

ARKANSAS DEPARTMENT OF EDUCATION
Special Education Unit

IN RE:

XXXX, Parent on Behalf of
XXX, Student

PETITIONER

VS.

CASE NO. H-17-07

East Poinsett County School District

RESPONDENT

HEARING OFFICER'S FINAL DECISION AND ORDER

ISSUES PRESENTED:

Whether the East Poinsett County School District (hereinafter "District" or "Respondent") denied (hereinafter "Student") a free, appropriate, public education (hereinafter referred to as "FAPE") between June 15, 2016 and September 16, 2016, in violation of certain procedural and substantive requirements of the Individuals with Disabilities in Education Act of 2004, 20 U.S.C. §§ 1400-1485, as amended (hereinafter referred to as "IDEA"), by: (1) failing to provide Student with an individualized educational program (hereinafter "IEP") that was reasonably calculated to provide educational benefit; (2) failing to provide educational services contained on Student's IEP; and (3) failing to educate Student in the least restrictive environment (hereinafter "LRE").¹

¹ Petitioner's Complaint, as well as Petitioner's Post-Hearing Brief, alleged that Respondent failed to provide Parent procedural and substantive due process required under the IDEA by failing to conduct IEP conferences, failing to hold evaluation conferences, failing to provide notice of IEP meetings, and failing to provide Parent meaningful participation in Student's IEP process. At the due process hearing in the above-captioned matter, however, Petitioner focused primarily on the three issues stated above and elicited little testimony regarding the remaining allegations in her Complaint.

PROCEDURAL HISTORY:

On September 16, 2016, the Arkansas Department of Education (hereinafter referred to as “Department”) received a written request from Parent to initiate due process hearing procedures on behalf of Student. Parent requested a due process hearing because she believed that the District failed to comply with the IDEA by failing to provide Student with an individualized educational program that was reasonably calculated to provide educational benefit, failing to provide educational services contained on Student’s IEP, and failing to educate Student in the LRE.²

At the time that Parent filed her request for a due process hearing, Student was eight years old and receiving homebound instruction. Parent and District stipulated that this Hearing Officer would address the specific period of June 15, 2016, the date of an executed settlement between Parent and District, through September 16, 2016, the date Parent filed her due process complaint in this matter.³

In response to the Parent’s request for hearing, the Department assigned the case to an impartial hearing officer. Thereafter, the date of October 24, 2016 was set as the date on which a hearing would commence if the Parent and District failed to reach resolution prior to that time.⁴

On October 18, 2016, a prehearing conference regarding this matter was conducted, via telephone. Counsel for both parties participated in the hearing. During the prehearing

² See Hearing Officer Binder of Pleadings and Orders. Refer also to Footnote 1.

³ In March 2016, Parent filed a due process complaint. Thereafter, Parent and District reached a resolution and memorialized same in an agreement dated June 15, 2016. Regarding any issues occurring prior to June 15, 2016, Parent’s remedy is to file suit for breach of contract.

⁴ See Hearing Officer Binder of Pleadings and Orders.

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

On October 24, 2016, the closed hearing of this matter commenced. Testimony was heard on October 24, 2016 and October 25, 2016.⁵ All testimony was heard at Tyronza Elementary School, located in Tyronza, Arkansas. The hearing concluded on October 25, 2016.

The following witnesses testified in this matter: XXX, XXX, XX, XX (hereinafter referred to as ""), XXX (hereinafter referred to as ""), and Parent.⁶ Parent had the burden of proof regarding the issues raised in this case.

Having been given jurisdiction and authority to conduct the hearing pursuant to Public Law 108-446, as amended, and Arkansas Code Annotated §§ 6-41-202 through 6-41-223, Danna J. Young, J.D., Hearing Officer for the Arkansas Department of Education, Special Education Unit, conducted a closed impartial hearing. Parent was represented by Theresa Caldwell (Little Rock, Arkansas) and the District was represented by Donn Mixon (Jonesboro, Arkansas).

