

Arkansas Department of Education
Special Education Unit

RE: XXXXXXXX XXXXXXXX
as Parent of Student
XXXXXXXX XXXXXXXX

PETITIONER

VS. H-17-10

Mountain Home School District

RESPONDENT

HEARING OFFICER'S FINAL DECISION AND ORDER

Issues and Statement of the Case:

The Petitioner alleges that the Respondent has denied the Student with a free and appropriate public education (FAPE) from October 7, 2014 of school year 2014-15 to October 7, 2016 of school year 2016-17 by violating the procedural and substantive obligations of the IDEA by failing to:

1. Provide prior written notice of IEP meetings to the Parent;
2. Adhere to state-mandated timelines;
3. Involve the Parent in education decision-making;
4. Consider an evaluation secured by the Parent;
5. Conduct complete and individualized evaluations;
6. Include appropriate content in the IEP;
7. Ensure that the Student's IEP was implemented as written; and
8. Develop and implement an IEP that was designed to provide educational benefit.

Relief being requested by the Parent includes:

1. Compensatory special education and related services for the denial of FAPE (none specified at the time of the filing of the complaint);
2. For a certified behavior analyst approved by the Parent to conduct a Functional Behavior Assessment and assist in the development of a Behavior Support Plan and to help with programming to address the Student's social skills, emotional and behavioral deficits, and to provide training for teachers and staff in data collection and

implementation of the Student's IEP;

3. The development of an appropriate IEP to be implemented in the LRE, specifically to include a Behavior Support Plan, evidence based therapies, social skills training, and teaching strategies to address the Student's autism and behavior deficits and to provide opportunities for rehabilitation with and interaction with the Student's non-disabled peers, with said IEP to include needed related services; and that

4. The Parent be declared to have exhausted her administrative remedies as to her Section 504 claims.

Issues raised by the Petitioner in her request for a due process hearing under the IDEA that were decided by the hearing officer as non-judicable included allegations that the Respondent engaged in actions in violation of Section 504 of the Rehabilitation Act of 1973. These issues were dismissed from being heard by pre-hearing order issued on October 10, 2016.

Procedural History:

On October 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 XXXXXXXX XXXXXXXX (Petitioner) (Hereinafter referred to as "Parent"), the parent and legal guardian of XXXXXXXX XXXXXXXX (hereinafter referred to as "Student"). The Parent requested the hearing because she believes that the Mountain Home School District (hereinafter referred to as "District") 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 November 7, 2016, on which the hearing would commence should the parties fail to reach a resolution 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 October 10, 2016. The required resolution conference was waived by both parties.

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 Parent was 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 as ordered by providing a response to the Parent's complaints on October 17, 2016. On October 26, 2016, the Petitioner submitted a motion for continuance, which was granted on the same date, establishing the dates of November 17 and 18, 2016 for the hearing to commence. However, again on the same date, the Petitioner requested yet another continuance due to the non-availability of counsel on those dates. On November 14, 2016, a second order of continuance was issued establishing the dates of January 11, 12, and 13, 2017 on which the case would be heard. At the end of day three on January 13, 2017, the Petitioner requested on the record for additional dates on which to continue the presentation of her case. An order was issued that date for the hearing to be continued on March 1 and 2, 2017. Again at the end of day five on March 2, 2017, Petitioner and Respondent both requested additional dates on which to continue the hearing. On March 4, 2017, an order was issued continuing the hearing for the final dates of April 26 and 27, 2017.

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 also includes Hearing Officer Exhibits containing all previously issued orders and correspondence between parties relevant to the issues of the hearing, including the District's post hearing brief, as well as a Joint Binder containing exhibits introduced and agreed to by both parties in the course of the hearing.

The Student has been a child in need of special education services since entering school in the District as a kindergarten student. Prior to the current request for a due process hearing the Parent had requested a hearing regarding the denial of FAPE for school year 2013-14. The final decision in that case was rendered by this Hearing Officer on October 29, 2015. The Parent did not prevail in that case. According to testimony the decision was appealed by the Parent with the

results of the appeal yet to be determined. As a result of the above the Student's IEP, and placement for services has remained the same under the stay put provision of the IDEA.¹

Findings of Fact:

On June 20, 2014, an annual review conference was conducted in preparation for the Student's school year 2014-15. At this point in time a final decision in the previous due process hearing had not yet been rendered.² According to the Parent's exhibit a written notice of the conference was sent to her on June 3, 2014.³ The IEP developed on that date showed that the Parent was present and participated in the conference.⁴ The Parent presented a record of her participation and concerns.⁵ The profile summary of the Student indicated that she was functioning intellectually from a significantly below average up to a below average range. The results of the testing used in developing the IEP indicated that she also had a severe discrepancy in oral expression and math problem solving skills. This summary was based on evaluations conducted on June 2, 2014, by the District's psychological examiner and recommendations provided by Easter Seals from an evaluation conducted on January 24, 2014.⁶ The IEP team also had available to them a neuropsychological evaluation provided by the Parent that was conducted the previous year in June 2013. The neuropsychologist concluded that the Student had a generalized neurocognitive dysfunction; an intellectual disability; and an autism spectrum disorder with associated sensory processing disorder and with combined presentation features of an attention- deficit/hyperactive disorder.⁷ The IEP team concluded that the Student's primary eligibility category for receipt of special education services continued to be autism.

¹ Transcript, Vol VII, Page 328-329

² Parent Binder, Page 82-83

³ Parent Binder, Page 128

⁴ Parent Binder, Page 86-126

⁵ Parent Binder, Page 84-85

⁶ Parent Binder, Page 289-290 and 291-293

⁷ District Binder, Page 511-519 and Parent Binder, Page 294-310

On June 20, 2014, the IEP team that developed the Student 's IEP for school 2014-15 also determined that the Student was eligible for extended school year services. Those services were to be conducted between June 20 and August 19, 2014.⁸ As noted above the Parent attended the conference and expressed her concerns by including them on the annual review/notice of decision form. In testimony the Parent stated that one of her objections to the IEP team was that they did not consider a behavior plan which was included as one of the topics to be discussed at the meeting.⁹ In her statement of parental participation and concerns one of the items she suggested was that the Student's teachers be provided with the "misplaced behavior plan and accommodations."¹⁰

As the result of a settlement agreement on August 21, 2012 and a memorandum of understanding on November 15, 2013, the District employed the services of a behavior consultant who had worked with the Student and all of her educators since the Student entered kindergarten. The consultant conducted multiple observations of the Student in her educational setting and provided on site and telephone consultation to the Student's teachers and paraprofessionals.¹¹ Her services resulted in the development of a behavior support plan in January 2013 as well as a behavior support and safety plan in October 2014.¹² In consulting with the Student's teachers she provided them with the undated behavior support plan and testified to it as being used during and since school year 2014-15.¹³ At the same time she acknowledged in testimony that although she consulted with the Student's teachers and paraprofessionals during school year 2014-15, the Student's IEP itself did not contain behavioral goals.¹⁴ The Parent's

⁸ Parent Binder, Page 82-83

⁹ Parent Binder, Page 128 and Transcript, Vol VI, Page 183-184

¹⁰ Parent Binder, Page 84

¹¹ Parent Binder, Page 146-151; Page 223-227 and Transcript, Vol IV, Page 32-33; 45-46; and 115

¹² Parent Binder, Page 214-222 and District Binder, Page 199-204

¹³ District Binder, Page 251-252 and Transcript, Vol IV, Page 60

¹⁴ Transcript, Vol IV, Page

expert witness stressed the need for conducting a Functional Behavioral Assessment prior to developing a behavior intervention plan as a means of determining the appropriate means of addressing the Student's maladaptive behaviors.¹⁵ Even though the Parent emphasized the importance of conducting a Functional Behavioral Assessment according to the Agreement of Understanding in 2012, she elected to not allow the District to proceed according to an email she sent to the District following a notice of conference on October 18, 2015.¹⁶ In her email she stated that the reason she disagreed with proceeding was that she was waiting on the outcome of the previous due process hearing.¹⁷

According to testimony by the District's director of special education services the behavior consultant provided a draft to the teaching staff of a behavior intervention/safety plan dated October 2014.¹⁸ The plan included the consultant's recommendation for staff training; a one-on-one personal aide for the Student; sensory breaks; inclusion of occupational therapy; the use of social stories with the speech pathologist; the use of redirection, proximity, ignoring, correction; and the use of calming spaces. She suggested making extreme modifications to the fourth grade curriculum; to alternate activities providing objects; to use alternative methods of presentation and evaluation; to provide WIN time for social skills training; removal from class; and provide the Parent with behavior notes. She continued with listing the Student's problem behaviors along with the observed antecedents and recommended consequences. She provided specific suggestions for when and how to intervene when the Student exhibited behaviors of aggression, spitting, throwing chairs, cursing or pulling down her pants. She made suggestions for safety issues, including the bathrooms, transitions, and the use of sensory breaks. The record shows that these were provided to both the Student's special education teacher, the paraprofessional, and her regular education classroom teacher.¹⁹

¹⁵ Transcript, Vol II, Page 185, 202, 204, 221, and 231

¹⁶ District Binder, Page 194

¹⁷ District Binder, Page 2250

¹⁸ Transcript, Vol VI, Page 57

¹⁹ District Binder, Page 199-204

According to the District's director of special education services this report and the suggestions from the behavior consultant were to be discussed at the October 2014 IEP conference; however, the meeting did not occur since the Parent had filed for a due process hearing on October 17, 2014.²⁰

Also at the June 20, 2014, meeting the Parent requested that "an appropriate Annual Review be held with appropriate staff and appropriate/completed progress monitoring (as agreed) before a complete IEP is put in place for the 2014-15 school year."²¹ Although the IEP did not contain a behavior support plan, it did however include behavior supports. When asked if these were sufficient to address the Student's behavior problems the District's behavior consultant testified that "those are excellent supports to address the behavior needs....(however) I would have added to them."²²

