

Arkansas Department of Education
Special Education Unit

**RE: XXXXXXX XXXXXXXX
 as Parent of Student
 XXXXXXX XXXXXXXX**

PETITIONER

VS. H-17-27

Greene County Tech 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) in violation of the “*procedural obligations*” of the IDEA for school years 2013-14, 2014-15, 2015-16, 2016-17 (ninth through twelfth grade) by failing to:

1. Conduct appropriate assessments to determine the Student’s educational need for special education services or current levels of academic achievement;
2. To provided services to enable the Student to make progress or to meet the educational standards of the ADE;
3. To provide oral motor therapy and other therapy services contained on her IEP;
4. To provide the Parent meaningful communication in IEP meetings, and refusing to accommodate the Parent in scheduling IEP meetings;
5. To provide physical therapy services as directed by the Student’s physician;
6. To provide a consistent communication system for the Student for the past two School years;

7. To conduct an evaluation following the recommendation from Easter Seals in 2013 that she receive an augmentative and alternative communication assessment to determine the most appropriate communication system for the Student;
8. To conduct assistive technology evaluation required to adequately determine the Student's programming needs;
9. To administer annual statewide testing or administer alternative portfolio testing to measure the Student's annual performance;
10. To provide the Student with an appropriate special or adaptive physical education program;
11. To develop an appropriate transition plan to support the Student's goals following graduation;
12. To provide feeding services as required by the Student's special needs;
13. To appropriately implement the services on the Student's IEP;
14. To provide the Student with any educational services since October 24, 2016; and
15. By violating the Stay Put provision of the IDEA since January 9, 2017.

Further the Petitioner alleges that the Respondent is in violation of the "*substantive obligations*" of the IDEA by failing to develop and implement an IEP for the above school years designed to provide the Student with an educational benefit.

Relief being requested by the Petitioner includes:

1. Compensatory Special Education and Related Services for the denial of FAPE (no amount specified);
2. Appropriate Evaluations to be conducted by persons agreed to by the parties and to

include a Functional Assessment; Vocational Assessment, Argumentative Communication Assessment; Assistive Technology Assessment; Comprehensive Evaluation to assess the Student's intellectual, achievement, communication, gross and fine motor needs, and adaptive behavior deficits; Curriculum Based Assessments across her environments; and other evaluations deemed appropriate by the IEP Team;

3. Consultant approved by the Parent and hired by the District as an outside consultant to be a permanent member of the IEP Team and to assist in determining the overall needs of the Student; to carry out what is necessary to provide the Student compensatory services and a FAPE, including such things as assisting the IEP Team in determining appropriate evaluations needed; assisting in determining the Student's current credits and future needs for transition and graduation; and to assist the IEP team to write a series of functional and measurable social, emotional, adaptive-behavioral, and cognitive behavioral goals into the Student's IEP immediately;

4. The development of an appropriate IEP to be implemented in the LRE, specifically to include - if appropriate - programming to address the Student's communication skills, academic skills, perceptual and/or motor functioning, behavior and self-sufficiency; and to include an augmentative/alternative communication systems and/or assistive technology; and to provide for the Student's orthopedic needs - specially including the participation in some special physical education, adaptive physical education, movement education and/or motor development;

5. Communication for the Parent to be provided concerning the Student's daily performance and needs - such mode of communication to be determined by the IEP team

in conjunction with the Consultant; and

6. For the Parent be declared to have exhausted her administrative remedies as to her § 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 April 18, 2017.

Procedural History:

On January 9, 2017, prior to the current complaint being filed by the Petitioner, 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"). At that time the Parent believed that the Greene County Tech 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 in the complaint of January 9, 2017.

The Department responded to that complaint by assigning the case to Impartial Hearing Officer Michael McCauley, with case number H-17-20. Mr. McCauley issued an order establishing preliminary timelines with the dates of February 15-17, 2017, as the dates on which the hearing would take place.

On January 30, 2017, the Parent submitted a motion with Mr. McCauley for a stay put order as well as an order directing the District to provide educational services to the Student. Mr. McCauley issued an order for stay put on February 3, 2017, finding that the Individual Education Plan (IEP) developed on October 19, 2016, was the controlling IEP under which the education services were to be delivered without modification.

On February 2, 2017, the Parent requested and was granted, without objection, a continuance by Mr. McCauley, with the hearing to be held on April 5-7, 2017. On February 9, 2017, the District entered a motion asking Mr. McCauley to set aside the order for stay put and that the Parent be ordered to take all necessary steps for the Student's primary care physician to communicate with the District about the needs of the Student to prevent choking and aspiration and that the Parent be ordered to authorize the physician to communicate with the District's nurse regarding feeding instructions. On February 17, 2017, Mr. McCauley issued an order denying the District's motion to dismiss for lack of standing in that the Student had reached the age of majority.

On March 13, 2017, the District filed a complaint for injunctive relief with the United States District Court, Eastern District of Arkansas, Jonesboro Division asking the Court to order the Parent to cease and desist from blocking the District from access to the Student's medical information from her primary care physician.

On March 31, 2017, the Parent requested and was granted, without objection, a second continuance with the date of May 24, 2017, being set as the date for the case to be heard by Mr. McCauley. However, on April 10, 2017, the Parent submitted the current complaint requesting that the Department initiate due process hearing procedures. The Parent requested this second

hearing because she believes, as in the first complaint, that the District has failed to comply with the IDEA 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 above.

On April 13, 2017, the District filed a motion and brief asking Mr. McCauley to dismiss the Parent's initial due process complaint scheduled to be heard on May 24, 2017. The Parent submitted a response objecting to the motion to dismiss the due process complaint on May 2, 2017. On April 24, 2017, prior to providing a response to the motion, the Department was informed that Mr. McCauley had recused himself from continuing to hear the case. After which the Department assigned the case to the current hearing officer. An order was issued by this hearing officer on May 2, 2017, dismissing case H-17-20 without prejudice. The order also allowed all of the allegations as claimed in the Parent's initial complaint pertaining to those under the jurisdiction of an IDEA due process hearing officer to be preserved for adjudication in the Parent's current request.

The Department responded to the Petitioner's request for a second hearing by assigning the case to the current impartial hearing officer and establishing the date of May 12, 2017, 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 April 18, 2017. 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 Donn Mixon, Attorney of Jonesboro, Arkansas.

The District responded as ordered in the pre-hearing order by providing a response to the Parent's complaints on April 20, 2017. On April 25, 2017, the District submitted a motion challenging the sufficiency of the due process complaint. On April 29, 2017, an order was issued stating that after a review on the face of the complaint that the Parent's due process complaint was found to meet the regulatory requirements of the IDEA.

As noted above, on March 13, 2017, the District filed a complaint for injunctive relief with the United States District Court Eastern District of Arkansas, Jonesboro Division, asking that the District be granted a preliminary and final injunction and order against the Parent and Student to cease and desist from blocking access of the District to the Student's medical information from her primary care physician and mandating that the Parent take necessary steps to release the medical information to the District and to permit the Student to attend school as required by the Stay Put Order issued by Mr. McCauley. On May 4, 2017, District Judge Kristine Baker, issued an order regarding an evidentiary hearing held on April 6, 2017, at which time the parties agreed to the following: (1) that the District withdraws its motion to dismiss without objection; (2) that the District will follow the stay-put order entered by Mr. McCauley; (3) that the parties reserve the issue of attorneys' fees associated with their cross-motions for injunctive relief; and (4) that the Court retains jurisdiction of the action.

On May 11, 2017, the Parent requested a continuance of the hearing due to Parent's counsel having a family emergency. The continuance was granted by order on May 11, 2017, with the date of June 19, 2017, be set as the date on which the hearing would commence. The

hearing began as scheduled on June 19, 2017, with continuances being granted on the record for the hearing to continue on July 20, 2017, and on July 21, 2017. On July 21, 2017, the Parent and District requested again on the record that the hearing be continued in order to allow both parties to complete the presentation of their evidence and testimony. An order was issued on July 22, 2017, setting the dates of July 27, 2017, July 28, 2017, and August 24, 2017 for the hearing to be conducted. However, the date of July 28, 2017, was deemed unavailable for the District. Following the hearing on August 24, 2017, both parties again requested a continuance, which was granted by order on August 28, 2017, for the hearing to heard and concluded on September 25, 2017 and September 28, 2017 if needed.

The Parent entered evidence in the course of the 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 each party's post hearing brief.

The Student has been a child in need of special education services since entering school in the District as a kindergarten student. The contested school years according to the Parent's complaint are the Student's ninth, tenth, eleventh and twelfth grades (2013-14, 2014-15, 2015-16 and 2016-17).