Both parties were offered the opportunity to submit post-hearing briefs, and both submitted briefs in accordance with the deadline set by this Hearing Officer.⁷ Petitioner additionally submitted a supplement to her post-hearing brief after the deadline. This

⁵ See Hearing Transcripts, Vols. I-II.

⁶ *Id.*

⁷ See Hearing Officer Binder of Pleadings and Orders.

supplement outlined requested remedies of Petitioner.⁸ Petitioner's supplement to post-hearing brief was not considered because it was filed untimely.⁹

FINDINGS OF FACT:

Student is an eight-year-old female who is provided educational services at Tyronza Elementary School, which is located within the boundaries of the East Poinsett School District. Student began the 2016-2017 school year classified as a third grader.¹⁰

Student was diagnosed with autism when she was two years old.¹¹ Thereafter, Student attended Ascent Pediatric Day Clinic in Trumann, Arkansas for a few years and eventually transferred to another program, Spark, located in Jonesboro, Arkansas. At Spark, Student began receiving ABA therapy, as well as occupational therapy, physical therapy, and speech therapy.¹² While at Spark, Student made progress and began exhibiting language.¹³ After Spark closed, Student began receiving 30 hours a week of in-home ABA therapy and continued this therapy until she began kindergarten at Tyronza Elementary School.¹⁴ In the years that she has attended Tyronza Elementary School, Student has exhibited aggression, including biting, kicking, pulling hair, falling down, and attacking other students and personnel.¹⁵ Student's aggressive behaviors have become more severe over time.

⁸ *Id.*

⁹ Respondent filed an Objection to Petitioner's Supplemental Brief on November 21, 2016. As this issue has been addressed in this decision, no separate order will be provided to the parties.

¹⁰ District Exhibit Binder, p. 1.

¹¹ Hearing Transcript, Vol. II, p. 229.

¹² *Id.* at 230.

¹³ *Id.*

¹⁴ *Id.* at 232.

¹⁵ *Id.* at 86.

On June 15, 2016, Parent and District executed a settlement agreement regarding services to be provided for Student.¹⁶ Thereafter, during the summer months of 2016, Parent and District began meeting to revise Student's IEP accordingly.

Three IEP meetings occurred between June 15, 2016 and September 16, 2016, when parent filed a complaint for a due process hearing. The dates of the IEP meetings were August 1, 2016, August 9, 2016, and September 13, 2016.¹⁷

Regarding the August 1, 2016 IEP meeting, the purpose of the meeting was to discuss the requirements of the June 15, 2016 settlement agreement and, in accordance therewith, devise a homebound program for Student and establish a relationship with a board certified behavior analyst (hereinafter "BCBA").¹⁸ Dr. Joan Henley, a BCBA, attended the meeting and agreed to work with District to create a homebound program for Student.¹⁹ District lacked recommendations for the program on account of missing evaluations; therefore, all parties to the IEP meeting discussed necessary evaluations and obtained necessary consents from Parent.²⁰ When the meeting concluded, it was the understanding of the IEP team that Dr. Henley would be evaluating Student for the purpose of determining programming needs.²¹ However, after the IEP meeting, Dr. Henley contacted XXXX, the special education coordinator for District, and notified her that she was no longer willing to serve at the BCBA

¹⁶ In March 2016, Parent filed a due process complaint. Thereafter, Parent and District reached a resolution and memorialized same in an agreement on June 15, 2016. Regarding any issues occurring prior to June 15, 2016, Parent's remedy is to file suit for breach of contract.

¹⁷ District Exhibit Binder, pp. 36-44, 27-35, 18-26.

¹⁸ Hearing Transcript, Vol. I, p. 61.

¹⁹ *Id.* at 62.

²⁰ *Id.* at 62-63.