The IEP developed on June 20, 2014, had the Student programmed to receive science, social studies, and specials in the regular classroom setting with literacy, math, and speech to be in the special education classroom. The science and social studies classes were to be jointly taught with a special education instructor in the regular education classroom (co-teaching). The Student was to have her assignments altered by providing her with: (1) extra time for completing assignments/appropriate activities, (2) opportunity to respond orally, (3) emphasis on major points, (4) special projects in lieu of assignments, and (5) a differentiated project rubric. Her instructions were to be adapted by providing her with: (1) a copy of a completed study guide, (2) encouragement for classroom/appropriate participation, and (3) a differentiated project rubric. Additionally she was to be provided with: (1) an altered format of materials, (2) with spelling being not counted against her unless it was the objective being taught, (3) emphasis on detail for mastery, and (4) adapt simplify assignments. Her tests would be adapted by: (1) use of a word bank, (2) a reduction of multiple choice options, (3) with one-on-one oral testing/read allowable portions, and (4) extended time for test completion. She was to be provided with frequent

²⁰ Transcript, Vol VI, Page 57

²¹ Parent Binder, Page 81

²² Transcript, Vol IV, Page 72

reminders of rules (verbal and/or nonverbal prompts and cues); visual aides for behavioral support; and sensory support as a means of managing inappropriate behaviors. Additional supports included a one-on-one paraprofessional aide; a special education bus for transportation to and from school; and a speech therapist being available for consultation.²³

For school year 2014-15 the Student was assigned to one of the District's intermediate schools. According to testimony the Student's regular education classroom teacher and the Parent had developed a close teacher/student relationship when the teacher herself was attending high school in the District. However, on being introduced by the District's special education director at the beginning of the year the Parent indicated to the director that she did not know the teacher. The teacher classified their current relationship in testimony now as being a non-conventional parent/teacher relationship. As a consequence and being leery of the Parent's motives, she asked for an administrator to be present when she met in the future with the Parent.²⁴

On September 5, 2014, near the beginning of the school year, attempts were made by the District to conduct a facilitated IEP meeting. The stated purpose of the meeting was to discuss the co-teaching provision of the IEP and change the frequency codes for the Student's accommodations. However, the Parent objected to it being a facilitated IEP meeting and left prior to any decisions being made. A second attempt was made on September 8, 2014, with the District agreeing not to conduct a facilitated meeting and agreeing not to put any restrictions on discussing any of the Parent's concerns; however, the Parent elected to not attend. The District notified the Parent of a continuance of the meeting on September 15, 2014; however, the Parent replied that she was ignoring the District. The meeting was held without the Parent.²⁵ The Parent testified that she notified the District on September 5, 2014, that she was going to file for another due process hearing; however, she testified that the filing did not happen until October

²³ Parent Binder, Page 86-126

²⁴ Transcript, Vol VI, Page 161-163

²⁵ Parent Binder, Page 50-52

17, 2014.²⁶

On October 13, 2014, the Parent was provided with a notice of an IEP conference to be held on October 24, 2014, with the stated purpose of developing a behavior plan and to review a report from a reading consultant.²⁷ A second notice of the conference was sent to the Parent on October 20, 2014, with the same stated purposes.²⁸

Prior to the October 20, 2014, conference a classroom observation was conducted by a Reading Recovery Teacher Leader/Literacy from the Northcentral Arkansas Education Service Cooperative on the first and second of October. She reported being unsuccessful the first day in that the Student's inattentive and maladaptive behavior did not permit her to complete the assessment. However, on the second day the assessment was completed. Her results were compared to the Student's performance on the same inventories on October 4, 2012. The results showed improvement in all areas, but indicated that the Student continued to need reading interventions.²⁹ The Student's special education teacher prepared a Parent Conference Rubric on October 23, 2014 to be shared with the Parent. Her specific concerns were that the Student struggled with content in both science and social studies and that the Student's behavior impeded here learning. Her stated plans for action included (1) to continue with positive reinforcement; (2) to continue trying new ways to present information; and (3) to continue using the recommendations made by the District's behavior consultant.³⁰

The changes initiated by the District at the September 15, 2014, meeting included a change in the minutes the Student would be receiving special education and regular education services as well as additions made to her instructional modifications, supplemental aids, and supports. The change was to having her assignments altered by providing her with extra time for completing assignments/appropriate activities included the comment of "during school day or the

²⁶ Transcript, Vol VII, Page 109-111

²⁷ Parent Binder, Page 49 and 52A and District Binder 470

²⁸ District Binder, Page 468

²⁹ Parent Binder, Page 285-287

³⁰ Parent Binder, Page 56A

very next day.” Added to providing emphasis on major points was a study guide. The special projects in lieu of assignments was to be determined by the teacher. The reduction of multiple choice options was suggested to be three. Her visual aids for behavioral support was programmed to include a visual schedule, with redirection being added as a fourth behavior management technique.³¹ Since the Student was in the stay put provision of the IDEA no other changes could be made without the Parent’s agreement.

The Student’s IEP, including placement, remained the same during her fourth grade school year (2014-15). According to testimony by the District’s director of special education services, one of the Parent’s concerns was for the District to provide the Student with the Orton-Gillingham multi-sensory reading program. The Director testified that the Student failed the screening for that particular program so they requested an outside consultant to review their reading program. On February 5, 2015, the reading consultant produced a report in which he had reviewed not only the District’s reading program in general, but the Student’s reading needs in particular.³² He conducted classroom observations of the Student on January 7 and 29, 2015. Even though the District’s director of special education testified that the purpose was for the consultant to review the District’s reading program, it is quite evident that he addressed the reading needs of the Student.³³ There was no evidence or testimony to show that the evaluation produced any change in the Student’s stay put IEP.

During school year 2014-15 and according to a Memorandum of Understanding dated November 15, 2013, and testimony by the compensatory education teacher, the District was providing compensatory education and therapy services to the Student during this period of time.³⁴ On March 2, 2015, the Student’s classroom teacher sent notice via email to the Parent noting that she had not yet received back a conference slip from her to request a conference time. The Parent responded that she would not be attending a parent/teacher conference due to an

³¹ Parent Binder, Page 53-56

³² Parent Binder, Page 565-568

³³ Transcript, Vol VI, Page 118-119

³⁴ Parent Binder , Page 141-145 and District Binder, Page 1878

incident on the campus on February 14, 2015, and on advise she had been given.³⁵ On April 2, 2014, the Student's special education teacher informed the Student's academic team via email of the progress the Student had made in math and with suggestions for assisting her with some of the Student's vocabulary words. The message was subsequently forwarded to others in the District including the Parent.³⁶ On April 30, 2015, the Parent was provided with an update via email of the Student's academic progress.³⁷

Speech therapy notes between August 20, 2014 and May 20, 2015, show that the Student was provided with speech therapy services according to the stay put IEP for 150 minutes weekly. The records show that during the thirty-six weeks in which school was in session and discounting the days in which the Student was absent as well as other special event days, she received the specified hours of speech therapy.³⁸ Some of the therapy sessions were interrupted by the Student's inappropriate behaviors; however, the record shows that the therapist was making progress in assisting the Student achieve the objectives of her speech goals. Her report at the end of the school year indicated that the Student's behavior was unpredictable and varied from day to day. She suggested that the time of day in which the services were provided may have contributed to the inappropriate behavior in that it was a transition time for her. She reported that she was able to use hidden therapy techniques along with a variety of rewards and reinforcement tactics. She also reported using a visual schedule developed by the District's behavior consultant; however, it was accidently sent home and never returned.³⁹

The Student's speech therapist for school year 2014-15 was not available to testify; however, the current school year (2015-16) speech therapist was providing the Student with her compensatory speech therapy during this time and was available to testify. She provided the compensatory services after school hours. Initially she provided them in the school setting, but

³⁵ District Binder, Page 1879

³⁶ District Binder, Page 1905

³⁷ District Binder, Page 1947

³⁸ Parent Binder, Page 371-381 and Transcript, Vol VII, Page 330

³⁹ District Binder, Page 282

due to the Student's inappropriate behaviors she requested and was granted permission to see the Student in her private office off campus. In so doing she reported that she no longer had any behavior problems with the Student.⁴⁰ Although she had concerns with the progress as reported by the previous therapist she viewed the Student's progress in speech therapy as being inconsistent, but that she was on a trajectory to making progress.⁴¹

The Parent was provided with daily observation notes completed by the Student's aide between October 20, 2014 and June 3, 2015.⁴² The notes were authored by not only the Student's aide, but also her speech therapist. They contained disturbing events according to the Parent such as the Student throwing things, swearing, running away, spitting, pulling her pants down, climbing on equipment, banging her head on a table, threatening to break school property, and screaming.⁴³

In testimony the District personnel all expressed difficulty in dealing with the Parent when it came to the Student. The Student's aide during school year 2014-15 testified that she "felt like no matter what I would do, that it would always be wrong in Mom's eyes."⁴⁴ The aide maintained daily observation records between December 19, 2014 and June 3, 2015, which were provided to the Parent as well as to the District.⁴⁵ On May 13, 2015, she recorded a note in which she recorded a conversation with the Parent that occurred in the hallway while she was escorting the Student to lunch. She expressed such difficulty in dealing with the Parent that she commented to the Parent "I can't do this" and walked away.⁴⁶

On June 2, 2016, the Parent was provided written notice of a conference to be held on June 8, 2015. The notice indicated that the purpose for the meeting was to discuss the Student's

⁴⁰ Transcript, Vol VII, Page 217-218

⁴¹ Transcript, Vol VII, Page 218

⁴² District Binder, Page 1081-1246 and Parent Binder, Page 412-446

⁴³ Transcript, Vol VI, Page 228-240

⁴⁴ Transcript, Vol I, Page 90

⁴⁵ District Binder, Page 1137-1246

⁴⁶ District Binder, Page 1227-1228

progress and that it had originally been set for June 2, 2015.⁴⁷ On June 23, 2015, a second written notice of conference was provided the parent for the conference to be rescheduled for July 13, 2015. Again indicating that the purpose for the conference was to discuss the Student's progress and noting that the conference scheduled on June 8, 2015, had been rescheduled for June 19, 2015 and then again for June 23, 2015 to accommodate the Parent.⁴⁸ The Parent was provided an agenda for the meeting which included progress monitoring in reading, occupational therapy progress, speech progress, Bridge testing in math and literacy, Brigance testing results, ABLLS progress, compensatory education overview, extended year discussion, and regular education overview.⁴⁹ The Student's progress was measured by use of a Slossan Reading Assessment, a Brigance Assessment, the ABLLS and ABLLS-R assessment and a Math Bridge assessment. The results indicated progress towards her reading, math, and speech goals. Since she experienced difficulty in generalizing the material into a functional environment the committee recommended providing her with extended school year services in her major deficit areas of speech and reading.⁵⁰ The Student was also receiving compensatory education services as directed by the Memorandum of Understanding of 2013. The teacher who provided the services prepared a report for presentation at the July 13, 2015, meeting; however, according to the teacher who provided the services she was not permitted to present her report, because it had not been provided early enough to make it "submittable."⁵¹ On cross examination she acknowledged that she sent the report to the District's special education director at midnight (12:55 a.m.) on July 13, 2014.⁵² She testified that she was told to give her report "orally and