Findings of Fact:

In April and May 2005, as a kindergarten student the Student was provided a psychoeducational re-evaluation by the District's school psychology specialist. According to the report a previous evaluation was conducted in May 2002. In 2002 she had been diagnosed with

quadriplegic cerebral palsy. The May 2005 assessment concluded that she continued to have delays in cognitive development, self-help skills, fine and gross motor skills, as well as, receptive and expressive language, being non-verbal.¹

In September 2012, a psychologist attempted to conduct psychological testing to determine the Student's intelligence quotient as required by Medicaid in order to initiate speech therapy; however, the psychologist determined that the Student's physical and speech limitations did not lend themselves to the requirements of any known psychological measurement of IQ. In lieu of any measure of intelligence the psychologist elected to measure the Student's adaptive behavior in communication, daily living skills, and socialization. Although all scored areas were determined to be in the low range the psychologist reported that she was oriented to person, place, time, and situation.² These results are consistent with those reported in testimony by the Student's teachers.³ Even though the Student's disabilities required modifications in the presentation and testing of information she received passing grades in all basic core subject areas through the years in question.⁴

The Student's IEP for her ninth grade (2013-14) indicated that she qualified for special education services under the educational disability of other health impaired. The only special education service listed was ninety minutes of indirect services in speech. All other subjects were to be rendered in the general education classroom. She also received related services which

¹ District Binder, Page 621-626

² District Binder, Page 627-629

³ Transcript, Vol III, Page 72-73 and Vol IV, Page 62

⁴ District Binder, Page 863

included a paraprofessional on a daily basis throughout the school day; speech therapy twice weekly for a total of ninety minutes; occupational therapy once weekly for sixty minutes; and special transportation to and from school three times weekly. The total time in the general education setting was 1,860 minutes weekly and 90 minutes receiving indirect special education services. The regular education classes included math, English, science, social studies, and “mini-courses” for both school semesters.⁵

The Student’s ninth grade IEP developed on May 14, 2013, indicated that the Parent was an active participant in the team decisions. The special education services (90 minutes weekly) were to be indirect services, with 1860 minutes weekly in the general education setting.⁶ There was no objection in testimony by the Parent that her statement of parental concern on the IEP for that school year was her desire that the Student’s credits to be gained “appropriately.” Additionally the record indicates that she wanted to make sure that the food services staff knew that the Student could not eat “soft bread foods.” The same record reflects the Parent’s desire for the District to check on getting an Easter Seals evaluation for an AAC communication device.⁷ Also on the record the Parent disagreed with the absence of the Student’s occupational therapist at the IEP team meeting. The Parent wrote that she was “not happy that OT [was] not represented....it is necessary for placement in elective courses for next year.”⁸

According to the IEP the elective courses for the ninth grade were Computer Business

⁵ Parent Binder, Page 77

⁶ Ibid

⁷ Parent Binder, Page 78

⁸ Parent Binder, Page 101

Applications (CBA) and Physical Education/Health. According to the IEP the CBA elective was scheduled to be taught by the Occupational Therapist and PE/Health elective was scheduled to be taught by the Physical Therapy therapist.⁹ Her tenth grade electives of concern to the Parent included Health & Wellness, to be taught by the Physical Therapist; Oral Communications, to be taught by the Speech Therapist; Personal Fitness, to be taught by the Occupational Therapist; and Drama, to be taught by the Speech Therapist.¹⁰ Her eleventh grade electives were listed as Theater, to be taught by her Physical Therapist the first semester and by the Speech Therapist the second semester; Leadership & Communication, to be taught by her Speech Therapist; Family and Consumer Science, to be taught by the Occupational Therapist for both semesters; and Nutrition & Wellness, to be taught by the Physical Therapist.¹¹ Her twelfth grade electives included Art, to be taught by the Occupational Therapist; Music, to be taught by the Speech Therapist; and Family & Consumer Science, to be taught by the Physical Therapist.¹²

The Student's transcript courses summary indicated that she earned one credit towards graduation in Computer Business Applications; a half credit in Health; and half credit in Physical Education. In her tenth grade she earned a half credit towards graduation in Drama; a half credit in Personal Fitness for Life; and a half credit in Oral Communications. In her eleventh grade she earned a half credit towards graduation in Nutrition & Wellness; a half credit in Leadership &

⁹ Parent Binder, Page 102

¹⁰ District Binder, Page 151

¹¹ District Binder, Page 132

¹² District Binder, Page 66

Service Learning; and one credit in Theater.¹³ Since she did not attend the entire year of her twelfth grade, the record does not reflect any earned credits towards graduation for the second semester.

According to the District's Assistant Superintendent the rationale for this action was that "the only thing I can point you to is an IEP team meeting, of which Mother was there and agreed to, that we would use these therapy sessions, it's in her IEP, to help her gain those credits for those classes."¹⁴ The District's special education supervisor testified on examination by the District that the elective classes were incorporated into the various therapies in order to allow the Student to have enough credits to graduate with a diploma:

"In the ninth grade, she would start counting credits. And we had talked about that we wanted her to graduate, the team wanted her to graduate with her peers that she had been going to school with. So, if we were going to do that, then we would graduate – she would graduate with 22 credits. So, how to get those credits. And that's when the discussion started about how is she going to get credit for therapy, because she takes – she has therapy every – even at that time, it was every day, different types of therapy. And so, when you look at her therapy, the classes were 45 minutes, her therapies were an hour, so that would take more than one class period to get therapies in. Her speech was 45 minutes, but the other was 60. By the time you get those in and you get lunch and then her freshen-up time, and then her core subjects. We had always talked about we wanted her to

¹³ District Binder, Page 863

¹⁴ Transcript, Vol I, Page 104

take English, Math, Social Studies, and Science. Those were her core subjects.

And so, that the OT, PT, and speech could count some for those elective classes.”¹⁵

She also testified that it was the Student’s mother who was the “driving person” who wanted the Student to graduate and meet all the requirements towards graduation. When challenged as to whether or not the class substitutions were consistent with the Department’s graduation standards she replied by reading into the record the Department’s regulation regarding a special education student’s IEP as the basis for graduating from high school.

She further testified that since it was the Parent’s desire for the Student to graduate with a high school diploma and that it required the Student to earn credits for graduation not only from core course requirements but also elective class credits as noted above. As noted above the Student’s ninth grade IEP scheduled her for extensive time in therapies and because additional time was needed for her to eat as well as complete her work, the IEP team decided to “look at what might be offered as an elective, what could we use for that and conceivably get some of those same objectives in like a therapy.”¹⁶ The individual who provided the physical therapy did not testify as to whether or not the Student received any type of CBA instruction during her physical therapy sessions and the District’s occupational therapist did not indicate in her testimony that the Student did or did not receive any instruction in PE/Health during the Student’s ninth grade year.

On May 13, 2014, the IEP team met to develop the Student’s tenth grade IEP. Once

¹⁵ Transcript, Vol VI, Page 33-34

¹⁶ Transcript, Vol III, Page 260-261

again the Student would be receiving special education as indirect services with 90 minutes in speech therapy. In addition to regular education classes in English, geometry, American history, and biology, she was provided credit for health and wellness, oral communication and enrichment. The related services included speech therapy twice weekly for ninety minutes, a one on one paraprofessional throughout the school day, transportation as needed, and occupational therapy for sixty minutes weekly.¹⁷ On May 12, 2015, the IEP team extended the Student's ninth grade IEP through June 3, 2015, as well as providing her with extended year services (ESY) for occupational therapy from June 10, 2015, through August 12, 2015, for sixty minutes weekly.¹⁸

According to the record of parental concerns contained in the Student's tenth grade IEP the Parent did not want the staff members to discuss resource placement with the Student. She believed that such discussion would have a negative impact on the Student's self-esteem and could cause her to lose confidence in her own abilities. She expressed a desire that the Student's materials be handed out at the same time as all other students.¹⁹

The Student's IEP for the eleventh grade was developed at the end of her tenth grade year on May 12, 2015.²⁰ At the same time the IEP team determined to provide the Student with extended school year services (ESY) during the summer months for occupational therapy.²¹ According to the IEP the Student continued to receive indirect services. The only course/activity

¹⁷ District Binder, Page 151

¹⁸ Ibid

¹⁹ District Binder, Page 152

²⁰ District Binder, Page 132-150

²¹ District Binder, Page 151

that the Student was scheduled to receive in a special education setting was leadership and communication in the first semester and theater in the second semester. Both classes were scheduled to be a part of Speech Therapy for ninety minutes weekly, with thirty of the ninety minutes being indirect services. Although the Parent was present in the development of the Student's IEP she testified that she did not know why the Student did not attend the regular education class for leadership or theater classes with her non-disabled peers.²² At the same time she was aware that the Student received credits towards graduation for both leadership and communication as well as theater.²³ She expressed her concerns at the IEP meeting stating that she wanted the Student to have as many of the same teachers as possible for her junior year. She also stated at the IEP team meeting that she felt the current modifications were working, further that she believed that the Student had a good year in her ninth grade and was pleased with her progress.²⁴

