Hearing Officer Exhibit 3). Counsel for the Respondent notified the Hearing Officer of unresolved conflicts for the date scheduled to begin the hearing on May 20, 2016, and on May 27, 2016, requested a continuance. (See Hearing Officer Exhibits 4 and 5). Counsel for the Petitioner objected to the continuance; however, a continuance was granted on May 23, 2016. (See Hearing Officer Exhibits 6 and 7). On the first day of the hearing counsel for the Respondent provided the Hearing Officer with notification of the resolution conference stating that both parties agreed to waive the conference doing so by text message. (See Hearing Officer Exhibit 8). The closed hearing began on August 8, 2016, and continued as scheduled on August 9 and 10, 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 sixteen-year-old tenth grade student enrolled in the District's high school.

2. The Student has been identified under the IDEA as a student with an intellectual disability entitling her to receive special education services and has been eligible for such services since entering the District in her kindergarten year.

3. Due to the severity of the Student's disability she has needed and has been programmed to receive the related service of an aide in her classroom.

Findings of Fact:

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

A. Failing to provide appropriate IEPs?

(1). School year 2014-15:

On April 24, 2014, an annual review conference was conducted by the Student's IEP team to prepare an Individualized Education Program (IEP) for her ninth grade school year (2014-15). Those in attendance included the Student's mother, a resource teacher, a classroom aide, a counselor, a speech/language pathologist and an occupational therapy aide. An additional meeting was conducted on April 30, 2014, with those in attendance being the Student's father, a physical therapy aide, an occupational therapy aide, the school's principal, a regular education

classroom teacher, and the special education resource teacher.¹

At the time the 2014-15 IEP was being developed the Student was completing the eighth grade, having been a student within the District since kindergarten. Her medical diagnosis at the time was Williams Syndrome, with the educational disability category for which special education service was deemed appropriate being an intellectual disability.² The psychoeducational evaluations on which the disability was determined contained conflicting data. The Student was provided with three different intellectual assessments (10/04/2011; 03/25/08; and 04/12/05). The earliest assessment concluded that she was performing significantly below average with a full scale intelligence score of 48; the second assessment also indicated that she was performing significantly below average with a composite intelligence index of 49; while the later assessment reflected a borderline level of functioning with a standard score of 74.³ It should be noted that all three were different assessment tools. The 2005 instrument was the Wechsler Pre-school and Primary Scale of Intelligence - Revised (WPPSI-R); the 2008 instrument was the Reynolds Individual Assessment Scales (RIAS); and the 2011 instrument was the Test of Nonverbal Intelligence-III (TONI). The achievement inventories administered in 2011 were more consistent with the two earlier inventories of intellectual abilities.⁴

The student profile summary for her proposed 2014-15 IEP concluded that her intellectual ability fell in the below average range and that her academic achievement was also in the low

¹ Parent Binder, Page 24-42

² Parent Binder, Page 102

³ Parent Binder, Page 133

⁴ Parent Binder, Page 130-131

range. It was noted that in addition to her academic deficits that she continued to need speech, occupational, and physical therapy services. In order to assist and enhance her academic activities it was also decided that she continued to need a paraprofessional with her at all times during academic instruction.⁵ Parental participation at the conference as noted on the annual review documentation was that the Parent was pleased with the Student's progress, but stated that, in her opinion, the Student could have done better if she had attended school more days. In addition to receiving related services of speech therapy twice weekly for thirty minutes, the IEP team also concluded that she would receive occupational therapy twice weekly for forty-five minutes and physical therapy twice weekly for forty-five minutes. It was decided that she would receive math, English, science, history, and a class in daily living skills during the first and second semesters of the year in a self-contained special education class for a total of 1,865 minutes per week. Another 235 minutes, with the location being unspecified, would be in the general education environment. The IEP contained consideration of special factors which included the Student (a) needing transition cues due to behavior problems when prompted to transition and (b) the use of an iPad to write verbal scores and to practice spelling and word study. She would not be subjected to the regular discipline policies and any discipline needed would be based on individual episodes. It was also decided that she would need "text to speech" as an accommodation in order for her to participate in the standard administration of state-wide and district-wide required assessments. It was also determined that she would participate in the Arkansas Alternative Assessment program.⁶