⁴⁷ District Binder, Page 334

⁴⁸ District Binder, Page 333

⁴⁹ District Binder, Page 328

⁵⁰ District Binder, Page 320-321

⁵¹ Transcript, Vol V, Page 280 and District Binder, Page 266-268

⁵² Transcript, Vol V, Page 305 and District Binder, Page 1999

stick to it.”⁵³

The Parent’s expert witness did not believe that the assessments that the District conducted were sufficient to show that the Student had made academic progress. At the same time he testified that the data used by the District to show progress did not show regression, since he saw regression as a statistical term and not an educational term.⁵⁴ His analysis of the data went back to the Student’s kindergarten year and did not concentrate solely on the current due process hearing school years. It should be noted that his background and expertise is as a school psychologist and not as a special education teacher or administrator.⁵⁵ On cross examination he also noted that the Student’s progress appears, from the data he was provided, to be progressing, but at a slower rate than her same-aged peers. He was concerned that her rate of progressing was slowing down, but did not provide any definitive answers as to why.⁵⁶

Although the speech therapist that provided the Student with services during school year 2014-15 was not available to testify the therapist that she replaced provided the progress feedback at the July 13, 2015, IEP conference. She was also responsible for providing the Student with compensatory speech therapy during this same period of time and thus had a very good handle on the Student’s progress. According to the previous speech therapist the Student made progress on two of her short-term objectives. The current speech therapist agreed that she had made progress with her as well.⁵⁷

The annual reviews and notice of a decision of the July 13, 2015, conference indicated that in addition to the Parent, those in attendance included the District’s LEA supervisor, the District’s Director of Student Services, the Speech Therapist who provided compensatory services, the Reading Progress Monitor, the Occupational Therapist, the District’s Assistant Principal, the Student’s current Speech/Language Therapist, a regular education teacher, and a

⁵³ Transcript, Vol V, Page 340

⁵⁴ Transcript, Vol II, Page 321

⁵⁵ Transcript, Vol II, Page 295

⁵⁶ Transcript, Vol II, Page 308

⁵⁷ Transcript, Vol VII, Page 219-220 and District Binder, Page 296-297

special education teacher. The Parent testified that she received all of the reports that were discussed at the meeting and that the meeting took four hours.⁵⁸ She recorded her disagreements with the committee's summary of the Student's progress as well as her opinion as to how the meeting was conducted.⁵⁹ The Parent also included a twelve item sheet of her concerns, some of which are the issues in dispute for this hearing. They include alleged procedural violations of (1) obstructing the Parent's participation in IEP meetings (e.g., failing to involve the Parent in education decision-making); and (2) no goals and objectives for science, social studies, and behavior; and the Bridge assessment doesn't correspond to IEP goals and objectives (e.g., failing to include appropriate content in the IEP).⁶⁰

The Parent requested that the Student be provided with extended school year services (ESY) for seven hours a week in direct instruction (goals, objectives, knowledge, and academics), an hour a week of speech therapy, and an hour a week of occupational therapy.⁶¹ The IEP committee agreed that she needed extended school year services in her major deficit areas of speech and reading, but that she did not qualify to receive ESY services in Math or OT. They agreed that she would receive speech and language services one day a week for sixty minutes and that she would receive academic instruction for a total of three hours a week in two hour-and-a-half sessions, twice a week. She would also receive speech and language therapy one day a week for sixty minutes as a related service.⁶² On July 27, 2015, the Parent sent a letter to the District's director of special education stating all of her objections as to the conduct and outcome of the July 13, 2015, meeting.⁶³

On July 30, 2015, the Parent was sent a notice of conference for the IEP team to meet on August 12, 2015, for the purpose of going over the test results of the ABLLS-R Progress

⁵⁸ Transcript, Vol VII, Page 8-10

⁵⁹ District Binder, Page 314-315 and 466-467

⁶⁰ District Binder, Page 316

⁶¹ District Binder, Page 317

⁶² District Binder, Page 319-321

⁶³ District Binder, Page 464-465

Monitoring.⁶⁴ On August 12, 2015, the day of the planned conference, the Parent sent an email to the District's director of special education stating that due to her having filed a due process complaint that day she would not be attending.⁶⁵

On August 4, 2015, the Student was reevaluated by a neuropsychologist on referral from the Student's neurologist. A copy was provided to the District on March 17, 2016.⁶⁶ It was unclear from the testimony as to when the Parent received feedback or a copy of the results of the evaluation. According to the Parent the earlier and initial neuropsychological evaluation, conducted on June 26, 2013, had never been discussed by the Student's IEP team. However, according to the Memorandum of Understanding in November 2013, the District agreed to their behavior consultant to assist them in refining the recommendations contained in the initial evaluation.⁶⁷ The behavior consultant was never asked if she used the evaluation in developing the Student's behavior support plan.

Although the annual review and notice of a decision for the August 12, 2015, conference is dated that date, the record shows that it was a continuation of the meeting on July 13, 2015. The only notation on the July 13, 2015, record for it to be continued on August 12, 2015, was on the extended year evaluation data summary.⁶⁸ The only other indication that it was a continuation of the annual review in July is on the annual review and decision form dated August 12, 2015.⁶⁹ Considering the Parent's comment in testimony that the July 13, 2015, meeting lasted for four hours, it is not surprising that all of the intended areas of discussion were not completed. The Parent testified that she was not made aware that it was a continuation of the

⁶⁴ District Binder, Page 329

⁶⁵ District Binder, Page 259 and 2019

⁶⁶ District Binder, Page 475-497 and Parent Binder, Page 262-284

⁶⁷ Parent Binder, Page 143

⁶⁸ District Binder, Page 319

⁶⁹ District Binder, Page 260-261

annual review, but contrary to her testimony she did receive notice of the meeting.⁷⁰ The teacher who provided the extended school year services also testified that the team needed to extend the meeting to a different date.⁷¹

In the absence of the Parent on August 12, 2015, the District's behavior consultant reviewed the Student's goals and objectives based on the ABLLS-R results, with a copy being sent to the Parent on August 18, 2015.⁷² One of the Parent's concerns noted in her statement at the July 13, 2015, meeting was that there was no comprehensive behavior support plan in place and no behavioral goals on the Student's IEP.⁷³ According to the decision notice it was the Parent who requested the presence of the behavior consultant. The behavior consultant was listed on the notice as being one of those invited to participate.⁷⁴ The separate programming conference decision form and notice of decision dated August 12, 2015, indicated that in addition to reviewing the ABLLS-R, the committee reviewed classroom/home observations reports and teacher reports. No changes were made to the Student's IEP since the Parent had filed for a due process hearing which placed the Student in the IDEA stay put provision for placement and services.⁷⁵

On August 14, 2015, a notice of conference form was provided the Parent with the conference date set for August 24, 2015, with legal counsel for both parties listed as being invited to attend.⁷⁶ According to the record, however, the meeting took place on August 14, 2015. According to the separate programming conference decision form and notice of decision the parties agreed to meet to "attempt to develop a new IEP." Further noting that "party's are in stay put, both agreed to jointly develop a 60 day IEP." It further noted that the "attorney's will

⁷⁰ Transcript, Vol VII, Page 27-28

⁷¹ Transcript, Vol V, Page 340

⁷² District Binder, Page 808-823

⁷³ District Binder, Page 316

⁷⁴ District Binder, Page 329

⁷⁵ District Binder, Page 262

⁷⁶ District Binder, Page 253-254

consult on Monday (8/17/15) regarding behavior goals & objectives.”⁷⁷ The IEP that was developed included reading, math and written expression goals and objectives that everyone agreed on. As well as classroom accommodations being developed for the Student.⁷⁸ All of the Student’s teachers acknowledged receipt of the classroom accommodations.⁷⁹ There is no record to show that the attorney’s developed behavior goals and objectives to be included in the Student’s IEP.

On August 18, 2015, the Parent was provided with a Prior Written Notice of Action, notifying her of a continuation of the meeting for conducting the Student’s annual review for services. The record indicated that after all of the assigned team members were in place the Parent notified the District’s director of special education services that she would not be attending the conference.⁸⁰

A second prior written notice of action was provided to the Parent on August 21, 2015, with the stated purpose being to develop an IEP for school year 2015-16. The Parent responded with comments typed on the form commenting that: “percentages on goals and objectives have been received - they have not been explained on 2-13-14 and/or 2014-15 IEP as of 8/21/15.”⁸¹ It should be noted that the decision in the previous due process hearing had not yet been rendered, thus the Student’s IEP could not be altered without both the District and Parent being in agreement.