²¹ *Id.* at 64. *See also* District Binder, Exhibit D, 8/1/2016 Prior Written Notice of Action.

for Student on account of time constraints and Parent not providing requested information.²²

Between the August 1, 2016 and August 9, 2016 IEP meetings, XXXX began seeking another BCBA to evaluate Student. XXXX generated a list of BCBA candidates and submitted the list to Parent for review. Palm, BCBA and owner of Transformations Autism Treatment Center (hereinafter referred to as “Transformations”) located in Memphis, Tennessee was on the list. Parent agreed to use Palm as a BCBA for Student.²³

On August 9, 2016, the IEP team met again to discuss programming for the 2016-2017 school year and review and revise Student’s IEP as necessary.²⁴ The team met to discuss scheduling of services, as well as to obtain necessary consents for OT and PT reevaluations. At this same meeting, a letter written by a physician at Dennis Developmental Center, specifically Dr. Eldon Schulz, M.D., was reviewed by the IEP team. The letter recommended that Student receive 35-40 hours of ABA therapy per week in the home and school setting, noting 4 to 6 hours per day as the recommendation.²⁵

School began on August 15, 2016. Student’s IEP provided Student would receive 390 minutes of special education in the subjects of language arts, math, science, and social studies, 300 of these minutes to be provided at Student’s home (1 hour per day). The remaining 90 minutes of special education minutes included speech therapy which was to be provided at District. In addition, Student was also to receive 200 minutes per week of

²² Hearing Transcript, Vol. I, pp. 65-66.

²³ Hearing Transcript, Vol. 1, pp. 152-54.

²⁴ *Id.* at 61. *See also* District Exhibit Binder, Exhibit D, August 9, 2016 Prior Written Notice of Action; District Exhibit Binder, pp. 33-34.

²⁵ Hearing Transcript, Vol. 1, pp. 41-42. *See also* District Exhibit Binder, p. 93.

general education at the District for music, art, library, physical education, and recess (one 40-minute subject per day).²⁶ Student was also to receive 60 minutes of OT and 60 minutes of PT each week, also services to be received at District. Beginning August 15, 2016, a two-person team went to Student's home each day pursuant to Student's IEP.²⁷ A paraprofessional was ready and willing to assist Student at school during general education subjects, physical therapy, and occupational therapy; however, Parent did not bring Student to school for these services because she did not feel that the school had someone properly trained and ready to assist Student.²⁸

On September 1, 2016, Palm, the new BCBA for Student, began observing Student for the purpose of assessing needs. Palm observed Student once at Student's home for a period of two hours, and a second time at District for a period of one and one half hours.²⁹ Palm noted in a report dated September 12, 2016 that Student had engaged in various aggressive behaviors, including biting, hair pulling, hitting, kicking, pica, and elopement during the home observation, noting that most of these behaviors occurred when Student was asked to do something that she did not want to do.³⁰ In addition, Palm noted that Student was able to express some basic wants and needs using one-word statements.³¹ Regarding the observation at the District, Palm noted that Student exhibited some appropriate behaviors, such as sitting with classmates, dancing, holding instruments, as well as demonstrated some

²⁶Hearing Transcript, Vol. I, pp. 72-73, 87-88, 147.

²⁷ *Id.* at 72.

²⁸ *Id.* at 88.

²⁹ District Exhibit Binder, p. 62.

³⁰ *Id.*

³¹ *Id.*

problem behaviors, such as getting up at inappropriate times, biting her fingers, not following group instruction, and attempting to leave class.³²

As a result of Palm's observations, she drafted seven different behavior goals for Student. Those goals state that Student will: (1) learn to ask for breaks or to stop an activity correctly without prompts 8 out of 10 times for at least 6 consecutive weeks; (2) decrease noncompliant behaviors to no more than 10 times per week for no less than 3 consecutive months and respond to no more than 2 verbal cues before returning to task; (3) decrease self-injurious behaviors to no more than 5 times per week for no less than 3 consecutive months leaving no tissue damage; (4) decrease hair pulling behaviors to no more than 0 times per week for no less than 3 consecutive months; (5) decrease biting behaviors (biting others) to no more than 0 times per week causing no tissue damage for no less than 3 consecutive months; (6) decrease hitting behaviors to no more than 1 time per week, causing no tissue damage for 3 consecutive months; and (7) decrease kicking to no more than 1 time per week causing no tissue damage for 3 consecutive months.³³ Each goal included replacement behavior objectives.³⁴ Palm's report also noted that data would be collected by family and school staff on behavior data sheets and summarized graphically by Palm. In addition, Palm's report addressed the need for training of family and school staff.³⁵