⁵ Parent Binder, Page 25

⁶ Parent Binder, Page 27

The proposed IEP contained instructional modifications, supplemental aids, and supports including (a) the opportunity to respond orally; (b) being given special projects in lieu of assignments; (c) being provided short instructions; (d) having her aide to help her with assignments; (e) using an iPad to assist in her work; (f) being provided modified tests to meet her needs; (g) having tests read to her; (h) being given clearly defined rules and sequences; and (i) providing her with private discussions to identify problems and solutions.⁷

The academic goals established for her 2014-15 school year included a reading goal with four stated objectives; a math goal with four stated objectives; and a speech/language goal with four objectives. The District's special education supervisor testified that the subject areas of English, history and science would be embedded in the goals and objectives of reading.⁸ The Student's progress as reflected at the annual review conference in April 2015 was that she had mastered all of her reading and English goals; that she was making progress on her receptive/expressive language goals, but that she continued to need maximum prompting/modeling. It was reported at the annual review conference that she was improving in speech, occupational, and physical therapies.

(2). School year 2015-16:

On April 22, 2015, an annual review conference was conducted by the Student's IEP team to prepare an Individualized Education Program (IEP) for her tenth grade school year (2015-16). Those in attendance included the Student's mother, a special education teacher, a

⁷ Parent Binder, Page 32-33

⁸ Transcript, Vol I, Page 123-125

regular education teacher; the assistant principal; and the speech/language pathologist.⁹

At the time the 2015-16 IEP was being developed the Student was completing the ninth grade in a self-contained special education classroom. Her medical diagnosis continued to be Williams Syndrome and the disability category for which special education service was deemed appropriate continued to be an intellectual disability. Parental participation at the conference was identical to that printed on the 2014-15 IEP.¹⁰ Bridge Testing in March 2014 indicated that she was at the “emergent level” in her reading skills and at the “not evident level” in her math skills.¹¹ Her reading was considered to be at the first grade level of difficulty. Although she exhibited adequate articulation skills, voice production and fluency of speech, her language skills were considered to be in the profoundly deficient range. Although the Student’s 2014-15 IEP entered as evidence is absent of progress notations, with the exception of speech therapy, the proposed IEP for 2015-16 states that she had mastered all of her reading and English goals. The IEP team decided that she continued to need speech, occupational, and physical therapies; with OT and PT being provided ninety minutes weekly and speech therapy sixty minutes weekly. The record also indicated that she would continue to need a personal aide at all times during academic instruction. The IEP also included a transition plan. The Student did not attend the meeting to participate in her transition plan; however, her mother participated in the decision making.¹²

The proposed IEP contained instructional modifications, supplemental aids, and supports

⁹ Parent Binder, Page 20

¹⁰ Parent Binder, Page 2 and Page 25

¹¹ District Binder, Page B-9

¹² Parent Binder, Page 1-23

including (a) being provided short instructions; (b) being encouraged to verbalize the steps needed to complete her assignments and appropriate activities; (c) modifying her tests to meet her needs; (d) being provided clearly defined limits, rules and consequences posted and implemented; (e) praising her immediately for appropriate behavior; (f) having private discussions with her to identify solutions; (g) providing her with in-class time out to cool down and regain control; (h) use of an iPad; and (i) providing her with a full-time aide.¹³

The proposed academic goals for 2015-16 included a reading goal with three objectives; a math goal with three objectives; a social skills goal with four objectives; and a speech goal with four objectives.¹⁴

The annual review conference for school year (2016-17) was conducted after the Parent filed for a due process hearing. However, both parties allowed the production of exhibits of the notice of conference; the extended school year addendum; and the annual review/notice of decision.¹⁵ The conference was initially scheduled for April 26, 2016, the day before the filing of the due process complaint; however, it was canceled due to the nonappearance of the Parent and rescheduled for May 13, 2016. The Parent chose not to attend. Those in attendance included the occupational therapy aide, the District's director of special education services, the physical therapist, a special education resource teacher, the speech/language therapist, a regular education teacher, the District's special education supervisor, and the principal.

¹³ Parent Binder, Page 16-17

¹⁴ Parent Binder, Page 5-12 (Also included as evidence were two goals and objectives for another student on pages 13-15).