For related services the Student was assigned a one on one paraprofessional aide on a daily basis as well as transportation daily on an as needed basis. She also received occupational therapy once a week for sixty minutes as well as speech therapy twice weekly for ninety minutes. She was scheduled to receive nursing services on a daily basis for four-hundred and fifty minutes weekly. She also received physical therapy outside of the school setting for one-hundred and twenty minutes weekly.²⁵

²² Transcript, Vol V, Page

²³ Transcript, Vol V, Page

²⁴ District Binder, Page 134

²⁵ District Binder, Page 132

The IEP reflects that the Parent actively participated in the development of the Student's IEP and as noted above that she was pleased with the Student's progress and the modifications that were being made for the Student to be successful in her classes.²⁶

Having achieved a 3.5 grade point average through the tenth grade the Student was eligible and nominated to the National Honor Society in September 2015. The application was physically completed by the Parent in which she noted that the Student was recognized by her classmates in the ninth grade as the "class favorite" as well as a Junior High Cheerleader. In the tenth and eleventh grade she was on the Student Council and in Junior Civitan. She noted in the application that the Student did not have any work activities after school because she "had therapy 5 days a week at school and after school along with her school work and responsibilities."²⁷ The Student's class grades and credits for the eleventh grade reflect grades ranging from 91 to 100 for English 11, anatomy, bridge to algebra II, theater I, world history, and leadership & service learning.²⁸

As noted above the records and testimony reflect that the Student did not actually attend the elective classes of theater or leadership & service learning along with her same age peers. Rather, these subjects as previously noted were to be incorporated into and a part of her speech therapy sessions. For the Student's twelfth grade year her speech therapy was to incorporate a music course. Her physical therapy was to incorporate a family and consumer science course and

²⁶ District Binder, Page 133

²⁷ District Binder, Page 1317-1319

²⁸ District Binder, Page 936

her occupational therapy was to incorporate an art class.²⁹ When asked about teaching music as a part of speech therapy the speech therapist testified that she did not actually teach music, but rather that they talked about communication through music and that they listened to music.³⁰ She also testified that she did not give the Student a grade for music, but rather for speech therapy.³¹ The occupational therapist testified that she was never asked to provide the study of art or consumer science as a part of her occupational therapy with the Student. She further testified that she did not participate in developing the Student's IEP, nor had she received a copy of the IEP prior to or while providing services.³²

When asked if the occupational, physical, and speech therapists were qualified to teach the elective courses for which the Student received credit, the District's special education supervisor responded that she did not think they were.³³ She defended the IEP team decision to embed the elective classes into the therapies with examples (i.e., "If you look in the course description under Theater or Ceramics, like Ceramics is expressing yourself through different modes. So, if she is painting or if she is drawing, it's that fine motor. So, those are the things they worked on in those types of therapies when they put them together with a therapy.")³⁴ Consequently, the Student was receiving a grade for therapy rather than for the course for which

²⁹ District Binder, Page 12

³⁰ Transcript, Vol III, Page 150

³¹ Ibid, Page 150-151

³² Transcript, Vol III, Page 233 and 245

³³ Ibid, Page 272

³⁴ Ibid

it was to be embedded.

On April 21, 2016, the Student's IEP team, including the Parent met to develop the Student's twelfth grade IEP. According to the record the District and Parent's main concern was making sure the Student's schedule maximized her time and needs by choosing the best time for therapy sessions and core classes.³⁵ Once again she was provided indirect services for her special education with speech therapy for 300 minutes weekly. She continued to need the one on one paraprofessional daily during the school day as well as specialized transportation services. In addition to occupational therapy services she was now scheduled to receive physical therapy as well as having a school nurse to help with personal care.³⁶

On July 21, 2016, the District conducted a facilitated IEP meeting with nine District personnel and the Parent participating in the meeting. The meeting resulted in the development of a Memorandum of Understanding (MOU).³⁷ Item seven of the MOU stated that the Parent and the District's special education supervisor would "begin to investigate post graduation therapy options...[and] discussions [would] continue during the school year (2016-17) about whether it is better for [the Student] to graduate off of credits or an IEP."³⁸ This as well as the testimony by the District's personnel contradicts the Parent's complaint that she was unaware that the Student was receiving graduation credits in therapies for elective classes that she never actually attended. The MOU further noted that all agreed for another team meeting on July 28, 2016, to finalize the

³⁵ District Binder, Page 114

³⁶ District Binder, Page 113

³⁷ District Binder, Page 281-286

³⁸ Ibid, Page 284

Student's 2016-17 IEP.³⁹

The facilitated IEP meeting was held on August 12, 2016, which resulted in the decision that the Student would receive physical therapy at the school twice weekly for ninety minutes and physical therapy privately for one-hundred twenty minutes weekly.

The District's occupational therapist who had conducted an annual OT evaluation on May 4, 2016, completed an addendum to the evaluation on August 20, 2016. Her recommendation was for the occupational therapy to be increased to 120 minutes per week.⁴⁰

On October 17, 2013, Easter Seals of Arkansas responded to the Parent and District's request for a consultation regarding the Student's communication difficulties. At that time the recommendation was that the Student receive an augmentative and alternative communication evaluation to determine the most appropriate system for her. The evaluation packet seeking information and consent to evaluate was sent to the Parent on October 17, 2013; however, the Parent did not complete nor return the packet to Easter Seals.⁴¹ A second attempt to obtain the evaluation was initiated in September 2016; however, even though the packet was completed by the speech therapist and other school personnel, the Parent did not complete the packet, nor give consent for the evaluation.⁴²

Another attempt at initiating an Easter Seals referral was completed by the District in the

³⁹ Ibid

⁴⁰ District Binder, Page 494-525

⁴¹ District Binder, Page 660-681

⁴² District Binder, Page 630-631 and 632-644

summer of 2016.⁴³ It was very difficult for the District on cross examination with the Parent to ascertain as to whether or not she did or did not consent for an augmentative communication evaluation by Easter Seals; however, the documents presented as evidence do not contain a consent to complete the evaluation.⁴⁴

On August 26, 2016, the Parent filed a formal complaint with the Department, alleging some of the same complaints generated in the previous and current due process. This event may have made it difficult for the Parent to comply with any of the requests from the District. She alleged that the District was not providing the Student with occupational, physical, or speech therapies, as contained in the Student's IEP. Following an extensive investigation between August 26, 2016, and October 25, 2016, the investigative team concluded that there was not sufficient evidence to substantiate the Parent's allegation that the District failed to provide the Student's special needs as outlined in her IEP.⁴⁵

What appears from the documents and testimony to have been the primary trigger for issuing the Parent's previous and current due process complaints with the District was the District's apprehension in feeding the Student. The District's nurse testified that the District had multiple contacts with the Student's mother over different things including choking and the risk of aspiration.⁴⁶ The Student's speech therapist testified that without a complete swallow study it

⁴³ District Binder, Page 647-659

⁴⁴ Transcript, Page 236-243

⁴⁵ District Binder, Page 1498-1520

⁴⁶ Vol III, Page 25-26

would not be possible to know the appropriate feeding for the Student.⁴⁷

On October 19, 2016, another facilitated IEP meeting was conducted. The MOU reached at the meeting included an agreement that the Parent would provide the District with a copy of a swallow study completed by the Parent on September 26, 2016.⁴⁸ Noted in the results of the study is a statement that the study was incomplete because the Student had aspirations during the study. The Parent testified that she was present during the study and stopped it because “they were trying to induce an aspiration and I would not allow it.”⁴⁹ The report was provided verbally to the Student’s physician who instructed “to whom it may concern” that “although aspiration was noted during the study” he recommended continuation of the Student’s speech and oral/motor therapy.⁵⁰ He also instructed “to whom it may concern” to contact his office if they had questions or needed additional information. The MOU as noted above referenced the District’s willingness to pay for the study. The Parent provided the District with a copy of the physician’s letter dated the same date as the swallow study, but not a copy of the study itself.⁵¹ The District’s director of special education contacted “someone in the speech pathology department at ACH [Arkansas Children’s Hospital]” who subsequently faxed the report to her on October 26, 2016.⁵²

⁴⁷ Ibid, Page 167-170

⁴⁸ District Binder, Page 41

⁴⁹ Transcript, Vol V, Page 155

⁵⁰ District Binder, Page 398

⁵¹ Transcript, Vol III, Page 175

⁵² District Binder, Page 960

According to testimony from the District's director of special education the District wanted to receive specific feeding instructions from the Student's primary care physician. This suggestion is consistent with the swallow study conducted on September 29, 2016.⁵³ As noted above the copy of the swallow study was not provided by the Parent, but rather was faxed directly from the speech pathology lab at Arkansas Children's Hospital.⁵⁴ The Parent's attorney in the course of the hearing, and in the post hearing brief, implied that such behavior was a violation of the HIPAA rules. However, it should be noted that the physician who ordered the report addressed his response to the report in a letter provided to the District by the Parent. It was addressed "to whom it may concern" and invited the receiver of the information to contact his office should that be necessary. Additionally, as noted in the MOU sighted above, the District agreed to pay for the expense of obtaining the study and that the Parent agreed to provide the District with a copy.