On September 13, 2016, the IEP team reconvened to discuss Palm's report and recommendations.³⁶ Palm, who had observed Student and prepared a report regarding her

³² *Id.* at 62-63.

³³ *Id.* at 65-67.

³⁴ *Id.*

³⁵ *Id.* at 68-69.

³⁶ District Exhibit Binder, Exhibit F, August 25, 2016 Notice of Conference.

recommendations, was present at the IEP meeting.³⁷ Palm presented two different options to the IEP team regarding how to address Student's aggressive behaviors. One option outlined how Student could come to Palm's clinic in Memphis, Tennessee each day and receive ABA therapy at the clinic, while also being assessed thoroughly by Palm. Palm indicated that she wanted to do additional testing and obtain sufficient information to put a plan in place for Student. The other option was to do the same work in Student's home.³⁸ Between the two options, Palm recommended that Student come daily to Transformations because she felt that Student's home environment was chaotic and that the intensive work that would occur in the clinic would result in a shorter timeframe for Student to eventually return to school. Coming to the Transformations clinic would allow Palm to work with Student in a controlled environment from 9:30 to 2:00 each day.³⁹ Palm explained that Student would be transported daily from Tyronza, Arkansas to Memphis, Tennessee, and back again. While Student was at Transformations, she would receive speech therapy as well.⁴⁰ It was discussed that physical therapy and occupational therapy, as well as general education minutes, would be suspended for the short time that Student was traveling to and from Transformations.⁴¹

After discussing this option, the IEP team, including Parent, agreed that Student should go to Transformations each day.⁴² Everybody on the IEP team seemed excited and

³⁷ Hearing Transcript, Vol. II, p. 81.

³⁸ *Id.* at 96.

³⁹ *Id.* at 81, 97-98, 105.

⁴⁰ *Id.* at 99.

⁴¹ Hearing Transcript Vol. I, pp. 84-85. *See also* District Exhibit Binder, Exhibit G, September 13, 2016 Notice of Action.

⁴² Hearing Transcript, Vol, II, p. 99.

happy with this decision, and there were no negative sentiments expressed.⁴³ In addition, Parent was notified that she was welcomed to come to Transformations with Student and attend all sessions. District talked with Parent about transportation needs so that she could attend all sessions with Student.⁴⁴ Parent commented to Palm that she was excited and appreciative of Palm's services, and that the IEP meeting was one of the best that she had attended.⁴⁵ Parent signed all necessary consent forms.

Palm owns and operates Transformations.⁴⁶ Palm has been a board certified behavior analyst since the year 2005.⁴⁷ Transformations is a behavior clinic and does not operate as a school.⁴⁸ Then intention of the IEP team was to utilize Transformations for behavioral therapy and continue providing special education academic instruction at Student's home, via the homebound programming in Student's IEP.⁴⁹ Transformations was never intended to be a change of Student's educational placement.⁵⁰ Transformations treats approximately 20 other children who are the same age as Student and are there daily.⁵¹

Also addressed by the IEP team at the September 13, 2016 IEP meeting was a note presented by Parent and written by Student's physician, Dr. Schulz. The note stated that Parent needed to attend school with Student while the due process settlement agreement was being executed.⁵² Student's IEP team considered this request but ultimately denied it.

⁴³ *Id.* at 100.

⁴⁴ Hearing Transcript, Vol. I, p. 154.

⁴⁵ Hearing Transcript, Vol. II, p. 101.

⁴⁶ *Id.* at 66.