Beginning on August 20, 2015 through September 14, 2015, frequency data on targeted behaviors of non-compliance, impulse control, inappropriate word, aggression, and property destruction was maintained by the Student’s paraprofessional. Even though the form includes “joint compression” as a potential request by the Student, the forms do not indicate that they

⁷⁷ District Binder, Page 216

⁷⁸ District Binder, Page 219-250 and Parent Binder, Page 32-48

⁷⁹ District Binder, Page 208-209

⁸⁰ District Binder, Page 257

⁸¹ District Binder, Page 211-214

were ever requested or rendered.⁸² The District's behavior consultant testified that she used the data from the forms to assist the paraprofessional in addressing the Student's behaviors.⁸³ She stated that on September 14, 2015, they started using a different form that she referred to as the blue sheet. The reason for the change was explained by her as being that they wanted to use a form that gave them the opportunity to do some self-monitoring with the Student, "to involve her in what the day looked like so that she could participate."⁸⁴ The Parent's attorney objected to the data not being tabulated and recorded as a means of giving feedback to the Parent and the IEP team on whether or not the Student was making progress on the targeted behaviors. However, the behavior consultant testified that the daily behavior notes were being scanned and sent to the Parent on a daily basis.⁸⁵

On August 24, 2015, the Student's fourth grade (2014-15) classroom teacher completed a NICHQ Vanderbilt Assessment Scale during the Student's science and social studies classroom as a request from the neuropsychologist who evaluated the Student on August 4, 2015. The results were scanned to the Parent on August 27, 2015. The teacher's narrative descriptions of the Student were that:

1. She enjoyed socializing with other children, but would get nervous when a test or assignment was expected from her. Also that she did not have a special, close "best friend" that she kept for more than a few months.
2. She would ask for the teacher to come to her, but then would refuse to interact.
3. She could not grasp certain concepts or vocabulary related to the curriculum.
4. She could be disruptive if she was trying to avoid class work and would distract classmates for attention from them.
5. She did not enjoy class when concepts were too difficult for her to comprehend and

⁸² Parent Binder, Page 382-411 and District Binder, Page 1247-1536

⁸³ Transcript, Vol IV, Page 104

⁸⁴ Transcript, Vol IV, Page 104-105

⁸⁵ Transcript, Vol IV, Page 116

she was unable to focus like the rest of her classmates.⁸⁶

The Student's special education teacher for school year 2015-16, provided information to the Parent via email on September 7, 2015, stating that she planned to begin with the Bridge/Class Assessment and then to the Classworks Assessment. She also noted that the importance of the assessments for all of the students in her class and that she planned on taking small breaks as they needed them. She agreed to meet with the Parent to show her how she was doing the alphabet and numbers board and agreed to provide the Parent with a set of both for her to work with the Student in the home.⁸⁷

During school year 2015-16 the Student was continuing to receive compensatory educational services; however, the District made a decision to change instructors. The initial service provider testified that she had greater success with the Student by taking her to the public library where she had fewer behavior problems. She also stated that she used materials and activities that she knew the Student would enjoy.⁸⁸ On August 24, 2015, she notified the District and the Parent that she would not be in the school from August 31 to September 4.⁸⁹ On cross examination she stated that she had taken a leave of absence from September to October 2015.⁹⁰ The District's special education supervisor wanted to complete the District's compensatory education requirement and chose to have another teacher provide the rest of those services. The initial provider had been a friend to the Parent outside of the teaching environment thus possibly leading the Parent to believe that the District objected to their relationship and as such replaced her as the Student's compensatory education provider.⁹¹ However, according to the District's director of special education, due to the immediate absence of the provider and the District's desire to complete the required compensatory education the District elected for a substitute to

⁸⁶ District Binder, Page 506-509

⁸⁷ District Binder, Page 2087

⁸⁸ Transcript, Vol V, Page 291

⁸⁹ District Binder, Page 2058-2059

⁹⁰ Transcript, Vol V, Page 331-332

⁹¹ Transcript, Vol V, Page 298-299

replace her for the remainder of the services.⁹² The teacher was not fired given that her contract was renewed and she was assigned a different student to provide educational services after she returned from her leave of absence.⁹³

On September 17, 2015, the Parent was provided via email a notice of conference to be conducted on October 5, 2015. The District received confirmation that the email was received by the Parent the same date.⁹⁴ The purpose listed for the conference was to consider conducting a Functional Behavior Assessment, develop a behavior plan and review the Student's progress.⁹⁵ On September 18, 2015, the Parent notified the District's director of special education services that she objected to the Director sending out "humiliating mass emails containing her (the Director's) personal interpretation, opinion and re-wording of communication." On the same date the Director notified the District personnel that the Parent requested that the IEP meeting be cancelled.⁹⁶

On September 18, 2015, the Parent hand delivered a letter to the District in which she acknowledged receiving the Notice of Conference scheduling the meeting on October 5, 2015. She informed the District that "we are in stay put right now and as I told you on August 17th - I do not agree to any more changes or modifications at this time except as explained above." She understood that the attorneys who were at the August 14, 2015, meeting were going to work on something but she guessed that it didn't happen. She objected to holding an IEP meeting to conduct an FBA and develop a BIP while "we are in due process!" However, at the same time she agreed to having someone conduct an FBA and to develop a BIP but that she was firm in requiring Dr. Travers be involved in conducting the FBA and in the development of the BIP for

⁹² District Binder, Page 2104-2105

⁹³ Transcript, Vol V, Page 332 and District Binder, Page 21205

⁹⁴ District Binder, Page 193

⁹⁵ District Binder, Page 194-195

⁹⁶ District Binder, Page 197

the Student if any changes are made during stay put.⁹⁷

On September 21, 2015, the Parent notified the District again via email that she had received the notice of conference, but that the purpose listed was not consistent with her understanding of the discussion and decision on August 14, 2015, when the attorneys were present to develop a temporary IEP. She understood that the conference would be at a jointly decided time. The District responded the same day to her email stating an apology for sending the notice of conference, but that it was the Director's understanding that the meeting was necessary in that the 60-day IEP developed on August 14, 2015, was going to expire and they needed an IEP for the Student.⁹⁸

On October 15, 2015, the Assistant Principal sent a response via email to address the Parent's concerns (1) about a BRIDGE assessment results not being shared; (2) about written summary sheets and behavior charts no longer being sent home; (3) about not understanding the blue sheet check list that she was receiving; and (about) the Students grade work and work/assignments not being sent home. The Assistant Principal's response to her first concern was that the Parent had been invited to the classroom to discuss progress as well as through the notice of conference provided to her. Her concern about the blue sheet check list was explained that she had informed the Parent in four emails since September 14, 2015, that the blue sheets were the only documentation that the District was keeping. She responded to the Parent's concern about work/assignments that the Student's fifth grade teacher had sent her via emails on August 21st, September 22nd, and October 13th about the upcoming chapters to be studied as well as the vocabulary that would be covered. In addition, she along with other parents receive a team wide daily email that features what has been done in class, what is upcoming in class, as well as any reminders that may need to be sent home. She further noted that the Parent also received an assignment notebook that covers the entire days academic happenings.⁹⁹

On October 18, 2015, the Parent responded to the Assistant Principal via email that a

⁹⁷ District Binder, Page 191 (Dr. Travers testified at the previous due process hearing as the Parent's expert witness.)

⁹⁸ District Binder, Page 196

⁹⁹ District Binder, Page 2250-2252

complete BRIDGE assessment of any level or area has not been received yet this year and that she had been to the classroom teacher twice in an attempt to discuss and pick it up. She went on to say that the notice of conference was for a Functional Behavior Assessment that the District agreed to do in 2012, that has yet to be completed because the District rejected the consultant she had chosen to complete the assessment. As a result she chose to wait. She went on to state that in her opinion the settlement agreements, IEP decisions and neuropsychological evaluations have been clear that all grade level work would be provided in addition to all of the Student's work being provided in advance. She objected to the vocabulary words being sent as a means of meeting the need of being apprised of work to be completed.¹⁰⁰ The Parent continued her frustration by sending an email to the Student's teacher on October 23, 2015, expressing her same concerns about the Student's work assignments being sent home. Unfortunately in the same email she accused the District of having administrators and other teachers in the hallway with the classroom door open while she held a parent/teacher conference, with audio and video recording taking place.¹⁰¹ The Student's classroom teacher responded to the Parent via email addressing all of the Parent's concerns. She also informed the Parent that she was forwarding her email to "address the false accusations towards the administrators" for them to address her concerns about audio and video recordings.¹⁰² It was explained to her by the Assistant Principal in an email on October 28, 2015, that the front door of the school building informs all of those that enter that cameras are in use in the building. Additionally, that the recordings of the evening, that she was willing to share with the Parent, contradicted her assertion that the administrators and teachers were standing outside the classroom as she visited with the teacher.¹⁰³

The Student's grades as of October 13, 2015, were 73 for the first semester and 84 in the second semester in literacy; 86 for the first semester and 93 in the second semester in mathematics; 75 for the first semester and 91 in the second semester in science; and 75 in the

¹⁰⁰ District Binder, Page 2250

¹⁰¹ District Binder, Page 2298

¹⁰² District Binder, Page 2336

¹⁰³ District Binder, Page 2335

first semester and 91 in the second semester in social studies.¹⁰⁴

A final decision was rendered on the previous due process hearing on October 29, 2015. The Parent testified that following the decision which was not rendered in her favor that she began to receive an “unbelievable amount of Notices of Conferences.”¹⁰⁵

Attempts were made via email between November 3, 2015 and November 13, 2015, to establish a team meeting with the Parent; however, the Parent did not agree to having a separate programming conference, but did not object to a team meeting to discuss the Student’s progress.¹⁰⁶ A contact log developed by the District indicated attempts to establish an IEP conference on November 20, 2015, and November 25, 2015.¹⁰⁷ A notice of conference was provided the Parent on November 20, 2015, establishing the date of December 4, 2015, on which an IEP conference would be held to review/revise the Student’s IEP, to discuss the Parent’s concerns, the Student’s progress, and the provision of FAPE.¹⁰⁸ A second notice was sent on November 25, 2015, for the same date and same purpose.¹⁰⁹ On the day of the scheduled conference the Parent informed the District that she was not able to meet and suggested December 9 and/or 16, 2015, as possible alternatives. The Parent was informed via email on December 7, 2015, that the District’s personnel would be able to meet on December 9, 2015.¹¹⁰ An official notice of conference was sent to the Parent on December 7, 2015, noting again that the purpose of the conference was to review/revise the Student’s IEP, to discuss the Parent’s concerns, the Student’s progress, and the provision of FAPE.¹¹¹ A tentative agenda developed for

¹⁰⁴ District Binder, Page 729

¹⁰⁵ Transcript, Vol VII, Page 141

¹⁰⁶ District Binder, Page 2421-2424 and 2410

¹⁰⁷ District Binder, Page 190

¹⁰⁸ District Binder, Page 187-189

¹⁰⁹ District Binder, Page 184-185, 188-189

¹¹⁰ District Binder, Page 2538 and Page 182

¹¹¹ District Binder, Page 178

the meeting included a speech class verbal report/progress; a RE class verbal report/progress; a SE verbal report/progress; the District's behavior consultant's verbal report/observations; the Student's IEP; and the Parent concerns.¹¹²

On the scheduled date of the conference an email was sent to the Parent reminding her of the time for the conference at 3:15 pm. The Parent responded on that same day at 2:27 pm that she had been out of town all week and she came home sick and would not be able to attend the conference.¹¹³

As noted above one of the items on the tentative agenda was the behavior consultant's report/observations. She conducted the observations on October 29, December 2, and December 3, 2015, and conducted interviews with the Student's special education teacher; the Student's co-teacher; the Student's paraprofessional; the Student's science/social studies teacher; and the District's assistant principal. Her recommendations were:

- (1) Continue with current behavior management plan.
- (2) Consider a peer lesson with the students in the co-taught class on how to handle distractions and ask for what they need.
- (3) Continue the use of tolerant peers in the classroom.
- (4) Place functional skills like name, address, phone number, etc. into the Student's daily curriculum.
- (5) Complete fluency trials in random rotation.
- (6) Continue the use of the Lunch Bunch to yield more social interaction and consider utilizing a small group of willing students on a regular basis for more social interaction during lunch.¹¹⁴ A copy of the report was provided to the Parent by the Director of special education services on December 16, 2015.¹¹⁵

On January 6, 2016, a notice of conference was sent to the Parent for a meeting to be held

¹¹² District Binder, Page 175

¹¹³ District Binder, Page 173

¹¹⁴ District Binder, Page 128-134

¹¹⁵ District Binder, Page 2591

on January 21, 2016, for the purpose of correcting the time on the front page of the Student's current IEP.¹¹⁶ An email was sent by the Student's special education teacher to the Parent stating that the Student's classroom teacher would not be available on January 21, 2016, for the meeting and that it was being rescheduled for January 20, 2016.¹¹⁷ A second notice with the change of date was provided on January 12, 2016, for the January 20, 2016, meeting.¹¹⁸ That conference did not occur and another notice of conference dated January 20, 2016, was provided the Parent establishing the date of February 5, 2016, for the meeting to correct the time on the original IEP and discuss the behavioral consultant's report.¹¹⁹ On January 29, 2016, a second notice of conference for the meeting on February 5, 2016 was sent to the Parent.¹²⁰ The Parent testified that the multiple notices of conferences she had received sent her to the doctor, stating that the District became "very aggressive after they received the decision from Doctor Doyle." (the previous due process hearing decision)¹²¹ She also believed that some of the scheduled meetings were canceled due to snow and others due to her taking care of herself and her daughter.¹²²

The meeting on February 5, 2016, was canceled with another notice of conference forwarded to the Parent on February 4, 2016, for the meeting to be held on February 18, 2016. This notice indicated that the purpose was to review/revise the IEP and review the behavior consultants report. It also contained the additional comments that the meeting had been rescheduled from December 4, 2015, to December 9, 2015, to December 9, 2015, to January 21, 2016, and February 5, 2016. On February 9, 2016, yet another notice of conference was sent to the Parent with the date of February 18, 2016, being set for the meeting. This notice included the same purposes as before with the addition of correcting the time on the front page of the

¹¹⁶ District Binder, Page 170

¹¹⁷ District Binder, Page 169

¹¹⁸ District Binder, Page 168

¹¹⁹ District Binder, Page 167

¹²⁰ District Binder, Page 164

¹²¹ Transcript, Vol VII, Page 148-150

¹²² Transcript, Vol VII, Page 152

Student's IEP.¹²³ On February 16, 2016, the Parent sent notice via email to the Director of special education services that she had received the notice for "the meeting on Thursday at my request." She stated however, that she did not request to have the meeting on that date and that she had not had any input into the dates scheduled for her. She asked that it be rescheduled for Tuesday and requested that the Occupational Therapist be invited.¹²⁴ She received a response from the Director stating that "due to the rescheduling of this conference so many times and the schedule of occupational therapy personnel, the conference for the Student would not include an occupational therapist. However, she had contacted the therapist and they agreed to meet with the Parent to listen to her concerns."¹²⁵ On February 18, 2016, the conference scheduled for that date was rescheduled to meet on February 22, 2016, with the same purposes listed, absent the purpose of changing the minutes on the Student's IEP.¹²⁶ The Parent testified that she attempted to attend the meeting on February 22, 2016; however, she recalled being told that "this was never an actual meeting."¹²⁷ For reasons stated in her testimony the meeting was canceled shortly after it began. She testified that she wanted to meet to change the minutes on the Student's IEP while the District wanted to discuss the behavior consultants report.¹²⁸ The District provided a separate programming conference decision form and notice of decision on February 22, 2016, which simply stated that no action was taken and that the meeting would be continued.¹²⁹

On February 23, 2016, the Student's special education teacher sent an email to the Parent asking her for two dates between March 7 and March 17 that would be convenient for her to meet to reconvene the conference. She also stated that the first meeting would be to simply make the corrections required on the Student's IEP as the Parent requested at the previous meeting.

¹²³ District Binder, Page 160

¹²⁴ District Binder, Page 2827

¹²⁵ District Binder, Page 2840

¹²⁶ District Binder, Page 157 and 159

¹²⁷ Transcript, Vol VII, Page 153

¹²⁸ Transcript, Vol VII, Page 158

¹²⁹ District Binder, Page 154

She then stated that the second meeting would be to discuss the behavior consultant's report, the Parent's concerns, and conduct an existing data review in preparation for the Student's three year evaluation. She asked the Parent to provide her with a list of her concerns that she wished to be discussed at the meeting. She also noted that the report by the previous provider of compensatory education services which was scheduled to be discussed at the July 13, 2015, meeting as well as the teacher, would be available to discuss her report if the Parent requested her presence. For the later, the teacher requested to be provided with a third date since the second meeting would more likely than not take a lot of time.¹³⁰ On February 24, 2016, the Student's special education teacher arranged a meeting with the occupational therapist and the Parent to be held the next day on February 25, 2016. The Parent responded the same day stating that she did not receive notice for this IEP meeting, to which the teacher responded that it was not an IEP meeting, but one that gave her the opportunity to meet with the Student's occupational therapist as she had requested.¹³¹ On that date the Parent also sent an email to the Student's classroom teacher asking for an audio transcript "that was made of me when I attempted to attend" the Student's parent teacher conference and visit in October and on Friday February 19, 2016. The teacher responded stating that she would make the recordings available, but was confused by the Parent's comment of an attempted meeting. She noted in her response that she and the Student's special education teacher spent approximately forty minutes discussing the Student's fifth grade year as well as concerns for the approaching sixth grade year.¹³²

On March 2, 2016, the District provided notice to the Parent for the first conference to be held on March 14, 2016; however, it was noted that the two planned meetings were combined at the Parent's request.¹³³ The outcome of that meeting was recorded on the separate programming conference decision form and notice of decision dated March 14, 2016. On one of the three forms in exhibit, it is noted that the Parent removed the form from the folder and took a picture

¹³⁰ District Binder, Page 2859-2860

¹³¹ District Binder, Page 2869-2870

¹³² District Binder, Page 2877

¹³³ District Binder, Page 144

of it before it was completed.¹³⁴ The original does not contain the above comment nor the Parent's typed in response to the meeting. It also contains an attachment of the Parent's concerns.¹³⁵ The typed-in responses by the Parent included:

"No meeting on 2/22/16 - not allowed to begin."

"IEP reflected last agreed IEP minutes prior to forced facilitated mtg with district paid."

"New minutes were miscalculated and show 1225 Sp Ed. This was explain in mtg by parent without acknowledgment. IEP & schedule are unclear. [Student] NEEDS the IEP accommodations implemented."

"* requested PWN of actions refused"¹³⁶

The statement of parental participation and concerns attached to the original document included thirteen items:

- "1. Lack of meaningful progress in math, literacy and related services
- "2. Discontinued goals/progress monitoring without parent communication
- "3. No comprehensive behavior support plan despite behaviors impeding learning since 2009
- "4. Inappropriate unclear and uncommunicated interventions / removals
- "5. 2012 Functional Behavior Assessment never written or shared with IEP team/parent
- "6. No BRIDGE Assessment data collected or shared as agreed in August
- "7. No joint grading / lack of meaningful access to class work in advance per IEP accommodation
- "8. Multisensory reading program with agreed out of district periodic progress monitoring
- "9. Parent prevented from meaningful participation in meetings & programming
- "10. Lack of confidentiality / evaluations conducted without parental knowledge or consent

¹³⁴ District Binder, Page 124

¹³⁵ District Binder, Page 125-126

¹³⁶ Parent Binder, Page 31 and District Binder, Page 124

“11. Access to appropriate role models / supervision in the least Restrictive Environment

“12. Placement predetermined without goals moving towards a more inclusive environment

“13. Parent letters/requests severely delayed, altered or go without acknowledgment”¹³⁷

The prior written notice of action was provided to the Parent on March 18, 2016, which summarized the results of the March 14, 2016, meeting. They included making the correction of the time reflecting the minute totals on the Student’s IEP and a discussion of the behavior consultant’s observations/consultations relating to the Student and her teachers. The form also noted that the Parent disagreed with the correction of the IEP as well as her objecting to the presence of teachers who will be teaching the Student the next school year.¹³⁸ In testimony the Parent stated that at the meeting she “wanted an IEP team meeting where we all worked together and discussed and implemented something that we consistently work on and have a plan, have a true team plan.”¹³⁹

On April 12, 2016, the District notified the Parent of a conference to be held on April 20, 2016, for the purpose of conducting an Existing Data Review (EDR) as part of an initial evaluation or reevaluation and the provision of FAPE.¹⁴⁰ On April 19, 2016, the Parent notified the District via email that she had not yet received the Existing Data that is to be reviewed at the meeting the next day. The Student’s special education teacher responded that she had sent it by email attachment the previous day. On the day of the hearing the Parent responded via email stating that she received the documents, but was objecting to having received it the day of the meeting.¹⁴¹ The Parent testified that even though she was not able to attend the conference on April 20, 2016, that she “sent them an e-mail and told them to go forward and do whatever they wanted to do. I turned them loose. I gave them free rein. I said, ‘Send me the consents. I will

¹³⁷ District Binder, Page 126

¹³⁸ District Binder, Page 122-123

¹³⁹ Transcript, Vol VII, Page 164

¹⁴⁰ District Binder, Page 120 and 109

¹⁴¹ District Binder, Page 111-112 and 117-119

sign them.”¹⁴²

The conference was rescheduled for May 11, 2016, with the notice of conference being sent to the Parent on May 5, 2016.¹⁴³ However, that conference was also canceled, but without exhibits or testimony it is unknown as to why or by whom.