¹⁵ District Binder, Page A173-181

The IEP team concluded that the Student made progress on her academic goals and objectives during school year 2015-16, but that her rate of progress did not meet the IEP expectations. She continued to require maximum verbal and visual/cues to promote participation in all of her speech therapy activities. Although she continued to show severe receptive/expressive language delay, her language skills were considered to be commensurate with her intellectual ability. In occupational therapy it was noted that she demonstrated poor participation, showing poor cooperation and attention during therapy sessions. Unlike speech and occupational therapies, in physical therapy she demonstrated good participation in treatment activities for the majority of the school year. One reason presented to the IEP team for her lack of progress was because she had missed an excessive number of days of school and when present was often lethargic, withdrawn and non-communicative. Extended school year services were deemed unnecessary due to having shown no indication of regression in her academic or therapy activities.

Other matters considered at the annual review meeting by the IEP team involved the potential outcome of the Parent's due process complaint, noting that even though the Parent did not respond to the notices of conferences, the District decided to move forward with the conference in order to comply with the IDEA annual review timelines.¹⁶

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

B. Failing to provide the Parent with meaningful participation in IEP meetings?

¹⁶ Binder District , Page A-178-180

The evidence as presented reflects that the Parent was present at both annual review IEP committee meetings for each of the school years under consideration. She elected to not attend the annual review conference after she had filed for a due process hearing. The Parent testified that she did not attend parent/teacher conferences held during the two school years in question because she and the Student's teacher spoke on a daily basis. However, she testified that she did attend parent/teacher conferences for her other children.¹⁷ From the testimony the meaningfulness of her participation appears to have centered around the Student's behavioral opposition to adults when being asked or directed to do something she did not want to do or not do, as well as when startled or being asked to engage in an unexpected activity.¹⁸ There was no evidence as to the Parent's objections to the academic subjects or the goals and objectives of the Student's IEP in meetings where she was present. She did not provide in testimony any objections to the physical, occupational, or speech therapy goals and objectives at the meetings she attended. Her major complaint and the issue which appears to have triggered this due process hearing was her objection to the reassignment of one of the Student's personal aides as well as the aide subsequently assigned to the Student. Her objection to this personnel change was addressed at a non-IEP meeting that she and the Student's step-grandfather attended. According to District testimony it was at this meeting where the decision to change aides was explained to her.¹⁹

Prior to the above non-IEP meeting, the Parent began email conversations with various

¹⁷ Transcript, Vol III, Page 171; 257; 260; and 278

¹⁸ Ibid, Page 57-58; 78-79; 92-93; 104-109; 187; and 284-286

¹⁹ Transcript, Vol I, Page 117; Vol II, Page 244-245; and Vol III, 215-216

District personnel. On February 19, 2016, she emailed the school principal stating her objection to the Student sharing an aide with another student after the Student's personal aide had been assigned to another student in another building in the district. She expressed apprehension as to the possibility of the Student hurting another student as a response to being slapped. On February 21, 2016, she asked for and received a meeting with the District's special education supervisor to address her concerns regarding the reassignment of the Student's aide. The non-IEP meeting was set for February 26, 2016, with the principal, the director of special education, the special education teacher, and the District's special education supervisor. The meeting was not considered an IEP meeting and no recorded documents were entered as evidence as to the outcome of the meeting. According to testimony from District personnel the Parent was informed that the decision of reassigning personnel was the responsibility of the District superintendent and could not be a decision of an IEP team.

Prior to the non-IEP meeting a separate programming conference was scheduled and held on February 25, 2016, at the Parent's request. The prior written notice of action for the meeting stated that the Student's mother requested the meeting to discuss the Student's progress and current IEP.²⁰ Although a review of the IEP was stated as the reason for the meeting, no changes to the IEP were made; however, instructional changes in the classroom were made. The Parent's emails as noted above on February 19, 2016, expressed her concerns about changing the Student's instructional aide. The District had employed a new special education teacher in January 2016, and according to testimony the death of an instructional aide at another school on the campus required the shifting of responsibilities for the aides assigned to the Student's

²⁰ Parent Binder, Page 94

classroom. The Parent objected to the change in that in her opinion the Student had established a positive rapport with the aide that was moved and did not want a change. The special education teacher testified that the aide previously assigned to the Student was not academically challenging the Student.²¹ Although the Parent was not satisfied with the District's decision in how the aide's were assigned to assist the Student there is no reason to believe that she did not engage in meaningful participation in the meetings where the topic as well as other special education services were discussed.