⁴⁷ *Id.* at 67.

⁴⁸ *Id.* at 68.

⁴⁹ *Id.* at 118.

⁵⁰ *Id.* at 171.

⁵¹ *Id.* at 111.

⁵² Hearing Transcript, Vol. 1, p. 70-71. *See also* Parent Exhibit Binder, p. 92.

The IEP team was concerned about having Parent act as Student's full-time paraprofessional due to potential confidentiality concerns, as Student would be exposed to other children throughout the day.⁵³

Following the September 13, 2016 IEP meeting, Parent texted Palm and had some additional questions about treatment at Transformations.⁵⁴ Subsequently, XXXX informed Palm that Student would not be coming to Transformations and that Parent had changed her mind.⁵⁵ XXXX inquired about Palm conducting the behavior training and assessment at Student's home, and Palm agreed.⁵⁶ Shortly thereafter, however, Parent texted Palm and told her that she did not want to work with Palm any longer.⁵⁷ Approximately three days later, Parent filed a complaint for a due process hearing. District has continued to attempt to work with Parent but has been denied access to Student.⁵⁸

All in all, because Parent would not bring Student to school, general education, speech therapy, occupational therapy, and physical therapy sessions were missed by Student.⁵⁹ District maintained a calendar noting occupational and physical therapy absences.⁶⁰ In addition, Parent cancelled several of the scheduled homebound sessions, and at other times, staff would arrive at Student's house and nobody would be present.⁶¹ Between August 15, 2016 and September 27, 2016, there were sixteen sessions that Parent cancelled or

⁵³ Hearing Transcript, Vol. 1, p. 89.

⁵⁴ Hearing Transcript, Vol. II, p. 129.

⁵⁵ *Id.* at 130.

⁵⁶ *Id.* at 132.

⁵⁷ *Id.*

⁵⁸ *Id.* at 154-55.

⁵⁹ Hearing Transcript, Vol. I, p. 147.

⁶⁰ District Exhibit Binder, pp. 74-75.

⁶¹ Hearing Transcript, Vol. 1, pp. 148-50.

otherwise missed.⁶² As of September 27, 2016, Parent declined all services stating that her attorney instructed her to not let anyone come to the house.⁶³

The most recent IEP for Student shows a proposed schedule of services that includes 390 minutes of special education and 0 hours of general education time. The document has 200 hours of general education time listed, but that entry has been marked through and replaced with 0 hours. XXXX explained that this was marked through when Parent refused to bring Student to school for general education pullouts. The IEP also states that Student should receive 90 minutes per week of speech therapy, 60 minutes per week of physical therapy, and 60 minutes per week of occupational therapy.⁶⁴ The IEP also contains goals for language arts, math, science, social studies, and physical education. Present levels of performance for each subject are provided.⁶⁵ The IEP also indicates that behavioral strategies are being employed, referencing a behavior plan, and that Student will be placed on homebound instruction.⁶⁶ Parent signed off on this IEP on September 13, 2016.⁶⁷

CONCLUSIONS OF LAW AND DISCUSSION:

Pursuant to Part B of the IDEA, states are required to provide a FAPE for all children with disabilities between the ages of three and twenty-one.⁶⁸ In 1982, in *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, the U.S. Supreme Court addressed the meaning of FAPE and set forth a two-part analysis that must be made by courts and hearing officers in determining

⁶² *Id.* See also District Exhibit Binder, p. 98-99.

⁶³ *Id.*

⁶⁴ District Exhibit Binder, pp. 1-17.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 17.