The Parent was provided with a prior written notice of action on May 18, 2016. The meeting was held in the absence of the Parent because it was time for the Student’s three year reevaluation. The Parent was provided with the notice along with informed consent forms for her to sign and return in order for the District to proceed with the reevaluation. She was also provided with a description of the assessment areas as well as a disability specific review of existing data, autism, school age. The additional data the IEP team needed included a social history which was sent home to the Parent, individual achievement by the school psychology specialist, a social/emotional behavior assessment, self help development/adaptive behavior evaluation by the behavior consultant, a motor development by the occupational therapist, classroom-based assessment and observations by her classroom teacher, observations by the behavior consultant, and an assessment of individual development by the school psychology specialist. The results were scanned to the Parent on May 18, 2016.¹⁴⁴ Although the Parent stated that she had given the District free rein to conduct the reevaluations she did not sign and return the consent forms. In email exchanges the Student’s sixth grade principal acknowledged the Parent’s agreement via email for the District to proceed with the reevaluations; however, she was unsure as to whether or not she needed the consent forms to be signed.¹⁴⁵

Prior to the May 18, 2016, meeting the Student’s occupational therapist provided the District with his annual review of the Student. On May 9, 2015, the occupational therapist concluded that the Student had made slow but fair progress on the therapy goals during the school year. He also provided the IEP team with his goals and objectives for the next school

¹⁴² Transcript, Vol VII, Page 167-168

¹⁴³ District Binder, Page 105-106

¹⁴⁴ District Binder, Page 93-99

¹⁴⁵ District Binder, Page 3215-3218

year.¹⁴⁶ Also on May 9, 2015, the Student's speech therapist provided the IEP team with a speech-language therapy summary report which included goals and objectives for the Student's sixth grade school year.¹⁴⁷ Although undated attached to the IEP folder was the behavior consultant's behavior plan.¹⁴⁸

The IEP team was provided with the results of the BRIDGE assessment conducted in September 2015 and again in January 2016.¹⁴⁹ The District's behavior consultant discussed why the District moved from using the Brigance to the BRIDGE as a classroom assessment tool to monitor goals and objectives, but not to measure progress. She testified that the change allowed for continuity to assess the mastery of particular skills. The existing data review for the May 18, 2016 conference contained a copy of the results of the ABBLs-R with comparisons of assessments conducted in August 2013, December 2013, August 2014, May 2015, and May 2016.¹⁵⁰

A lot of testimony was generated on the use of the results of the ABBLs-R, both from the District as well as the Parent's expert witness. The Parent's expert witness testified that the ABBLs-R ceilings at the kindergarten level and that it could not be used as a tool to show progress.¹⁵¹ Even though he was highly critical of the use of the ABBLs-R at the same time he did not fault the District for using the ABBLs-R in that, according to him it is a behavior operant conditioning approach and is consistent with how BCBA's, such as the District's behavior consultant, are trained.¹⁵² The District's behavior consultant testified that she used the ABBLs-R as progress marking. When asked to explain progress marking she stated that "it's just to see if her skills have improved from what she knew at the beginning of the time period versus at the

¹⁴⁶ District Binder, Page 65-69

¹⁴⁷ District Binder, Page 70-71

¹⁴⁸ District Binder, Page 72-73

¹⁴⁹ District Binder, Page 986-1058

¹⁵⁰ District Binder, Page 74-76

¹⁵¹ Transcript, Vol II, Page 270, 278, and 322

¹⁵² Transcript, Vol II, Page 381-382

end of a specified time period.” She went on to explain that with the Student the ABBSL-R results allowed here to break down into really small, measurable chunks so that when you have a broad-based goal or a broad-based objective on an IEP it gives you the opportunity to take those in very small chunks and allows teachers, educators, and people that are working within the team to make sure they are not missing prerequisite skills.¹⁵³ She agreed with the Parent’s expert witness that the ABBSL-R measures skills up to “kindergarten, first grade, absolutely.” Going on to state that “it’s more of a making sure that you have all of those background skills necessary to progress.”¹⁵⁴ The Student’s special education teacher testified that she and the behavior consultant discussed the ABBSL-R as to whether or not the Student demonstrated mastery of the skills in the classroom.¹⁵⁵ She testified to having reviewed the report prepared by the Parent’s expert witness with regard to his comments on the District’s use of the ABBSL-R. Her opinion of the expert witness was that he “is very knowledgeable, he is a great guy, and he has done a tremendous amount with General Education and RTI in respect to school improvement..but with regard to programming instruction for a child with autism, I would have liked to have seen him utilize this document or to actually spend enough time with [the Student] to recognize the value of where this, you know, may have been...the ABBSL is only as useful in accuracy as the person, you know, who is administering that...I’m not sure that he had an awareness that I have, you know, a background in Special Education.”¹⁵⁶ The Parent’s expert witness acknowledged on cross examination that he does not have a degree in special education and has never been a teacher in a public school and that his work in school systems has been from a school psychology viewpoint.¹⁵⁷ The Student’s special education teacher’s testimony was consistent with the District’s behavior consultant and contrary to the opinion of the Parent’s expert witness with regard to the use of the ABBSL-R to measure progress on the Student’s goals and objectives.

¹⁵³ Transcript, Vol IV, Page 20-21

¹⁵⁴ Transcript, Vol IV, Page 22-23

¹⁵⁵ Transcript, Vol I, Page 356-357

¹⁵⁶ Transcript, Vol IV, Page 214

¹⁵⁷ Transcript, Vol II, Page 294-295

She stated that she did not use the ABLLS-R, the Bridge or the CLASS to measure progress, using the results only for the purpose of programming for the Student's deficit skills. The Student's special education teacher testified that the CLASS assessment was a bridge between academic performance and individual performance. She provided the IEP team with the results of the CLASS assessment she conducted on May 9, 2016.¹⁵⁸ Unlike the other students who completed the assessment online she testified that the Student was able to complete only parts online and the rest was completed by pencil and paper.¹⁵⁹ The results produced a profile of the Student's academic strengths and her needs. According to testimony this allowed the IEP team to develop appropriate goals and objectives.

The IEP team meeting on May 18, 2016, had copies of classroom assessments conducted between April 7, 2016 and May 18, 2016, as well as a Dolch Sight Words Assessment conducted on May 18, 2016.¹⁶⁰ The Student's special education teacher testified that she administered the Dolch on a quarterly basis, with the results showing that the Student had increased somewhat and that her accuracy had improved across the four quarters reflected on the document.¹⁶¹ Prior to the meeting the special education teacher provided classroom work samples to the Parent and the other IEP team members, indicating the Student's classroom work as well as the observed behaviors between November 13, 2015 and March 16, 2016.¹⁶²

The Student's special education teacher asked the Student's aide to prepare a summary of the school year including both the academics as well as the Student's behavior. She reported that the Student progressed in both basic literacy and math skills. She reported that with regard to behavior that the Student "worked very hard for me and for [the teacher] all year long, even when she wasn't completely focused on task or the task that was set before her wasn't enjoyable or interesting to her." She also noted that the Student was influenced by the behavior of her peers,

¹⁵⁸ District Binder, Page 62-64

¹⁵⁹ Transcript, Vol I, Page 343-346

¹⁶⁰ District Binder, Page 862-866 and 867

¹⁶¹ Transcript, Vol I, Page 349-350

¹⁶² District Binder, Page 824-859

repeating phrases that she heard and that she enjoyed her peers at recess, in the classroom and at lunch by talking and playing with them. Even when the Student came to school appearing anxious and engaging in inappropriate classroom behavior, such as profanity, unkind words towards peers, refusal to do class work or refusal to listen to the teacher's instructions, they were able to use the behavior support plan. After which she noted that the Student's behaviors became less disruptive and inappropriate to allow her to be able to engage in a positive learning experience with her peers.¹⁶³

In preparation for the Student's next school year (2016-17) the District sent notice to the Parent for the annual review conference on June 3, 2016, for the meeting to be held on June 20, 2016. A second notice was sent on June 10, 2016. The purpose on the notice included reviewing/revising the Student's IEP, considering extended school year services, an annual review of the Student's progress, a Parent survey, and the provision of FAPE.¹⁶⁴

On June 30, 2016 the Parent was provided with an annual review and notice of decision completed at the IEP meeting held on June 20, 2016, along with the prior written notice of action.¹⁶⁵ The IEP team decided that the Student needed six one-hour education units and three one-hour speech units as extended school year services and prepared a calendar as to when and at what times those services would be provided.¹⁶⁶ The team recorded the meeting and provided the Parent a copy of the recording. The team also decided that they still needed to look at a new assessment to replace the ABLLS-R because the Student had mastered most skills.

For her sixth grade school year the Student would be going to a middle school on a different campus. The District prepared a special team to provide as smooth a transition for the Student as possible. The middle school principal testified that for the Student they offered five days of extended school year services with the main purpose being transition, but the Student

¹⁶³ District Binder, Page 84-85

¹⁶⁴ District Binder, Page 88 and 89

¹⁶⁵ District Binder, Page 54-58

¹⁶⁶ District Binder, Page 86-87

only attended two of those days.¹⁶⁷ The Principal stated that she was aware of the Student's autism and her difficulty dealing with unfamiliar faces and being in an unfamiliar building. During the five day extended school year offering the District planned to use the speech pathologist with whom the Student had a good relationship to aid in her transition.¹⁶⁸ The teacher employed to provide the Student's extended school year academic services testified that she was also hired to help the Student with the transition. She, stated that "we wanted to get her acclimated with the school, have her familiar with the classes that she was going to be going to, make her aware of where her locker was, do those types of things with her so that she has a pretty good foundational knowledge about the school and about the people that she will be in contact with." She stated that they had to extend the schedule to accommodate the Parent's request, but only got to have the Student for one day.¹⁶⁹ In testimony the Parent was never asked as to why she did not take advantage of the offer for the five-day transition.