As previously noted the non-IEP meeting to discuss which aide to assign to the Student was conducted prior to the Parent filing for a due process hearing. The testimony from the Parent and step-grandfather was that the District refused to make the change they requested in the assigned instructional aide. The testimony from District personnel was that the decision was to use all of the aides in the classroom to provide one on one instruction to the Student, including the aide that the Parent objected to being in the self-contained classroom.²²

With the exception of not agreeing with the Parent's selection of a personal aide for the Student and not assigning another aide to be in the self-contained classroom there was no evidence or testimony to justify the allegation that the District failed to provide the Parent with meaningful participation in IEP meetings.

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

²¹ Transcript, Vol II, Page 107

²² Transcript, Vol III, Page 286-287

C. Failing to provided extended school years services (ESY)?

The annual review notice of decision on April 24, 2014, considered ESY for the summer between the Student's seventh and eighth grade. They decided that based on her progress, pre and post testing, observation, work samples and regression that ESY was not needed.²³ The annual review notice of decision on April 22, 2015, considered ESY for the summer between the Student's eighth and ninth grade. They again decided that based on her progress, pre and post testing, observation, work samples and regression that ESY was not recommended.²⁴ Following the filing for a due process the District conducted the annual review conference as noted above on May 13, 2016, and once again, decided that the Student did not qualify for ESY. The decision contained in the IEP was based on a calculation of regression. The Parent chose not to attend the later annual review conference.²⁵

When asked about the Student regressing during the summer the Parent testified that in her opinion "everybody would."²⁶ Although absent from the evidence for the summer between the Student's seventh and eight grade years there was no evidence or testimony presented to indicate that the District did not consider the Student's need for ESY.

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

²³ Parent Binder, Page 104-105

²⁴ Parent Binder, Page 100-101

²⁵ District Binder A-177; A-181-182 and Parent Binder, Page 99A

²⁶ Transcript, Vol III, Page 175

D. Failing to provide meaningful instructions?

The facts to address this complaint relies on the testimony provided by the special education classroom teacher, one of the Student's instructional aides, and the regular education teacher. The special education teacher who provided testimony had only begun teaching the Student in January 2016. (There was no testimony provided by any prior special education teachers.) She testified that the Student was reading at the kindergarten level and as to how she used precursor steps in teaching the Student to identify words. She testified that she did not use any particular reading program, but taught the Student by building on the Student's skills using activity books.²⁷ She testified that it was difficult for the Student to form/develop words. As a new college graduate she testified that she began her work with the District as a classroom aide in January 2016 and remained so until she received her teaching license in February 2016. She also testified that in addition to her instructing the Student, she used a one-on-one instructional aide and two other personal aides assigned to the classroom. She testified that the instructional aide assigned the Student when she entered the classroom as the teacher was not challenging the Student enough to help her reach her potential.²⁸ Consequently, she agreed to changing the instructional aide to another aide in the classroom that was familiar with the Student. She further testified that she used a research-based curriculum (Lakeshore) in teaching history, science, spelling, and the Student's daily living skills.²⁹ For social science she testified that she used

²⁷ Transcript, Vol II, Page 93-95

²⁸ Ibid, Page 107

²⁹ Ibid, Page 112-113

project learning activities that the Student appeared to enjoy.³⁰ With the changing of the aide she testified that the Student was participating more. She testified that she sent the Student's work home each day with the exception of not doing so after the Parent chose not to return the Student in April 2016.³¹

The only instructional aide to testify was the aide that the Parent objected to being in the classroom and the one to which the Student had been reassigned. She testified that she had been trained in various methods for instructing special needs students, having worked as an employee of the District for twenty-eight years.³² As the Student's instructional aide she testified that she helped her with her spelling, math, and reading.³³ The classroom teacher testified that the Student was engaged in several different academic activities, such as pairing her with a more fluent reader, with the aide assisting when she struggled with a word, and with the use of shaving cream to write sight words or pictures of various animals associated with the word.³⁴ Since the self-contained classroom was located in the high school building the teacher testified that she went to the elementary school library to obtain books for the Student.³⁵ In addition to the academic activities in the self-contained classroom the Student received additional instruction in speech, occupational, and physical therapy. The special education teacher testified that the total