Prior to receiving the final Department complaint investigation report the District on September 27, 2016, provided the Parent with a notice of conference to be held on October 3, 2016. The purpose for the meeting was to review/revise the Student's IEP and to review evaluation data and therapy addendum.⁵⁵ According to the contact log the Parent did not wish to attend the meeting because she did not want to meet until a "new FCP is completed."⁵⁶

On September 28, 2016, another notice of conference was provided the Parent scheduling

⁵³ District Binder, Page 396

⁵⁴ District Binder, Page 393

⁵⁵ District Binder, Page 219

⁵⁶ District Binder, Page 221

the conference for October 12, 2016. The purpose for the conference was the same as the previous notice with the added notice to conduct an existing data review.⁵⁷ The Parent notified the District that she could not meet at the time suggested on October 12, 2016, asking that the meeting be held after school time.⁵⁸ On October 4, 2016, the District provided the Parent with another notice of conference to be held on October 19, 2016; however, the notice removed conducting an existing data review, but indicating that an Easter Seals representative was being invited.⁵⁹ A second notice of the conference scheduled for October 19, 2016, was provided the Parent on October 12, 2016.⁶⁰ On October 11, 2016, the Parent notified the District that she would not attend the conference due to a new FCP not being completed.⁶¹ The FCP [Functional Communication Profile] was conducted by the District's speech/language pathologist on August 24, 2016. It was not clear from the Parent's testimony as to her objection to the FCP conducted by the District. On direct examination by her attorney she testified that she asked for a "Functional Communication Profile because [she] wanted speech to be built for her, because there was too much going on...she wasn't getting oral motor therapy, they were doing exercises, not doing oral motor."⁶² The results of the FCP as presented at the IEP meeting that the Parent attended on October 19, 2016, revealed that the Student presented with profoundly disordered

⁵⁷ District Binder, Page 222-223

⁵⁸ District Binder, Page 224

⁵⁹ District Binder, Page 225-226

⁶⁰ District Binder, Page 227-228

⁶¹ District Binder, Page 229

⁶² Transcript, Vol V, Page 183

language skills, articulation skills, and impaired oral mechanisms. The report noted that the Student would benefit from speech therapy to address language and oral motor deficits.⁶³ The District's speech therapist testified that she used an iPad application that helped with oral-motor exercises.⁶⁴ When questioned further as to the use of additional programs and applications in providing oral-motor therapy the therapist stated that she was not familiar with the program she was being asked about and that was one of the reasons "why we thought it was a great idea for her to have the Easter Seals evaluation, which did not happen."⁶⁵ Another factor listed as a result of the IEP conference was that the District was waiting on the swallow study results, acknowledging that they had received only the letter from the physician as noted above.⁶⁶ The Parent stated that at the conference she told the rest of the team about the swallow study and why she stopped the test.⁶⁷

On October 24, 2016, two days before the District obtained a copy of the swallow study, and without the Parent providing the District consent to communicate with the Student's primary physician regarding instructions on how to proceed with feeding the Student, the District elected to not allow their personnel to continuing feeding her. Without the Parent giving permission for the District to receive feeding instructions from the Student's primary care physician, the District's Assistant Superintendent, testified that instead of conducting an IEP team meeting, a

⁶³ District Binder, Page 233

⁶⁴ Transcript, Vol III, Page 133-134

⁶⁵ Ibid, Page 136

⁶⁶ District Binder, Page 241

⁶⁷ Transcript, Vol V, Page 155

non-IDEA meeting was held without the Parent. At that meeting the District decided to provide the Parent with two options pending her permission to obtain information from the Student's primary care physician. One was for the Parent or her twin sibling to feed the Student while at school or to provide the Student with a shortened day, completing her classes in the morning and going home for lunch.⁶⁸ The testimony from the District's personnel and the Parent regarding the options and how they were presented varied to some degree, but the final result of the encounter was that the Parent elected to not allow the Student to attend school under the options provided by the District. Her reasoning, according to her testimony, was simply that she had recently taken on a full time job and would not be available to be at home when the District brought her before lunch and that her twin sibling was in college and would also not be available to assist at the school. However, it should be noted that her sibling was employed by the District as the Student's primary tutor in Algebra.

Prior to these events, on October 21, 2016, with anticipating receiving a copy of the swallow study, the District provided the Parent with a notice of a facilitated IEP conference to be held on November 4, 2016. The purpose of the meeting was listed as revising reviewing/revising the Student's IEP as well as reviewing the results of the swallow study, reviewing the feeding plan, and reviewing the Student's schedule.⁶⁹ The Parent notified the District that neither she nor the Student would not be able to attend and the meeting was rescheduled for November 16, 2016.

The Parent elected to not attend the November 16, 2016, FIEP meeting. She testified that she had begun a new job in October and that the options of the meeting be held at either 8:15 in

⁶⁸ Transcript, Vol I, Page 87-88; Vol II, Page 184, and Vol VI Page 111-114

⁶⁹ District Binder, Page 215

the morning or at 3:00 in the afternoon were not possible for her. She also testified that on November 16, 2016, she was not at work, but rather was with the Student at Health South for a follow up with a feeding study that was conducted on November 4, 5, and 6, 2016.⁷⁰ The results of the meeting held without the Parent resulted in a Memorandum of Understanding (MOU), with only the signatures of the District personnel being in attendance. Among other things the November 16, 2016, MOU concluded that: (1) the District continue to assist the Parent in completing the packet for Easter Seals in order for them to conduct the communication evaluation; (2) that the District requests the Parent to initiate contact with the Student's primary care physician to seek a formal letter with directions on types of foods and how best to assist with feeding as well administer prescribed medications; (3) following the physician's information that the District find a speech therapist that specializes in swallow/feeding training to assist by training school personnel; (4) that a Waiver of Liability be drafted for the Parent to review and sign in order for the District to resume oral intake.⁷¹ According to the exhibit the Parent was mailed a copy of the team meeting and notice of action on November 18, 2016.⁷²

A summary of the swallow study to which the Parent testified, dated November 21, 2016, revealed that the Student demonstrated a strong cough to clear penetrated material from her airway and that due to her cerebral palsy "this is her baseline and she has in all probability been swallowing this way all her life." The summary goes on to say that "in order to reassure the school system that [the Student] is not aspirating the school nurse can use auscultation, monitor

⁷⁰ Transcript, Vol V, Page 194

⁷¹ District Binder, Page 4-6 and 212-214

⁷² District Binder, Page 201-202

breath sounds and her temperature after meals to ensure no aspiration of food or liquid.”⁷³ The Parent testified that the summary was sent to the Student’s primary care physician from whom she received a copy in early December 2016.⁷⁴ The District’s special education supervisor testified that she had not seen a copy of the summary until the first day of the current hearing (June 19, 2017).⁷⁵

An exchange of emails between the District’s special education supervisor and the Parent began on December 2, 2016, in which the District wanted to have a non-IDEA meeting with the Parent and the District’s Superintendent, Assistant Superintendent, and high school Principal “to discuss personnel [the Parent objected to] and how to get [the Student] back in the school setting.” The Parent’s email response on the same date stated that she would only meet for a facilitated IEP that did not include the Student’s paraprofessional and the Student’s speech therapist, stating that “neither will ever e allowed to be around [the Student] again.”⁷⁶ On December 5, 2016, the District’s special education supervisor responded to the Parent’s email stating that the District requested a mediation and not an IEP conference, allowing for freedom for the Parent to discuss personnel issues. The Parent responded the same day, again stating that she would only agree to a facilitated IEP meeting.⁷⁷ The District responded to the email on December 6, 2016, stating that they would arrange a facilitated IEP meeting for Monday,