On July 27, 2016, the District provided the Parent with a notice of conference to be held on August 10, 2016, for the purpose of reviewing/revising the Student's IEP and to discuss the provision of FAPE. Those listed as being invited to attend included the Student's new teachers, therapists, and school administrators.¹⁷⁰ The Parent did not attend; however, the team elected to meet to consider a draft IEP in her absence. The separate programming conference decision form and notice of decision as well as the prior written notice of action forms were prepared and sent to the Parent. The forms indicate that the draft IEP that was discussed reflected the Student's need in her transition from one campus to the next, noting that the draft IEP mirrored the stay put IEP.¹⁷¹ Also noted was that due to the Parent's absence the District did not have written consent for them to proceed with the reevaluations.¹⁷²

¹⁶⁷ District Binder, Page 59-61

¹⁶⁸ Transcript, Vol V, Page 9-11

¹⁶⁹ Transcript, Vol VII, Page 173-175

¹⁷⁰ District Binder, Page 52

¹⁷¹ District Binder, Page 29-49 and Parent Binder, Page 1-20

¹⁷² District Binder, Page 25-28 and Parent Binder, Page 21

Although the Parent acknowledged receiving the notice of conference she testified that on the day of the conference she asked that it be postponed. She stated in her testimony that the notice of conference did not contain her concerns about discussing the latest neuropsychological evaluation. She further stated that it was her understanding by the end of the conversation with the middle school principal that the meeting would be postponed.¹⁷³ The principal recalled the telephone call differently:

“She called about ten minutes after the meeting was set to begin. It is incredibly difficult to talk to [the Parent]. You go from one end to the other and then you don’t even know where you have been. She talked about – we talked about scheduling, we talked about, as far as her child’s class schedule, we talked about meeting teachers, we talked about open house, we talked about therapies. We talked about all sorts of things, and she continued to talk about how humiliated she would be to attend the meeting. I encouraged her, I encouraged her, and encouraged her, and told her to come advocate for her child. I was almost begging for her to come. She wouldn’t come. And after I got off the phone, I thought, ‘She is not coming.’”¹⁷⁴

Her recall of the telephone conversation with the Parent was not unlike the Parent’s testimony during the due process hearing. However, it was the Parent’s understanding that the meeting would be postponed. Even though it was not in the notice of conference it was her desire for the team to discuss the neuropsychological evaluation conducted a year earlier (8-14-15).¹⁷⁵ She was uncertain as to when she received the evaluation, but did not provide a copy of the report to the District until July 27, 2016.¹⁷⁶ On August 12, 2016, the Parent sent an email to the Student’s new special education teacher with a copy to the middle school principal stating that she had asked the principal that the meeting be rescheduled thinking that it would be;

¹⁷³ Transcript, Vol VII, Page 55-56

¹⁷⁴ Transcript, Vol V, Page 74

¹⁷⁵ Parent Binder, Page 262-284

¹⁷⁶ District Binder, Page 3233

however, she discovered that the meeting proceeded without her.¹⁷⁷

The Parent tape recorded the conversation with the principal and after playing it back to her the principal apologized to the Parent for not remembering that she had asked that the meeting be postponed.¹⁷⁸

On August 17, 2016, and on August 24, 2016, the District again notified the Parent of an IEP conference on August 31, 2016, where the team would again review/revise the Student's IEP and discuss the provision of FAPE.¹⁷⁹ On August 26, 2016, the District sent, via email attachments, the consent forms that they needed to be signed in order to conduct the reevaluations in occupational therapy and speech therapy. The Parent responded the next day, stating that her computer would not open the documents that the District had attached and again stated that she had already given verbal consent for the reevaluations.¹⁸⁰

The District's separate programming conference decision form and notice of decision of the August 31, 2016, meeting noted that the IEP team met at the Parent's request to review and possibly revise the Student's current IEP and that the team would attempt again to obtain parental consent to conduct speech and occupational evaluations. The notice also stated that the Parent had requested that the IEP team review and consider the results of the neuropsychological evaluation conducted a year earlier in August 2015. The District acknowledged receipt of the report on July 27, 2016, and that they were actively looking for a licensed professional qualified to review the results with the committee. Even though the Parent had previously agreed verbally to the reevaluations, she again did not sign the consent forms electing instead to take them with her, stating that she had already sent signed copies via inter-district mail.¹⁸¹ The special education teacher who provided notifications for the meeting wrote a note to the record following the conference. Her note written on September 6, 2016, noted that at the August 31, 2016,

¹⁷⁷ District Binder, Page 3231

¹⁷⁸ Transcript, Vol V, Page 88

¹⁷⁹ District Binder, Page 19-22

¹⁸⁰ District Binder, Page 3245-3247

¹⁸¹ District Binder, Page 18

meeting:

“The committee agreed to new speech objectives suggested by the student’s new speech therapist and to add to them to the current IEP. However, [the Parent] refused to review the IEP in its entirety and no changes or revisions can be initiated. [The Parent] then submitted a written request for a Due Process Hearing and the meeting was over per her request. Due to the abrupt ending of the meeting, no decisions were made by the committee and signatures were not obtained to reflect a decision on the Separate programming Conference Decision Form. Also, the committee proposed again for [the Parent] to sign the informed consents to evaluate [the Student] for Speech and Occupational Therapy of which were declined and forms were taken by her. [The Parent] informed the committee that she had sent another signed copy of them through inter-district mail but they have not been received by [the] Middle School as of 9/06/2016.”¹⁸²

On September 2, 2016, and again by email on September 7, 2016, the District provided the Parent with a notice of conference to be held on September 8, 2016, for the purpose of reviewing and revising the Student’s IEP as well as to discuss the provision of FAPE and review the neuropsychological evaluation obtained by the Parent.¹⁸³ On September 8, 2016, in lieu of any actions taken the Student’s special education teacher wrote another note for the record dated the same date:

“On 9/8/2016 Committee meeting was scheduled and team members were present. [The Parent] was a no-call and a no-show so team was dismissed. Wendy Stovall agreed to stay to discuss and interpret the results of the neuro-psych to [the Student’s] special education teacher, speech therapist, and administration.”¹⁸⁴

On September 8, 2016, the District once again attempted to conduct an IEP team meeting for the purpose of reviewing the report results and recommendations of the Parent’s

¹⁸² District Binder, Page 17

¹⁸³ District Binder, Page 8

¹⁸⁴ District Binder, Page 7

neuropsychological evaluation obtained a year earlier.¹⁸⁵ Once again however, the Parent elected not to attend even though she acknowledged receipt of the notice via email.¹⁸⁶

According to the Student's aide on September 19, 2016, the Student was over heard saying that she was going to be dead soon, that she was going to kill herself, and kill another student. The Parent was notified the same date and provided with a note to take to the Student's doctor for an assessment. No one including the doctor and District personnel believed that the Student would act on the comments and did not see her as being a threat to either herself or anyone else.¹⁸⁷

Summary of the Due Process Complaints and Findings of Fact:

The facts as generated in the testimony and evidence have to answer whether or not the District violated the procedural and substantive obligations of the IDEA by procedurally failing to (1) provide prior written notice of IEP meetings to the Parent; (2) adhere to state-mandated timelines; (3) involve the Parent in education decision-making; (4) consider an evaluation secured by the Parent; (5) conduct complete and individualized evaluations; (6) include appropriate content in the IEP; (7) ensure that the Student's IEP was implemented as written; and by (8) substantively failing to develop and implement an IEP that was designed to provide educational benefit.

1. There is insufficient evidence to support the complaint that the District failed to provide prior written notices of IEP meetings to the Parent. In fact the opposite was shown to be true in that the Parent testified that the numerous notices she received sent her to the doctor.

2. The Parent failed to adequately demonstrate either by evidence or testimony that any particular state-mandated timelines were violated by the District. The only mention of mandated timelines generated in the course of the seven days was on cross examination of the Parent when asked about the alleged violation and its relationship to the comment she was given by the

¹⁸⁵ District Binder, Page 5

¹⁸⁶ District Binder, Page 2

¹⁸⁷ Joint Exhibit, Page 49-50 and Transcript, Vol V, Page 202-205

District when she submitted the Student's neuropsychological examination to the District.¹⁸⁸

3. Although it is evident from the testimony and evidence that the Parent's participation was limited due to her absences, there is insufficient evidence or testimony to judge that her recommendations for the Student's education were not considered.

4. As noted in item two above the neuropsychological examination obtained by the Parent in August 2015 was not presented to the District until July 2016. As noted in the course of the findings of fact it is evident that the District attempted to consider the report; however, the Parent elected not to attend the meetings.

5. It was not clear from the testimony as to the Parent's meaning of "individualized" in that there is no evidence to show that the District failed to provide and/or attempt to provide the Student with the required evaluations in order to develop an appropriate IEP.

6. There was very little testimony elicited as to the appropriateness of the content in the Student's IEP. The development of her IEP was significantly hampered by the multiple due process hearing requests that placed the IEP under the IDEA stay put provision. Additionally, the evidence and testimony is replete with the District's attempt to involve the Parent in changing the IEP to address the Student's educational needs.

7. There was no evidence presented either by evidence or testimony to lead one to believe that the Student's IEP was not implemented as programmed.

8. The above seven procedural allegations do not support the allegation that the IEP developed for the Student was not designed and substantively implemented to provide the Student with an educational benefit.

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 21.¹⁸⁹ The IDEA establishes that the term "child with a disability" means a child with mental retardation, hearing impairments (including deafness), speech or language

¹⁸⁸ Transcript, Vol VII, Page 79

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

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.¹⁹⁰ The term “special education” means specially designed instruction.¹⁹¹ “Specially designed instruction” means adapting, as appropriate, to the needs of an eligible child under this part, the content, methodology, or delivery of instruction.¹⁹²

The Department has addressed the responsibilities of each local education agency with regard to addressing the needs of all children with disabilities such as the Student in its regulations at Section 2.00 of *Special Education and Related Services: Procedural Requirements and Program Standards*, Arkansas Department of Education, 2008.

The jurisdiction of a hearing officer in IDEA due process hearings is confined to ruling on any matter that pertains to the identification, evaluation or educational placement of a child with a disability, and the provision of a free appropriate public education to the child within the meaning of the IDEA and Arkansas Code Annotated 6-41-202, et seq.¹⁹³ In this case the Parent has challenged the District as to whether or not they have complied not only with the procedural requirements of the Act, but also the substantive requirements of providing FAPE.

The record shows that the Student has been the educational responsibility under the IDEA since entering kindergarten. Since that time the record also shows that the Parent has filed numerous complaints with the Department regarding the Student’s education and her belief that the District has failed both the procedural and substantive obligations of the IDEA. The evidence and record shows that the Student’s primary disability which requires special education to be a pervasive developmental disorder on the autism spectrum scale. In addition to autism the Student presented her educational team with an intellectual disability in the moderate severity range. Educationally her deficits include expressive-receptive language deficits; fine motor

¹⁹⁰ 20 U.S.C. § 1401(3)(A)

¹⁹¹ 20 U.S.C. § 1402(29)

¹⁹² 34 CFR § 300.26(b)(3)

¹⁹³ *Special Education and Related Services: Procedural Requirements and Program Standards*, Arkansas Department of Education (2008), Section 10.01.22.1

dysgraphia; as well as generalized deficits in memory regulation, fluency under time pressure, reasoning and problem solving skills, and organization and planning skill deficits. Emotionally and behaviorally her deficits include attention regulation, impulse control, behavioral flexibility, and emotional regulation. As a consequence of these multiple deficits the Student has presented not only the District, but the Parent with challenges in meeting her education and social needs as she has advanced from kindergarten to the sixth grade in the public school setting where she has been guaranteed to receive a free and appropriate public education (FAPE).