³⁰ Ibid, Page 114-115

³¹ Transcript, Vol II, Page 143-144

³² Transcript, Vol I, Page 182-183

³³ Ibid, Page 189

³⁴ Transcript, Vol II, Page 89-91

³⁵ Ibid, Page 94-95

number of students in the classroom was ten.³⁶

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

D. Failing to evaluate the Student for all of her suspected disabilities?

The Parent has alleged that the District has approached the Student as a child with “mental retardation” as opposed to considering her as a child with a health impairment. As noted previously the Student has been diagnosed with Williams Syndrome. As explained by the Parent this is a genetic disorder that manifests itself in multiple ways as the child develops, primarily having difficulty in learning academic skills. However, the Parent did not enter any other evidence other than her testimony as to how Williams Syndrome impacted her ability to function in an academic or social setting, other than her limitations with regard to occupational, speech, and physical issues. In addition to the intellectual deficits associated with Williams Syndrome the Parent testified that the Student was being treated for anxiety. There was no evidence presented to show that the two disorders were related. The classroom special education teacher testified that the Parent provided her with information about Williams Syndrome; however, she stated that the Parent appeared to be more concerned about the Student’s anxiety.³⁷ The “anxiety” as seen by the teacher was when the Student was upset about something of unknown origin and was expressed by crying.³⁸ The high school principal testified that his only knowledge

³⁶ Ibid, 97

³⁷ Ibid, Page 100-101

³⁸ Ibid, Page 102-104

of Williams Syndrome is what was relayed to him by the Student's mother. He was not informed as to any relationship between Williams Syndrome and the associated behaviors referred to by the Parent as anxiety.³⁹ He further testified that at a meeting with the Parent and the Student's father that the major concern appeared to be for the Student's safety and not whether the District was addressing or had evaluated her for all suspected disabilities.⁴⁰ He acknowledged an email from the Parent, previously cited, where the Parent informed him that for Williams Syndrome "patients it's repeat, repeat, repeat in order to learn." He further testified that the Parent informed him that the Student had developed a heart murmur (time unspecified) and that in her opinion the Student was "coming out of her depression."⁴¹ The most recent psychoeducational evaluation conducted in November 2014, acknowledged the diagnosis of Williams Syndrome, but did not suggest any previous diagnoses of either anxiety or depression.⁴² All three of the psychoeducational evaluations presented as evidence contained a social history as provided by the Parent. None of the reports indicated the Parent's concern about either depression or anxiety as being a part of the Student's developmental history.⁴³

The emotionally related behaviors observed by District personnel included her being lethargic, whining, sleepy, and crying a lot. The Parent testified that in December 2015 the Student killed a kitten and when asked why, the Student replied that "one kitten was talking to

³⁹ Ibid, Page 193-194

⁴⁰ Ibid, Page 215-216

⁴¹ Ibid, Page 217 and Parent Binder, Page 258

⁴² Parent Binder, Page 123-127

⁴³ Ibid, Page 123, 128, and 175

the other one - - - or arguing with the other one.” Following this event the Parent took the Student to a physician who started her on Risperdal, an anti-psychotic medication.⁴⁴ The Parent also testified that she observed the Student “pretending like she was seeing scary things” and when asking the psychiatrist if she was schizophrenic, the response was that she was not schizophrenic, but it “was just pretend, that it was imaginary” because mentally “she was under five, and it then would just be pretend, and to her, it would be real.”⁴⁵ Following the use of the medication the Parent reported to the physician that the Student was really tired. After which the physician increased the dosage, which according to the Parent increased the Student’s tiredness. The time period following these medication events was when the Student also experienced the change in her instructional aide. The Parent further testified that the Student was taken off the medication, but not until April 2016, when she was no longer attending school. Her pediatrician had no knowledge of Williams Syndrome, but when she made contact with the parents of other children with Williams Syndrome and discovered that the unusual behavior of killing a kitten and the subsequent medication for a psychotic disorder was not related. On returning to the psychiatrist who prescribed the medication she reported that he thought she was depressed and wanted her to remain on the anti-psychotic and added an anti-depression medication.⁴⁶