⁷³ Parent Binder, Page 128-129

⁷⁴ Transcript, Vol V, Page 200-201

⁷⁵ Transcript, Vol V, Page 133

⁷⁶ District Binder, Page 1020

⁷⁷ District Binder, Page 1026

December 15, 2016, at 5:30 pm. The participants would not include the paraprofessional; however, it would include the speech therapist. The agenda for the meeting would include a discussion of the results of the swallow study conducted on September 29, 2016; the need for the Student's primary care physician's oral intake recommendations; the need for an additional swallow study; a release for permission to contact the Student's primary care physician; discussion of a liability waiver after an oral intake plan is approved by the Student's primary care physician; discussion of the need for the Easter Seals Augmentative Communication Evaluation; and other scheduling items including a discussion of the need for guardianship for the Student who is nineteen years old.⁷⁸ Within thirty minutes the Parent responded: "I have stated before [the speech therapist] is not needed at all. She is no longer permitted to work with [the Student] or have access to any information concerning [the Student] as well as [the paraprofessional]. [The high school principal] does not need to attend either. This is not an option. If those people are present, the meeting will not meet and other options will proceed." She went on to present the agenda that she wanted the IEP to discuss. Her agenda included a review of the September 29, 2016, swallow study "that was illegally obtain by GCT/breach of HIPAA with ACH;" PCP recommendations; [the Student's] civil rights and GCT responsibility to provide her with an education as well as access to nourishment; graduation; providing therapy/schedule/therapist; class schedule; tutoring; home bound status; missed therapy notes; and authorizations and consents."⁷⁹

On December 6, 2016, the District provided a notice of conference to the Student and

⁷⁸ District Binder, Page 1033

⁷⁹ District Binder, Page 1034

Parent for the meeting to be held on Monday, December 15, 2016, at 5:30 pm.⁸⁰ The Parent again stated that she was unwilling to attend an IEP meeting with certain staff members being present.⁸¹ On December 14, 2016, the District provided the Student and Parent with a notice of conference for an IEP meeting to be held on January 5, 2017, at 5:30 pm. As of January 3, 2017, the District noted that they had not received a response from the Parent or Student on whether or not they would be attending the facilitated IEP meeting.⁸²

On January 9, 2017, the Parent filed her first request for a due process hearing to address the complaints as noted above. On January 30, 2017, the Parent submitted a motion asking for a stay put order as well as an order directing the District to provide educational services to the Student. An order for stay put was issued on February 3, 2017, finding that the October 19, 2016, IEP was the controlling IEP under which the education services were to be delivered without modification.

On February 9, 2017, the District entered a motion asking that the stay put order be put aside and that the Parent be ordered to take all necessary steps for the Student's primary care physician to communicate with the District about the needs of the Student to prevent choking and aspiration and that the Parent be ordered to authorize the Student's primary care physician to communicate with the District's nurse regarding feeding instructions. Additionally asking that the Parent's complaints be dismissed for lack of standing because the Student had reached the age of majority. Both motions were denied.

⁸⁰ District Binder, Page 188

⁸¹ District Binder, Page 1041

⁸² District Binder, Page 179-180

On February 10, 2017, the District's special education director faxed a letter to two of the Student's physicians asking them to provide the school nurses with diet recommendations because "we want to be as safe as possible with her."⁸³ On March 1, 2017, the school nurse notified the District's special education supervisor that she had left messages with the Student's physician on February 27 and 28, 2017. The physician's nurse told the school nurse that the reason she had not responded earlier was because the Parent had forbid the doctor's office from sending anything to the school.⁸⁴

As noted above, on March 13, 2017, the District filed a complaint for injunctive relief with the United States District Court, Easter District of Arkansas, Jonesboro Division asking the Court to order the Parent to cease and desist from blocking the District from access to the Student's medical information from her primary care physician. Also as noted above, on April 10, 2017, the Parent submitted the current complaint requesting that the Department once again initiate due process hearing procedures.⁸⁵ As a consequence of all of the above the Student did not complete the second semester of her senior year.

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 obligations of the IDEA for school years 2013-14, 2014-15, 2015-16, 2016-17 (ninth through twelfth grade) by failing to:

1. Conduct appropriate assessments to determine the Student's educational need for

⁸³ Parent Binder, Page 131

⁸⁴ District Binder, Page 401

⁸⁵ See Hearing Officer Exhibits

special education services or current levels of academic achievement;

2. To provided services to enable the Student to make progress or to meet the educational standards of the ADE;

3. To provide oral motor therapy and other therapy services contained on her IEP;

4. To provide the Parent meaningful communication in IEP meetings, and refusing to accommodate the Parent in scheduling IEP meetings;

5. To provide physical therapy services as directed by the Student's physician;

6. To provide a consistent communication system for the Student for the past two School years;

7. To conduct an evaluation following the recommendation from Easter Seals in 2013 that she receive an augmentative and alternative communication assessment to determine the most appropriate communication system for the Student;

8. To conduct assistive technology evaluation required to adequately determine the Student's programming needs;

9. To administer annual statewide testing or administer alternative portfolio testing to measure the Student's annual performance;

10. To provide the Student with an appropriate special or adaptive physical education program;

11. To develop an appropriate transition plan to support the Student's goals following graduation;

12. To provide feeding services as required by the Student's special needs;

13. To appropriately implement the services on the Student's IEP;

14. To provide the Student with any educational services since October 24, 2016; and

15. By violating the Stay Put provision of the IDEA since January 9, 2017.

In addition to the procedural obligations the testimony and evidence also needs to answer the question as to whether or not the District is in violation of the substantive obligations of the IDEA by failing to develop and implement an IEP for the above school years designed to provide the Student with an educational benefit.

With regard to alleged procedural violations of the IDEA:

1. The evidence and testimony does not support the allegation that the District failed to conduct appropriate assessments to determine the Student's educational need for special education services or her current levels of academic achievement. Although the evidence shows that it was not possible to assess the Student's intelligence level, all present including the Student's mother, agreed that she was intelligent enough to made grades that allowed her to be in the National Honor Society.⁸⁶

2. Did the District fail to provided services to enable the Student to make progress or to meet the educational standards of the Arkansas Department of Education (ADE)? The standards of the ADE with regard to students receiving special education services is that the Student's IEP serves as the student's graduation plan. For a student with disabilities, fulfillment of the requirements set forth in the student's IEP constitutes the basis for graduation from high school.⁸⁷ According to the District's personnel instructing the Student and the recorded grades she would

⁸⁶ Transcript, Vol V, Page 46

⁸⁷ Section 14.04 Arkansas Department of Education Rules Governing Standards for Accreditation of Arkansas Public Schools and School Districts, August 2015

have been on course for graduating had she been able to stay in school for the second semester of her senior year.

3. Did the District fail to provide oral motor therapy and other therapy services contained on her IEP? The swallow study conducted on September 29, 2016, although considered incomplete, under esophageal phase observations the impression was that the Student's oral motor ability was in the severely disordered range. "A comprehensive assessment of oral motor skills was not conducted today due to the focused nature of this fluoroscopic test. A full evaluation of oral sensory motor skills and any recommendations regarding the need for intervention in this area is deferred to the local SLP [speech language pathologist]."⁸⁸ The District's speech language pathologist was never questioned about whether or not the Student received oral motor therapy, even though the study referenced above suggested that the Student needed to receive "oral motor intervention and to provide oral hypersensitivity reduction/prevention."⁸⁹ The District's speech therapist did however, state that she used an iPad application that helped with oral-motor exercises.⁹⁰ The speech therapist completed an annual evaluation in June and July of 2016, in which she recommended for the Student's senior year, that she receive speech-language services for up to five hours a week to enhance her ability to produce more precise oral-motor movements."⁹¹ In testimony she stated that her

⁸⁸ District Binder, Page 395-396

⁸⁹ District Binder, Page 396

⁹⁰ Transcript, Vol III, Page 133-134

⁹¹ District Exhibit, Page 402-403

recommendations were accepted by the Student's IEP team which included the Parent.⁹²

The earliest physician recommendation entered into evidence was from the division of pediatric otolaryngology regarding the Student's need for speech therapy.⁹³ The next physician correspondence was as discussed above regarding the results of the swallow study conducted on September 29, 2016. However, a letter from the same physician dated April 30, 2015, and not provided to the District until July 21, 2016, recommended that the Student "continue the speech and oral/motor therapy."⁹⁴

The Student's primary care physician sent a letter addressed "to whom it may concern," dated November 28, 2016, after the District asked for clarification on the feeding of the Student at school. He recommended continuation of the Student's speech and oral/motor therapy at school.⁹⁵ According to testimony there was no communication between the District and the Student's primary care physician. Thus it is impossible to know whether or not the physician was cognizant of the types of speech/language therapies the Student was receiving.