⁶⁸ 20 U.S.C. § 1412(a); 34 C.F.R. § 300.300(a).

whether a school district has failed to provide FAPE as required by federal law.⁶⁹ Pursuant to *Rowley*, the first inquiry that a court or hearing officer must make is that of whether the State, *i.e.* local educational agency or district, has complied with the procedures set forth in the IDEA. Thereafter, it must be determined whether the IEP(s) developed pursuant to IDEA procedures was reasonably calculated to enable the student to receive educational benefits.⁷⁰

It must first be determined whether District complied with the procedures set forth in the IDEA. In the present case, Petitioner asserted procedural violations of the IDEA in her complaint, specifically alleging that District failed to conduct IEP conferences, hold evaluation conferences, provide notice of IEP meetings, and provide Parent meaningful participation in Student's IEP process.⁷¹ Petitioner, however, neither focused on these allegations during the hearing nor elicited testimony regarding same. Therefore, Petitioner presented insufficient evidence to establish that Student was denied FAPE as a result of procedural violations of the IDEA.

Having analyzed the first prong of the FAPE analysis, it is now necessary to consider whether the District substantively denied FAPE to Student. Pursuant to *Rowley*, the goal of the IDEA is "more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside."⁷² Essentially, an IEP is not required to be designed to "maximize a student's potential commensurate with the opportunity provided to other children," thus making the standard

⁶⁹ 458 U.S. 176, 206-07 (1982).

⁷⁰ *Id.*

⁷¹ See Hearing Officer Binder of Pleadings and Orders.

⁷² *Id.* at 192

that District must meet very minimal.⁷³ However, what constitutes educational benefit when dealing with a disabled student must be determined on a case-by-case basis. Specifically, “[t]he IDEA requires public school districts to educate ‘a wide spectrum of handicapped children,’ and the benefits obtainable by children at different ends of the spectrum will ‘differ dramatically.’”⁷⁴

The IDEA also requires that students with disabilities be educated in the least restrictive environment pursuant to 20 U.S.C. §1412(a)(5). There is a “strong preference in favor of disabled children attending regular classes with children who are not disabled,” resulting in a “presumption in favor of public school placement.”⁷⁵ However, the IDEA “significantly qualifies the mainstreaming requirement by stating that it should be implemented to the ‘maximum extent appropriate.’”⁷⁶ Essentially, a disabled student should not be separated from his or her peers unless the services that make segregated placement superior cannot be “feasibly provided in a non-segregated setting.”⁷⁷ The requirement to mainstream is not applicable when it “cannot be achieved satisfactorily.”⁷⁸ As such, it is permissible to remove a disabled child from a mainstream environment when he or she would not benefit from mainstreaming or when the “marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting.”⁷⁹

⁷³ *CJN v. Minneapolis Pub. Sch.*, 323 F.3d 630, 68-39 (8th Cir.), *cert. denied*, 540 U.S. 984 (2003).

⁷⁴ *C.B., by and through his parents, B.B. and C.B. v. Special Sch. Dist. No. 1, Minneapolis, MN*, 636 F.3d 981 (8th Cir. 2011) (quoting *Rowley*, 458 U.S. at 202).

⁷⁵ *CJN*, 323 F.3d at 641.

⁷⁶ *Pachl v. Seagren*, 453 F.3d 1064, 1067 (8th Cir. 2006); *see also* 20 U.S.C. § 1412[a](5).

⁷⁷ *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983).

⁷⁸ *Pachl*, 453 F.3d at 1068.

⁷⁹ *Roncker*, 700 F.2d at 1063.

In the present case, Parent asserted that the District failed to provide FAPE when it failed to develop an appropriate IEP, and failed to provide services as set forth on the inappropriate IEP that was in place between June 15, 2016 and September 16, 2016. In addition, Parent asserted that the decision to send Student to Transformations would have been in violation of the requirement to educate Students in the LRE.