How or when this information was conveyed to the District was unclear from the testimony. The only awareness of depression for the school principal was as noted above through the Parent’s email concerning the changing of the instructional aide. Also as noted

⁴⁴ Transcript, Vol III, Page 79

⁴⁵ Ibid, Page 50-51

⁴⁶ Ibid, Page 80-82

above the special education classroom teacher stated that what was being asked about anxiety was seen as being upset. She was never asked about her awareness of the Student being treated for depression. The District's special education supervisor testified that her knowledge of the Student having anxiety issues was when the Parent requested that her instructional aide be changed back to the aide she preferred. She was not presented with a formal diagnosis from the Student's physician stating that the Student had been diagnosed or was being treated for an anxiety disorder. When asked about the possibility of declaring the Student as being eligible for special education services under the category of OHI (other health impaired) she testified that in looking at the educational deficits and needs the disability would have to be an intellectual disability.⁴⁷

The testimony and evidence indicate that the District personnel were not provided by either the Student's behavior, the educational evaluation results, or the Parent's concerns in a need for evaluating the Student for any other possible disabilities that might have a negative impact on her education. The timing of the Student being placed on psychotropic medications, resulting in changes of mood, and the alteration in the assigned instructional aide appears to have been the tipping point for the consequent behaviors which resulted in the Parent filing for a due process hearing.

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

E. Not educating the Student in the least restrictive environment (LRE)?

⁴⁷ Transcript, Vol I, Page 71-72

The Parent was asked if she was aware of whether or not the Student had any interaction with children that were not disabled at school. She replied that “she has had a friend since she was in kindergarten...and she sometimes gets to see her.”⁴⁸ She knew that the Student was in a self-contained classroom, but also believed that the friend she referred to above would come to the self-contained classroom as a resource room for her disabilities.⁴⁹ When asked if the Student liked to be around other children the Parent replied that she did. She used the example of the Student hanging out with other children and following them around, even though she is not likely to talk to them, she will listen to other people talk.⁵⁰ The Parent was not talking about the Student being educated in the least restrictive environment, which apparently was not a major concern until the filing of the due process hearing. The issue was not contained in any of the IEP meetings to which the Parent attended. In direct testimony the Parent stated that it was “worth a try” for the Student to be in regular education classes “because it doesn’t seem like she has progressed very much, if any at all, since she has made it to high school.”⁵¹ The District’s special education supervisor testified in response to direct examination that the Parent did not discuss any concern about the Student being in regular education classes, stating that what she was hearing from the Parent at the due process hearing was “a 180.”⁵² It was her understanding that the Parent was more concerned about the Student’s safety. She testified that the Parent was

⁴⁸ Ibid, Vol III, Page 82

⁴⁹ Ibid, Page 83

⁵⁰ Transcript, Vol III, Page 82-85

⁵¹ Ibid, Page 146

⁵² Ibid, Page 284-85

concerned about the Student being a flight risk, wandering off, or running off if she got anxious in a big crowd. She quoted the Parent as having told her that she needed the Student to be in the self-contained classroom so her safety was always looked after and that she was always with someone.⁵³

So 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 time during the school day in which she was programmed to be with non-disabled peers for both school years under question included the teaching of daily living skills by a regular education teacher. The teacher testified that due limitations of the intellectual level of the Student that she talked “most about relationships, daily living techniques, hygiene, manners, how to get along with others, [and] a little bit of cleaning.” She stated that we “talked about things like, if we went to the restaurant and we ordered from the menu, how would we do that and when we paid, do we need to pay a tip, and the reason we did that...just those every-day skills.”⁵⁴

The Student’s special education classroom teacher testified that even though the Student spends the majority of time in her classroom she does spend time with non-disabled peers between classes, accompanied by her paraprofessional in the hallways and during lunch when she would visit with her friends.⁵⁵

Even though the Student received instruction from a regular education teacher she did not