The Parent provided the District with an osteopathic physician's prescription dated July 25, 2016, asking that the Student's occupational therapy be increased to sixty minutes, two times weekly, noting that "she is now receiving Botox injections."⁹⁶ On August 29, 2016, the Student's medical physician asked the osteopathic physician for clarification if she was in fact

⁹² Transcript, Vol III, Page 140

⁹³ Parent Binder, Page 125 and District Exhibit Page 399

⁹⁴ District Exhibit, Page 399

⁹⁵ District Exhibit, Page 400

⁹⁶ District Binder, Page 476

recommending that the Student “receive a total of 120 min/wk of OT for 3 months.” To which the osteopathic physician signed indicating that this was correct.⁹⁷ The District’s occupational therapist, on May 17, 2016, sought clarification per the Parent’s request to increase the Student’s occupational therapy from ninety minutes per week, “to up to three-hundred minutes per week, of direct occupational therapy services.”⁹⁸ The other therapy services that the Parent addressed in the hearing was occupational therapy and physical therapy. The record shows that these were addressed in the Student’s IEP meetings and contained as related services on the IEPs. Entered into evidence were the occupational therapy notes dated from August 1, 2015 to August 30, 2016 and from August 17, 2016 to September 14, 2016.⁹⁹ As noted above, the Student’s ninth grade IEP did not provide for occupational therapy. Physical therapy was not included in the Student’s IEP until her twelfth grade year and even then it was to be provided by a private therapist. The outside source conducted a physical therapy evaluation on February 23, 2016. At that time it was recommended that the Student receive physical therapy two times a week for sixty minute sessions for a total of one-hundred twenty minutes. The evaluator developed goals and objectives for the Student and attended the IEP meeting on June 8, 2016.¹⁰⁰

Although the Parent did not approve of the speech therapist who provided indirect special education services to the Student, there is no indication in the record or testimony, other than hers, that therapies were not provided as programmed.

⁹⁷ District Binder, Page 475

⁹⁸ District Exhibit, Page 495

⁹⁹ District Exhibit, Page 525-562; 563-563J; and 565-570

¹⁰⁰ District Exhibit, Page 582-596

4. Did the District fail to provide the Parent meaningful communication in IEP meetings, and refusing to accommodate the Parent in scheduling IEP meetings? The record is replete with evidence that the District attempted to accommodate the Parent in the scheduling of IEP meetings. There was no testimony or evidence that the Parent's input at IEP meetings was not considered. There was a significant amount of non-IDEA meeting communications entered as evidence that the Parent's issues and concerns were made available to the District.

5. Did the District fail to provide physical therapy services as directed by the Student's physician? No evidence or testimony entered in the course of the hearing addressed a physician's request for physical therapy services. As noted above the physical therapy evaluation was not completed until the end of the Student's eleventh grade.

6. Did the District fail to provide a consistent communication system for the Student for the past two School years? It is unclear as to what type of communication system that the Parent was complaining about, nor what type of communication was being recommended. This issue was not presented directly in either evidence or testimony other than the Parent stating that she did not receive enough information from the District concerning the progress of the Student. The suggested remedy was that "communication for the Parent to be provided concerning the Student's daily performance and needs - such mode of communication to be determined by the IEP team in conjunction with the Consultant."

7. Did the District fail to conduct an evaluation following the recommendation from Easter Seals in 2013 that she receive an augmentative and alternative communication assessment to determine the most appropriate communication system for the Student? The evidence shows that the District completed the necessary documents for the evaluation to be conducted; however,

it was the Parent who disagreed with some of the District's information contained in the packet that convinced her to not complete her portion of the packet.

8. Did the District fail to conduct an assistive technology evaluation required to adequately determine the Student's programming needs? In testimony the Parent wanted the Student to have available the appropriate assistive technology that would permit her to be included in more classes with her non-disabled peers.¹⁰¹ The assistive technology evaluation was attempted through the Easter Seals assessment in 2013 and again in 2016. As noted above it was not the failure of the District to conduct the assistive technology, but it was the Parent who failed to give consent and complete the necessary paper work to initiate the evaluation.

9. Did the District fail to administer annual statewide testing or administer alternative portfolio testing to measure the Student's annual performance? IEP teams must consider a student's individual characteristics when determining whether a student with a disability should participate in the general assessment with or without accommodations, or in the Alternate Assessment Program.

The Arkansas Alternate Assessment Program is administered each year to students in grades 3-8 and 11 for literacy and math and in grades 5, 7 and 10 for science who meet the required criteria. As reflected in the Guidelines, to participate in the Arkansas Alternate Assessment a student must meet all three of the following criteria:

"1. The student has a significant cognitive disability. Review of student records indicate a disability or multiple disabilities that significantly impact intellectual functioning and adaptive behavior essential for someone to live independently and to function safely in daily life.

¹⁰¹ Transcript, Vol V, Page 179-180

2. The student is learning content linked to (derived from) the State Content Standards. Goals and instruction listed in the IEP for this student are linked to the enrolled grade-level state content standards and address knowledge and skills that are appropriate and challenging for this student.

3. The student requires extensive direct individualized instruction and substantial supports to achieve measurable gains in the grade and age-appropriate curriculum.

The student:

a. Requires extensive, repeated, individualized instruction and support that is not of a temporary or transient nature, and

b. Uses substantially adapted materials and individualized methods of accessing information in alternative ways to acquire, maintain, generalize, demonstrate and transfer skills across multiple settings.”¹⁰²

There is no evidence that the District provided annual testing or administered an alternative portfolio to assess the Student’s annual performance. Some testimony was elicited as to how she might be accommodated in taking college entrance assessments such as the ACT.¹⁰³ The Parent’s mother participated in developing the Student’s transition plan as indicated in the IEP developed for her ninth grade.¹⁰⁴ Rather than annual assessments the testimony elicited from the District’s special education supervisor addressed transition assessments; however, she stated

¹⁰² See *Guidance for IEP Teams on Participation Decisions for the Arkansas Alternate Assessment Program (2017-2018)*

¹⁰³ Transcript, Vol IV, Page 210 and Page 231; and Vol VI, Page 34-35

¹⁰⁴ Parent Binder, Page 110

that the Student was not in attendance to take the assessments.¹⁰⁵

It is uncertain as to what the Parent is asking for with statewide testing; however, alternative portfolio testing is one means of assessing an IDEA student's level of achievement towards meeting grade level performance. There was no indication in either testimony or evidence that such a portfolio was discussed.

10. Did the District fail to provide the Student with an appropriate special or adaptive physical education program? The Student's IEPs presented as evidence reflect that physical education was imbedded into occupational and physical therapies, for which she received credit toward graduation in physical education.¹⁰⁶ Although never presented as evidence the Parent testified on cross examination that she possessed a letter from the Student's primary care physician that stated that because the District "does not offer any kind of specialized equipment for [the Student's] capabilities, to allow that time to go to physical therapy...that for a physical education, let her do PT, because at least at that point she was getting specialized intervention."¹⁰⁷ No evidence or testimony addressed the type or types of adaptive equipment other than what was provided in her physical therapies that would or could be used in a physical education class. Given the extreme orthopedic limitations that the Student presents with, the physician was more likely than not correct in allowing her physical education to be incorporated in her physical therapies.

11. Did the District fail to develop an appropriate transition plan to support the Student's

¹⁰⁵ Transcript, Vol IV, Page 211-212

¹⁰⁶ Parent Binder, Page 102; District Binder, Page 151

¹⁰⁷ Transcript, Vol VI, Page 156-157 and Vol V, Page 10

goals following graduation? For a student with disabilities, the IEP serves as the student's "graduation plan." Beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by a student's IEP team, transition planning must be initiated to prepare a student for exit from a secondary education program to post-secondary life. This includes planning for the student's exit from school due to graduation. For a student with disabilities, fulfillment of the requirements set forth in the student's IEP constitutes the basis for graduation from high school.¹⁰⁸ The Student's initial transition plan was included in the IEP developed for her ninth grade on May 5, 2013.¹⁰⁹ The only comment contained on the document was that the committee would complete the information in September, prior to her sixteenth birthday. On September 10, 2013, the transition plan included in her tenth grade IEP was completed after an interview by the Student's paraprofessional and her mother. The plan simply states that upon graduation from high school the Student wished to go to college and become a writer of children's books. Due to her "unique physical" needs her post-secondary living skills would require her to live at home with her mother. The only outside agency contacted was the Student's private provider of physical therapy.¹¹⁰ The transition plan contained in her eleventh grade IEP contained a duplicate of the first page of the tenth grade IEP along with the high school courses she would need to complete towards her anticipated post-secondary goals.¹¹¹ No outside agency was indicated as the source of the course requirements.