Appropriate IEP and Provision of Services. Parent asserted that the District failed to develop an appropriate IEP for the 2016-2017 school year and, also, that District failed to provide services that were listed on Student's inadequate IEP. The IDEA requires that IEPs include the following: "(1) a statement of the student's present levels of academic and functional performance, (2) measurable annual goals, (3) a description of how progress will be measured, (4) a statement of educational and related services to be provided, (5) an explanation of the extent to which the student will not be in the regular classroom, (6) a statement of accommodations necessary to measure achievement, and (7) the date on which services will commence.⁸⁰ If a student's IEP is reasonably calculated to enable her to receive educational benefits, then the IEP requirements have been met.⁸¹ An IEP "should be set aside only if procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formation process, or caused a deprivation of educational benefits."⁸²

⁸⁰ *Park Hill Sch. Dist. v. Dass*, 655 F.3d 762 (8th Cir. 2011). See also 20 U.S.C. § 1414(d)(1)(A)(i).

⁸¹ *Rowley*, 458 U.S. at 207.

⁸² *Lathrop R-II Sch. Dist. V. Gray*, 2009 WL 2982645 1, 9 (W.D. Mo.) (citations omitted).

In the present case, the record established that Student's IEP was reasonably calculated to enable Student to receive educational benefit while at District. The IEP provided for homebound instruction, which was apparently agreed to by Parent and District in reaching a prior settlement agreement. The IEP provided student with 300 minutes of special education instruction in language arts, math, social studies, and science, and this instruction was to take place in Student's home. In addition, the IEP provided student with 200 minutes of general education activities, including music, physical education, art, library, and recess, all services to be provided at Tyronza Elementary School. The IEP further provided for 90 minutes per week of speech therapy, and 60 minutes per week of both OT and PT, all services to be provided at Tyronza Elementary School.

Parent argued that, per the IEP, there were no minutes of general education that were being provided, pointing out that the IEP in place at the last IEP meeting, specifically the meeting occurring on September 13, 2016, was modified so that the provision of 200 general education minutes was marked out and changed to 0 minutes. This Hearing Officer was satisfied, however, with District's explanation that this change was made only because Parent had repeatedly refused to bring Student to the school for general education activities, physical therapy, and occupational therapy.

In addition to special and general education minutes, Student's IEP contained measurable goals for language arts, math, science, social studies, and physical education. The goals for each subject additionally provided a statement of how the goals would be measured and, within each subject area (just prior to goals) contained a statement of Student's present levels for the subject area.

Regarding Student's behavioral issues, the IEP indicated that positive behavior interventions and supports were being used to address Student's behavior issues, referencing a behavior plan. In addition, documentation from the three IEP meetings that occurred in August and September 2016 referenced District's attempts to address behavioral issues. The IDEA does not require District to state goals or objectives for behavior in an IEP, so long as the document indicates in some manner that behaviors are being addressed.⁸³ As such, Student's IEP is not deficient on this basis.

Considering these findings, it is the opinion of the Hearing Officer that Student's IEP was appropriate. Certainly, it appears from the record that District had plans to continue revising Student's IEP as additional evaluation data was received. Nonetheless, the document as it existed met the minimum legal requirements for an IEP under the IDEA.

Finally, Parent asserted that the services stated in Student's IEP were not provided to Student. However, that argument fails because the evidence clearly established that Parent was the impediment to Student receiving services. Parent repeatedly cancelled homebound instruction sessions and refused to bring Student to Tryonza Elementary School so that she could receive general education subjects, PT, OT, and speech therapy. This was documented in District records via logs and attendance calendars. It appears from documents and testimony that Parent failed to cooperate with District because she wanted to attend school with Student and act as Student's paraprofessional, a request that was denied by the IEP team on September 13, 2016. The concerns of District in denying this request are legitimate, particularly considering that District had a full-time paraprofessional ready and willing to

⁸³ *Id.*

work with Student. It is illogical for Parent to prevent District from providing homebound services, refuse to bring Student to the school to receive general education, PT, OT, and speech services, and then claim that District did not provide all services outlined in the IEP.

Based on the foregoing, it is the conclusion of this Hearing Officer that Student's IEP was appropriate. In addition, to the extent that Student was not provided services pursuant to the IEP, this was a result of Parent's refusal of services as opposed to District's refusal to provide services.