⁵³ Ibid, Page 284

⁵⁴ Transcript, Vol III, Page 8-9

⁵⁵ Transcript, Vol II, Page 85

attend any academic class activities with non-disabled peers. Based on her level of intellectual abilities, and her apparent anxiety as reported by the Parent, 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 21.⁵⁶ The IDEA establishes that the term "child with a disability" means a child with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities, and who by reason of their disability, need special education and related services.⁵⁷ The term "special education" means specially designed instruction.⁵⁸ "Specially designed instruction" means adapting, as appropriate, to the needs of an eligible child under this part, the content, methodology, or delivery of instruction.⁵⁹

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

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

⁵⁷ 20 U.S.C. § 1401(3)(A)

⁵⁸ 20 U.S.C. § 1402(29)

⁵⁹ 34 CFR § 300.26(b)(3)

Requirements and Program Standards, Arkansas Department of Education, 2008.

Did the District in this case deny the Student FAPE during school years 2014-15 and 2015-16 by (a) failing to provide appropriate IEPs; (b) failing to provide the Parent with meaningful participation in IEP meetings; (c) failing to provide extended school year services (ESY); (d) failing to provide meaningful instructions; (e) failing to evaluate the Student for all of her suspected disabilities; and by (f) not educating the Student in the least restrictive environment (LRE)?

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.⁶⁰

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 she slapped an instructional aide and broke the aide's glasses. An incident similar to this involving another aide occurred the previous year, but without any disciplinary action being taken and without a due process complaint being filed by either the Parent or the District. The record shows that the Student's behavior did not result in difficulties unless she was exposed to sudden changes or when demands were placed on her that she did not wish. The maladaptive behavior exhibited by the Student may or may not have also been contributed to by medications prescribed by a psychiatrist

⁶⁰ *Special Education and Related Services: Procedural Requirements and Program Standards*, Arkansas Department of Education (2008), Section 10.01.22.1

to address the Student's "pretend behavior" and her "depression." The District was not provided with medical documentation regarding the Student's mental health issues and thus were compelled to continue providing the Student with special education services as a student with an intellectual disability.

Given the timeline of the maladaptive behavior and the request for a due process hearing the District did not have time nor opportunity to make a referral for an evaluation to determine if any other disabilities might adversely impact the Student's education. Whether or not the Student should have been considered a child in need of special education services under the eligibility category of other health impaired (OHI), was the challenge presented to the District under questioning during the hearing.

The IDEA and Department definitions of OHI are essentially the same. According to the federal regulations, other health impairment means having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that (a) is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, and sickle cell anemia; and (b) adversely affects a child's educational performance. Thus, to qualify as OHI eligible, a child must meet four conditions. First, he or she must suffer from a chronic or acute health condition. Second, the health condition must cause limited alertness to the educational environment due to limited strength, vitality, or alertness or heightened alertness to the surrounding environment. Third, the child's educational performance must be adversely affected by the disability. A child with limited alertness whose educational performance is not affected

does not qualify for placement as OHI. Finally, OHI, like all other qualifying conditions, must create a need for special education services. Generally speaking, analysis of OHI eligibility first considers the child's health condition and its general effects on the child, then looks separately at the disability's effect on the child's educational performance. Thus any acute or chronic health condition can meet the OHI definition if it results in limited alertness to the educational environment. This limited alertness may be manifested by a low level of strength, vitality, or general alertness or by heightened attentiveness to environmental stimuli. Determination of OHI eligibility must be made on a case-by-case basis. A medical diagnosis is not a necessary, nor by itself a sufficient, criterion for establishing OHI eligibility. A school system may require a medical assessment, but if it does, the school, not the child's parents, must bear the costs of such an assessment. However, the finding of a medical condition that causes limited alertness is not enough. The condition and diminished alertness caused by the condition must also adversely affect the student's educational performance. Educational performance is not defined in the IDEA or the Department's regulations. However, the courts have consistently held that such a determination needs to be reached on a case by case basis.⁶¹

In this case there was no evidence presented to show that other than the Student's frequent absences from school that her behavior or social adjustment needs had changed to such a degree to warrant a reevaluation for a change in the eligibility category for services under OHI.