¹⁰⁸ Section 14.04.1-2 *Special Education and Related Services: Procedural Requirements and Program Standards*, Arkansas Department of Education (2015)

¹⁰⁹ Parent Binder, Page 93-97

¹¹⁰ District Binder, Page 162-163

¹¹¹ District Binder, Page 147

The controlling IEP (10-19-16) for her twelfth grade year provides for a more extensive review of what is involved in the Student's transition. Although no consent was given, the District sought consent for a vocational rehabilitation specialist to attend her IEP conferences. The required goals for employment and education indicated that on July 21, 2016; July 28, 2016; and August 12, 2016; that the IEP team discussed the possibility of the Student remaining in high school until she was 21 years of age. The list of existing and proposed transition services included completing a college survival and success scale; for the speech pathologist to obtain personal preference indications, along with employment support indicators, and conducting a RIASEC inventory and a transferable skills scale.¹¹² The plan was to check on ACT registration and accommodations. The vocational rehabilitation specialist was invited to discuss with the Student and her mother about what she wanted to do following college.¹¹³

The Student's twelfth grade IEP transition plan is obviously a more complete plan; however, the discussion of the plan was and has been hampered by the controversies associated with the previous and current due process hearings. Had this plan been included in her IEPs as early as the ninth grade, when she apparently desired to go to college and become a writer of children's books, it would have been more appropriate.

12. Did the District fail to provide feeding services as required by the Student's special needs? As previously stated this issue appears to be the primary reason and major focus of the Parent's concerns and complaints against the District. Following a concern for an increase in

¹¹² The Holland RIASEC interest inventory stands for: realistic, investigative, artistic, social, enterprising, and conventional.

¹¹³ District Binder, Page 30-36

choking events at the school, the District's director of special education the District wanted to receive specific feeding instructions from the Student's primary care physician. As noted above this suggestion is consistent with the swallow study conducted on September 29, 2016.¹¹⁴ The study was incomplete which left the District seeking an additional study as well as a continued effort to receive specific instructions from the Student's primary care physician. Based on the testimony by the District personnel their concern for the Student's health was justified; however, according to the Parent they were not justified. The decision made by the District to ask for specific instructions would be prudent regarding the potential fatal hazard of aspiration. The decision to immediately disregard the Student's IEP for personal health care, including feeding of solids and liquids, on the other hand, appears to have been an overreach of caution given that District personnel who had been providing feeding services were familiar with how to assess and respond to a possible aspiration event.

Unfortunately the District's decision and the Parent's response led to the Student being unilaterally withdrawn from her indirect special education services as well as the related services she was receiving from the District.

13. Did the District fail to appropriately implement the services on the Student's IEP? It is unclear as to which IEP that this complaint involves; however, the important word in this complaint is "appropriately." As designed and as agreed to by both the District personnel and the Parent the IEPs presented as evidence were appropriately implemented as defined by the IDEA, with the exception of the last and controlling IEP. The Parent contended that she was unaware that the Student was receiving credit for elective courses, the classes of which she did not attend

¹¹⁴ District Binder, Page 396

nor receive instruction from the regular education teachers. In case law we find that apart from physical education, some modifications and non-academic services provided to students with orthopedic impairments may be appropriately considered specially designed instruction.¹¹⁵

14. Did the District fail to provide the Student with any educational services since October 24, 2016? This complaint is in direct relationship to complaint item twelve above. The results of October 24, 2016, began prior to the events on that date. The school nurse recorded a choking event on September 22, 2016, with the comment in her record that the Student's aide and the high school principal informed her of previous events.¹¹⁶ In testimony the high school principal stated that his information as to the worsening of the Student's choking was coming from information provided by the Student's aide.¹¹⁷ In testimony the aide stated that in her opinion the frequency of choking events "had increased...it was getting worse as the year went on."¹¹⁸ Records of text messages between the aide and the Parent dating back to the previous school year reveal that not only was the aide concerned about the Student's choking, but the

¹¹⁵ See, e.g., *Yankton Sch. Dist. v. Shramm*, 24 IDELR 704 (8th Cir. 1996), reh'g denied, 112 LRP 18821 (8th Cir. 10/01/96) (ruling that although a high schooler with cerebral palsy earned straight A's in her regular education classes, she needed specialized instruction in one-handed typing, self-advocacy skills, and daily living skills such as cooking and cleaning); and *Letter to Pawlisch*, 24 IDELR 959 (OSEP 1996) (" Modifications required by a student with a physical impairment may be as subtle as altering the regular class curriculum or methods of instruction in order to accommodate the student's impairment. If such modifications are considered 'specially designed instruction' because they constitute individualized instruction planned for a particular student, they could be deemed special education.").

¹¹⁶ District Binder, Page 721

¹¹⁷ Transcript, Vol II, Page 157

¹¹⁸ Transcript, Vol V, Page 21

Parent was also.¹¹⁹

Without the Parent providing the District consent to communicate with the Student's primary care physician regarding instructions on how to proceed with feeding the Student, the District elected to not allow their personnel to continue feeding her. The District's Assistant Superintendent, held a meeting with the District's superintendent, high school principal and the District's special education supervisor to decide on how to handle the potential risk of the Student choking and possible aspiration. As noted previously it was decided to provide the Parent with two options pending her permission to obtain information from the Student's primary care physician. One was for the Parent or her twin sibling to feed the Student while at school or to provide the Student with a shortened day, completing her classes in the morning and going home for lunch.¹²⁰ The testimony from the District's personnel and the Parent regarding the options and how they were presented varied to some degree, but the final result of the encounter was that the Parent elected to not allow the Student to attend school under the options provided by the District and unilaterally decided to not allow the Student to attend school.

Following the stay put order, as noted above, the Student attempted to return to school on March 7, 2017, accompanied by an aide employed by the Parent, but she was not permitted to continue her education as programmed. Following a hearing order the Student returned to the school accompanied by her sister on April 7, 2017. Again once a dispute arose between the District personnel and the sister, the Student left the campus and as of the end of the school year had not returned.

¹¹⁹ District Binder, Page 1397-1402

¹²⁰ Transcript, Vol I, Page 87-88; Vol II, Page 184, and Vol VI Page 111-114

15. Did the District fail to provide the Student FAPE by violating the Stay Put provision of the IDEA since January 9, 2017? The obvious answer to the complaint question is that the District did not provide services to the Student after October 24, 2016. The stay put provision as held by the District Court continues to be the controlling decision with regard to educational services for the Student.

Is the District in violation of the substantive obligations of the IDEA by failing to develop and implement an IEP for the above school years designed to provide the Student with an educational benefit and as such denied the Student FAPE? The only IEP that reaches this level of a denial of FAPE is the failure of the District to implement the court ordered IEP of October 19, 2016. However, the implementation of this IEP was hampered by the Parent's refusal to accept the precautions and limitations suggested by the District in their concern for the safety of the Student. Thus no denial of FAPE for failure to implement the substantive obligations of the IDEA can be justified from the evidence and testimonies presented in this hearing.

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 21.¹²¹ The IDEA establishes that the term "child with a disability" means a child with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities, and who by reason of their disability, need special education and related

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

services.¹²² The term “special education” means specially designed instruction.¹²³ “Specially designed instruction” means adapting, as appropriate, to the needs of an eligible child under this part, the content, methodology, or delivery of instruction.¹²⁴

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.¹²⁵ 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. The evidence and record shows that the Student’s primary disability which requires special education to be other health impaired. Although not considered by the Parent as a complaint raised in the current hearing, the question as to the correct qualifying disability was addressed by the Parent’s attorney in her opening statement. She stated that the

¹²² 20 U.S.C. § 1401(3)(A)

¹²³ 20 U.S.C. § 1402(29)

¹²⁴ 34 CFR § 300.26(b)(3)

¹²⁵ Section 10-01.22.1 *Special Education and Related Services: Procedural Requirements and Program Standards*, Arkansas Department of Education (2015)

more accurate disability which qualified her for special education services should have been an orthopedic impairment rather than other health impaired. However, she is a non-verbal student with other medical issues such as an inability to engage in skills of daily living and self-care.

Although it was not possible for the evaluators to obtain a measure of her intelligence, it was agreed on by her educators and the academic grades they gave her that she was at least of average intelligence. Emotionally and behaviorally she did not present with any deficits.