Least Restrictive Environment. Parent alleged that the IEP team's September 13, 2016 decision to send Student to Transformations each day for evaluation and ABA therapy constituted a change of placement and would have resulted in the District failing to educate Student in the least restrictive environment. As stated *supra*, the IDEA requires that students with disabilities be educated in the least restrictive environment pursuant to 20 U.S.C. §1412(a)(5). There is a "strong preference in favor of disabled children attending regular classes with children who are not disabled," resulting in a "presumption in favor of public school placement."⁸⁴ However, the IDEA "significantly qualifies the mainstreaming requirement by stating that it should be implemented to the 'maximum extent appropriate.'"⁸⁵ Essentially, a disabled student should not be separated from his or her peers unless the services that make segregated placement superior cannot be "feasibly provided in a non-segregated setting."⁸⁶ The requirement to mainstream is not applicable when it "cannot be achieved satisfactorily."⁸⁷ As such, it is permissible to remove a disabled child

⁸⁴ *CJN*, 323 F.3d at 641.

⁸⁵ *Pachl v. Seagren*, 453 F.3d 1064, 1067 (8th Cir. 2006); *see also* 20 U.S.C. § 1412[a](5).

⁸⁶ *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983).

⁸⁷ *Pachl*, 453 F.3d at 1068.

from a mainstream environment when he or she would not benefit from mainstreaming or when the “marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting.”⁸⁸

In the present case, however, Student’s programming and placement at District was not going to significantly change due to the IEP team’s decision to send Student for evaluation and ABA therapy at Transformations. In fact, there was sufficient evidence, specifically testimony, that it was the intention of District to continue providing Student with homebound instruction per the IEP during the period that Student would be traveling back and forth to Transformations. In addition, Transformations would be providing speech therapy as required by Student’s IEP. The only change that was going to occur was the temporary suspension of OT and PT, which the entire team agreed to when it made the decision to send Student to Transformations for intensive ABA therapy.

Parent, along with the rest of the IEP team, was presented with the option of having Student travel daily to Transformations for ABA therapy or, alternatively, receive the same therapy in the home setting. The entire team, including Parent, agreed to Transformations for ABA therapy. In addition, when Parent changed her mind and indicated that she did not want Student to travel to and from Memphis, TN each day for ABA therapy, District was willing to have Palm, the BCBA agreed upon by Parent and District, provide the very same services at home. Nonetheless, Parent refused all services and filed a Complaint for a due process hearing.

⁸⁸ *Roncker*, 700 F.2d at 1063.

It is noted that, even if Student's attendance at Transformations were deemed to be a change in placement, Transformations was certainly less restrictive of an environment than Student's home. At Transformations, Student would have been exposed on a daily basis to approximately 20 other children that were her age. At home, Student was exposed to no other peers. Parent's choice to have Student receive behavior therapy at home, as opposed to a clinic where other same-aged peers are present, does not square with her argument that Transformations would have been a more restrictive environment.

Conclusion. Having considered Parent's allegations of substantive due process violations, and in light of the findings and conclusions *supra*, it is the conclusion of this Hearing Officer that Student was not denied FAPE as a result of substantive violations of the IDEA.

ORDER:

The results of the testimony and evidence warrant a finding for the District. There is not sufficient evidence to warrant a denial of FAPE as alleged by Parent. This case is hereby dismissed with prejudice.

FINALITY OF ORDER AND RIGHT TO APPEAL:

The decision of this Hearing Officer is final and sXXXX be implemented unless a party aggrieved by it sXXXX file a civil action in either federal district court or a state court of competent jurisdiction pursuant to the Individual's with Disabilities Education Act within ninety (90) days after the date on which the Hearing Officer's Decision is filed with the Arkansas Department of Education.

Pursuant to Section 10.01.36.5, Special Education and Related Services: Procedural Requirements and Program Standards (Arkansas Department of Education 2008), the Hearing Officer has no further jurisdiction over the parties to the hearing.

IT IS SO ORDERED.

/s/ Danna J. Young

HEARING OFFICER

11/29/2016

DATE