⁶¹ See, e.g., *S. D. v. Haddon Heights Bd. of Educ.*, No. 15-1804 (3d Cir. 2016); also see *Leslie B. by and through John C. v. Winnacunnet Coop. Sch. Dist.*, 28 IDELR 271 (D.N.H. 1998, CV-94-530-SD) (holding that a student's social difficulties were a product of her disability and contributed to the adverse affect on her educational performance); *Christopher T. v. San Francisco Unif. Sch. Dist.*, 553 F. Supp. 1107, 1120 (N.D. Cal. 1982) (“[E]motional and social needs [may be] . . . unseverable from [a] child's educational needs.”).

Regardless of any actions and/or inactions on the part of the District's observations of the Student's behavior and the Parent's complaints, the testimony and evidence still needs 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?⁶²

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*.⁶³ 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

⁶² *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))

⁶³ *O.S. v. Fairfax Cnty. Sch. Bd.* (4th Circ., 2016)

to this case, the court concluded that the district court did not err in finding that the School Board met that requirement. Accordingly, the court affirmed the 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.⁶⁴

According to the Parent the Student was diagnosed with a genetic disorder referred to as Williams Syndrome. According to the Parent this disorder has resulted in the Student's ability to learn, as well as having physical ailments such as pain in the joints of her fingers finding it difficult for her to write. The adverse impact that this disability has had on her education 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, and speech therapies as related services. Thus, the question is not whether or not the Student is and has been eligible for special education services, but whether or not the individual education plans for the past two school years were reasonably calculated to enable the Student to receive an educational benefit.

The Court of Appeals for the Eighth Circuit in *Zumwalt v Clynes*⁶⁵ agreed with the Supreme Court's decision in *Rowley* in stating that the IDEA requires that a disabled child be provided with access to a free appropriate public education and that parents who believe that their child's education falls short of the federal standard may obtain a state administrative due

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

⁶⁵ *Zumwalt v Clynes*, (96-2503/2504, U.S. Court of Appeals, Eight Circuit, July 10, 1997)

process hearing.⁶⁶ 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).”⁶⁷

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 the student.⁶⁸

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. 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

⁶⁶ *Board of Education v. Rowley*, (458 U.S. 176-203, 1982)

⁶⁷ *Light v. Parkway C-2 School District*, 41 F.3d 1223, 1227 (8th Cir. 1994), cert. denied, 515 U.S. 1132 (1995)

⁶⁸ *Fort Zumult School Dist. v. Clynes*, 96-2503,2504, (8th Cir. 1997)

developing and implementing specifically designed instruction and related services to enable a disabled child to meet his or her educational goals and objectives.⁶⁹ 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 joint pain. 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. The Student's behavior of responding inappropriately to unexpected events and unwanted demands were well documented prior to the major event (i.e., changing of the instructional aides) which triggered the request for the due process hearing. Additionally, the Parent's testimony of how and why the Student was placed on psychotropic medications appears to have altered the Student's response to instruction (i.e., sleepiness, lethargy, crying, etc.). This unfortunate chain of events does not appear from the testimony and evidence to have been the result of the District's failure to consider the Student's unique needs in developing the goals and objectives on the two IEPs in question. Based on the evidence and testimony the Student did appear to be making some progress toward those goals and objectives.

⁶⁹ *Honig v. Doe*, 484 U.S. 305 (1988)

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. 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 special education services she was provided were primarily in a self-contained classroom with no academics being provided in a class of non-disabled students. 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. Considering the Student's limited intellectual abilities as well as her communication deficits the evidence and testimony is consistent with the IEP team's decision for her to be educated for the majority of her academics in a self-contained classroom.

Another major question with regard to the current case, and whether or not FAPE was denied, is whether or not the District failed to adequately address all of the Student's disabilities. The other disabilities as outlined by the Parent in her request for a due process hearing was the Student's behaviors as a consequence of her medical issues. However, the more important issue the Parent wished to address at the hearing was her concern as to how the District responded to her request that the Student's instructional aide not be the one of her choice. However, an IDEA due process hearing is not the appropriate venue for addressing those concerns. There was no evidence presented to show that the District failed to consider all of the Student's disabilities, nor

did their decision to change her instructional aide result in a denial of FAPE.

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 6, 2016

Date