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?¹⁹⁴

In 1988, the Supreme Court once again addressed FAPE by emphasizing the importance of addressing the unique needs of a child with disabilities in an educational setting by addressing the importance of a district's responsibility in developing and implementing specifically designed instruction and related services to enable a disabled child to meet his or her educational goals and objectives.¹⁹⁵ More recently the Supreme Court has held that an appropriate education for a student with a disability is one that is "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."¹⁹⁶ The Court also noted that a

¹⁹⁴ *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-207 (1982)

¹⁹⁵ *Honig v. Doe*, 484 U.S. 305 (1988)

¹⁹⁶ *Andrew F. v. Douglas County Sch. Dist. RE-1*, 69 IDELR 174 (U.S. 2017).

"reasonableness" standard governs the provision of special education to eligible students with disabilities, but a student's educational program must be "appropriately ambitious in light of his circumstances." The Court opined that the IDEA does not guarantee a particular level of education because "the IDEA cannot and does not promise 'any particular [educational] outcome.'"¹⁹⁷ At the same time the Court emphasized that what is appropriate depends on the child's circumstances and explained that the instruction offered must be specially designed to meet a child's unique needs, through an individualized education program.¹⁹⁸

With respect to a child, such as the Student in this case, who is not fully integrated in a regular classroom and is not able to achieve on grade level, the IEP must be "appropriately ambitious," thus giving the Student a "chance to meet challenging objectives."¹⁹⁹

Given the numerous requests for a due process hearing, and the subsequent appeal of the most recent ruling, the Student's IEP has been hampered in being altered to any degree without both parties agreeing to the changes. Consequently, it has been necessary to look at and judge the IEP for the Student in light of what was known about the special needs of the Student at the time the stay-put IEP was developed. The High Court in the Endrew case referred to above also provided guidance for this particular case in noting that the adequacy of a given IEP turns on the unique circumstances of the child for whom it was created. More importantly to this case, the Court noted that nature of the IEP process ensures that parents and school representatives will "fully air" their respective opinions on the degree of progress a child's IEP should pursue.²⁰⁰ This finding is important in that the Parent's testimony in this case was her allegation that her concerns were not being heard or considered in the development of the Student's IEP.

The Parent alleged that the Student's IEP did not show progress towards the goals and objectives by using an expert's summation of the Student's achievement scores on a variety of instruments. Relevant to this issue was a ruling out of the Second Circuit in which it was

¹⁹⁷ Ibid, Citing *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 553 IDELR 656 (U.S. 1982)

¹⁹⁸ Ibid, Citing 20 USC 1401 (29) and 20 USC 1401 (14)

¹⁹⁹ *Endrew F. v. Douglas County Sch. Dist. RE-1*, 69 IDELR 174 (U.S. 2017).

²⁰⁰ Ibid.

decided that "a disabled child's development should be measured not by his relation to the rest of the class, but rather with respect to the individual student, as declining percentile scores do not necessarily represent a lack of educational benefit, but only a child's inability to maintain the same level of academic progress achieved by his nondisabled peers."²⁰¹ This opinion is consistent with the findings by the Eighth Circuit Court of Appeals in answering whether or not a student made gains in her areas of need. The Court opined that it would not compare the student to her nondisabled peers.²⁰²

In reviewing the elicited testimony and the evidence, in this case there is ample testimony and evidence that the District attempted to focus on the Student's unique needs, but it would appear that they were hampered by the multiple non-appearance of the Parent at IEP meetings as well as her failure to provide consents for the District to further evaluate the needs of the Student in order to make appropriate changes to the Student's IEP.

The record shows extensive maladaptive behaviors exhibited by the Student during the two years of this due process complaint. At the same time the evidence and testimony by the District's personnel including the behavior consultant, they were able to address those behaviors with some degree of success. Contrary to the Parent's allegation, the District did have a behavior plan in place which included ongoing consultation made available to the teaching staff. Although the Parent and her expert witness believed it necessary, there was no evidence presented that a more extensive evaluation such as a Functional Behavioral Analysis of the Student's behavioral needs was necessary.

The Parent was obviously concerned as to how the District staff responded to the Student's behaviors once she made the transition from one campus to the other, but the record shows that the District made appropriate plans to assist the Student. Those plans were hampered by the Parent not providing the Student with the recommended number of days to assist her in making the transition.

The Parent's challenge that the District denied the Student FAPE during the adjudicated

²⁰¹ *H.C. v. Katonah-Lewisboro Union Free Sch. Dist.*, 61 IDELR 121 (2d Cir. 2013, unpublished)

²⁰² *K.E. v. Independent School District No. 15*, 57 IDELR 61 (8th Cir. 2011)

period of time is not supported by the evidence. The identification and evaluation of this Student's unique needs of autism were responded to appropriately according to the evidence and testimony. At the same time the evidence and testimony shows that the District attempted to provide additional evaluations to measure the Student's unique needs, but were hampered in the process by the Parent not providing the appropriate written consent.

As noted above, the IDEA maintains that the term educational performance and the regulations being implemented by the IDEA is not limited to academic performance. As the District amply points out the Student not only has the difficulties in acquiring academic skills, but also has behavioral difficulties in adapting socially in some situations. The regulations clearly establish that the determination about whether or not a student is a student with a disability is not limited to information about his or her academic performance. In this case the District attempted to address her maladaptive behaviors.

A student's diagnosis such as autism, is not determinative of the appropriateness of his or her placement. Under the IDEA, the primary focus of an IEP team should be on the unique needs displayed by the child and not on the label given to the student's disability. Congress established and the courts have consistently agreed that FAPE must be based on the child's unique needs and not on the child's disability.²⁰³ Too often this hearing officer has found that parents, school administrators and attorneys representing them, agree on the basis, such as a given diagnosis, but do not make this distinction in their arguments on the complaints or the differences they've encountered. The charge to education professionals is to concentrate on the unique needs of the child rather than the title of the disability or disabilities which makes them eligible for special education services. Such as in this case, the Student's exhaustive behavior difficulties were not only being associated with her autism, but also with her extremely limited intellectual abilities. Thus, students with different identified disabilities can be educated in similar programs if their disability-related needs are one and the same.

Keeping in mind, as noted above, FAPE is defined as special education and related

²⁰³ 20 U.S.C. § 1400(d)(1)(A); § 1401(14); and 34 C.F.R. § 300.300(a)(3). See *Heather S. v. State of Wisconsin*, 26 IDELR 870 (7th Cir. 1997). See also *Torda v. Fairfax County Sch. Bd.*, 61 IDELR 4 (4th Cir. 2013, unpublished), cert. denied, , 114 LRP 13487 , 134 S. Ct. 1538 (2014)

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 for failure to follow and implement the procedural guidelines of the IDEA or whether or not the District substantively implemented an appropriate IEP requires: (1) looking at each individual issue raised by the Parents to determine whether or not the District has been in compliance with the definition of FAPE under the IDEA, and (2) whether or not any single violation, or the accumulation of violations, is severe enough to constitute a denial of FAPE.

The Court of Appeals for the Eight Circuit in *Zumwalt v Clynes*²⁰⁴ 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 process hearing.²⁰⁵ 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).”²⁰⁶

There is no doubt in this case that the Parent was and is aware of her rights under the IDEA in that she has pursued several complaint processes with the Department in an attempt to obtain what she believes is the most appropriate education for her child. There is no doubt that she was procedurally provided with ample opportunities to express her concerns and opinions as

²⁰⁴ *Zumwalt v Clynes*, (96-2503/2504, U.S. Court of Appeals, Eight Circuit, July 10, 1997)

²⁰⁵ *Board of Education v. Rowley*, (458 U.S. 176-203, 1982)

²⁰⁶ *Light v. Parkway C-2 School District*, 41 F.3d 1223, 1227 (8th Cir. 1994), cert. denied, 515 U.S. 1132 (1995)

to what she believed the Student needed for not only her academic education, but also to address her maladaptive social behaviors.

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 receive a publicly funded education that benefits the student.²⁰⁷

One of the questions with regard to the current case and whether or not FAPE was denied is whether or not the District failed to appropriately evaluate the Student. However, the record shows that it was the Parent who delayed providing the District with an evaluation she obtained which may have aided the District in decision making and it was the Parent who refused to provide the District with written permission to conduct reevaluations which may have provided additional information to aid in the Student's academic and social education.

Order

1. There is no evidence or testimony to support the Parent's allegation that she was not provided prior written notice of IEP meetings.

2. There is no evidence or testimony to support the Parent's allegation that the District failed to adhere to state-mandated timelines.

3. There is no evidence or testimony that supports the allegation that the District failed to involve the Parent in education decision-making; even though there is evidence to show that the District did not always agree with the Parent in the decision-making process.

4. The evidence and testimony reveals that the District was poised and ready to consider an evaluation secured by the Parent; however, the report was provided one year later and the Parent did not attend the IEP meeting where the report was considered.

5. The evidence and testimony reflects the failure of the Parent to provide appropriate consent for the District to conduct complete and individualized evaluations.

²⁰⁷ *Fort Zumult School Dist. v. Clynes*, 96-2503,2504, (8th Cir. 1997)

6. There was insufficient evidence or testimony presented or elicited from the witnesses to conclude that the Student's IEP did not include appropriate content.

7. According to testimony the Student's IEP was implemented as written.

8. The evidence and testimony provided in the course of the hearing does not support the Parent's allegation that the District failed to develop and implement an IEP that was designed to provide educational benefit to the Student.

Consequently, it is hereby found that:

The Parent has failed to provide testimony or evidence to suggest that the District has denied the Student with a free and appropriate public education between October 7, 2014 of school year 2014-15 to October 7, 2016 of school year 2016-17 by violating the procedural and substantive obligations of the IDEA.

Finality of Order and Right to Appeal

The decision of this Hearing Officer is final. A party aggrieved by this decision has the right to 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.

June 5, 2017

Date