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?¹²⁶

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

¹²⁶ *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-207 (1982)

objectives.¹²⁷ 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."¹²⁸ The Court also noted that a "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.'"¹²⁹ 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.¹³⁰

"While including students in the regular classroom as much as is practicable is undoubtedly a central goal of the IDEA, schools must attempt to achieve that goal in light of the equally important objective of providing an education appropriately tailored to each student's particular needs."¹³¹ With respect to a child, such as the Student in this case, who was fully integrated in her regular education classrooms for her core courses, but not the electives, the special education services for which she was programmed were considered as "indirect services"

¹²⁷ *Honig v. Doe*, 484 U.S. 305 (1988)

¹²⁸ *Andrew F. v. Douglas County Sch. Dist. RE-1*, 69 IDELR 174 (U.S. 2017).

¹²⁹ *Ibid*, Citing *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 553 IDELR 656 (U.S. 1982)

¹³⁰ *Ibid*, Citing 20 USC 1401 (29) and 20 USC 1401 (14)

¹³¹ *P. v. Newington Board of Education*, 51 IDELR 2 (2d Cir. 2008).

and targeted “related services.”

Children with disabilities who receive special education in the general education classroom are considered to be receiving indirect services if these services are provided by the general education classroom teacher in consultation with qualified special education personnel (consulting teacher). Indirect services should consist of consultation with, and technical assistance to, the teacher which could be in the form of communication, observation, monitoring, and maintenance of a child’s skills (i.e., program/content, modifications, modeling of instruction, etc.)¹³² Those same standards state that child cannot receive direct services in the same placement (service setting) in which indirect services are being provided. For example - a child may not receive both direct and indirect services for speech therapy or for special education, etc. However, the child may be receiving indirect services in lieu of resource services but continue to receive direct speech therapy or vice versa instruction.¹³³ Regardless of whether the child receives direct or indirect services the IEP must be “appropriately ambitious,” thus giving the Student a “chance to meet challenging objectives.”¹³⁴ If a child receiving indirect services does not pass content area course(s) or satisfactorily complete goals and objectives set out in the IEP for two (2) consecutive progress reviews, the special education teacher is obligated to initiate a program review conference in accordance with established due process procedures. The committee will document its decision as to either the continuation of indirect services or

¹³² Section 17.05.1.1-2 *Arkansas Department of Education Rules Governing Standards for Accreditation of Arkansas Public Schools and School Districts*, August 2015

¹³³ *Ibid*, Section 17.05.2.4

¹³⁴ *Endrew F. v. Douglas County Sch. Dist. RE-1*, 69 IDELR 174 (U.S. 2017).

placement in direct services, consistent with any revision of the student's IEP.¹³⁵

Given the nature of the current due process request being filed without the previous request being fully adjudicated the Student's IEP that remains the controlling IEP of October 19, 2016, has not been implemented. The controlling IEP can be judged as to its probability of being developed in such a manner to provide an educational opportunity. However, it has been necessary to look at and judge the previous IEPs for the Student in light of what was known about the special needs of the Student at the time the stay-put (controlling) 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.¹³⁶ This finding is important in that the Parent's testimony in this case was her allegation that the Student's various related therapy services were not being appropriately implemented. It is quite obvious from the numerous emails, notes, and conferences held at which the Parent was present that her concerns were being heard and considered in the development of the Student's IEP. There was presented both testimony and evidence that both parties were highly invested in seeing that the Student was successful. The Parent requested on numerous occasions for the Student to receive more therapies than were being provided as well as specific types of therapies. The question to be

¹³⁵ Section 17.05.3.2 *Arkansas Department of Education Rules Governing Standards for Accreditation of Arkansas Public Schools and School Districts*, August 2015

¹³⁶ *Ibid.*

addressed however, is not just whether the Parent had opportunities for input, but rather were the IEPs that were developed appropriately ambitious to give the Student a chance to meet challenging objectives.

Relevant to this issue was a ruling out of the Second Circuit in which it was 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."¹³⁷ 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.¹³⁸ Although noting that the Student was achieving on grade level with her non-disabled peers in her core academic courses, she was not afforded the full opportunity to be educated along with her non-disabled peers in the elective courses for which she was given credit through her various related therapy services.

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 time constraints and physical demands deemed appropriate to address in order for the Student to have access to an education. Additionally, the District was hampered by the frustration exhibited by the Parent in refusing to consent to

¹³⁷ *H.C. v. Katonah-Lewisboro Union Free Sch. Dist.*, 61 IDELR 121 (2d Cir. 2013, unpublished)

¹³⁸ *K.E. v. Independent School District No. 15*, 57 IDELR 61 (8th Cir. 2011)

evaluations which may have improved the Student's access to her education.

The Parent was obviously concerned as to how the District staff responded to the Student's multiple physical needs; however, she hampered their ability to seek clarification as to how best serve the oral and feeding needs that the Student exhibited. Had she cooperated with providing consent, the primary issue surrounding the failure to provide services beyond October 24, 2016, may never have happened. The Parent's challenge that the District denied the Student FAPE during the adjudicated period of time is; however, not supported by the evidence. At the same time the evidence and testimony shows that the District attempted to seek out safe feeding information as well additional evaluations to measure the Student's unique communication needs, but were hampered in the process by the Parent not providing the appropriate written consents.

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 was successful in her academic areas, but that she was successful in her social environment with other students. 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 addressed her nutritional and social needs as well.

This student's diagnosis such as other health impaired or orthopedic impairment, was not and should not be determinative of the appropriateness of her placement. Under the IDEA, the primary focus of her IEP team should be on her unique needs and not on the label given to her 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.¹³⁹ 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 extensive physical limitations placed on her as a consequence of cerebral palsy appears to have had very limited effects on her intellectual abilities, but extensive effects on her physical expressions of those intellectual skills.

Keeping in mind, as noted above, FAPE is defined as special education and related services that are provided at public expense, under public supervision and direction, and without charge, which meet the standards set forth by the Department. Thus the question as to whether or not the Student was denied FAPE by the District for failure to follow and implement the procedural guidelines of the IDEA or whether or not the District substantively implemented appropriate IEPs requires: (1) looking at each individual issue raised by the Parent 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.

¹³⁹ 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)

The Court of Appeals for the Eight Circuit in *Zumwalt v Clynes*¹⁴⁰ 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.¹⁴¹ 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).”¹⁴²

There is no doubt in this case that the Parent was and is aware of her rights under the IDEA in that she has engaged the District as well as 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 to what she believed the Student needed for not only her academic education, but also to address her physical needs as well.

¹⁴⁰ *Zumwalt v Clynes*, (96-2503/2504, U.S. Court of Appeals, Eight Circuit, July 10, 1997)

¹⁴¹ *Board of Education v. Rowley*, (458 U.S. 176-203, 1982)

¹⁴² *Light v. Parkway C-2 School District*, 41 F.3d 1223, 1227 (8th Cir. 1994), cert. denied, 515 U.S. 1132 (1995)

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.¹⁴³

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 has not provided the District with consent to evaluate the communication needs of the Student. At the same time, the District has placed road blocks in the Student's path in being able to access her educational opportunities on the basis of being concerned about her physical safety. There is sufficient evidence to show that the District could have proceeded with the Student's remaining twelfth grade education without jeopardizing her physical safety. There is also sufficient evidence to show that the District has fallen short in not just delaying in the development of an adequate transition plan, but in not involving the Student in constructing the plan.

Thus this hearing officer finds in part for the District and in part for the Parent as noted above.

Order:

1. Upon receipt of this order, but no later than November 30, 2017, the Parent will provide the District with the necessary documentation in order for Easter Seals to conduct an

¹⁴³ *Fort Zumult School Dist. v. Clynes*, 96-2503,2504, (8th Cir. 1997)

adaptive communication evaluation and any assistive technology evaluations they deem appropriate to assist the Student in the classroom as well as in implementation of the associated related services.

2. Upon receipt of this order the Parent will sign consent for District personnel responsible for the health and safety of the Student to receive directions on types of foods and how best to assist with feeding as well administer prescribed medications for the Student.

3. Upon receipt of this order, but no later than November 30, 2017, the District will submit the CIRCUIT request for Easter Seals to conduct the augmentative communication and assistive technology evaluations as noted in number one (1) above.

4. Upon receipt of this order, but no later than January 5, 2018, the District will conduct a facilitated IEP conference to develop an IEP for the Student to complete classes necessary for her to receive a high school diploma. The Parent will not dictate which District personnel will be present to assist in the development of the IEP.

5. Should the Parent fail to comply with item one (1) above the District will still be obligated to conduct the facilitated IEP conference as ordered in item three (3), and develop an IEP based on the best information available as of January 5, 2018.

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.

A handwritten signature in black ink, appearing to read "Robert B. Doyle". The signature is stylized with a large, looped initial "R" and "D".

Robert B. Doyle, Ph.D.

November 3, 2017

Date