

**Arkansas Department of Education**  
Special Education Unit

**RE:   XXXXXXXX and XXXXX XXXX  
      as Parents of Student  
      XXXXXXXX XXXXXX**

**PETITIONERS**

**VS. H-18-04**

**Searcy County School District**

**RESPONDENT**

**HEARING OFFICER’S FINAL DECISION AND ORDER**

**Issues and Statement of the Case:**

The Petitioners allege that the Respondent has denied the Student with a free and appropriate public education (FAPE) in violation of the “*procedural obligations*” and the “*substantive obligations*” of the IDEA for school years 2015-16, 2016-17, 2017-18 (kindergarten through second grade) by:

1. Failing to provide an appropriate second grade IEP that adequately addressed all of the Student’s disabilities;
2. Failing to acknowledge and program for the Student’s intellectual disability and program for his speech therapy;
3. Failing to appropriately implement the Student’s first grade IEP;
4. Failing to use peer reviewed or evidence based practices;
5. Failing to address the Student’s related service of specialized transportation;
6. Punishing the Student for disability related behaviors.
7. Denying the Parents access to information concerning the Student’s school day and

denying them access to observe the Student;

8. Failing provide appropriate playground equipment;
9. Refusing the Parents with meaningful communication in the IEP development;
10. Failing to implement the consultant recommended behavior plan; and
11. Failing to provide necessary training for the Student's teachers and aides to implement evidence based practices.

Relief being requested by the Petitioners includes:

1. Compensatory Special Education and Related Services for the denial of FAPE (no amount specified);
2. Reimbursement for the Parents for evaluations produced at Parental expense (no amount specified);
3. The development of an appropriate IEP to be implemented in the least restrictive environment, specifically to include an ABA Therapy/Evidence Based Practices; a Behavior Intervention Plan, evidence based therapies, social skills training, and teaching strategies to address the Student's autism and behavior deficits and to provide opportunities for rehabilitation with and interaction with the Student's non-disabled peers, with said IEP to include needed related services;
4. The District be ordered to provide the Parents meaningful communication to be implemented between the home and school; and
5. For the Parents be declared to have exhausted their administrative remedies as to her § 504 claims.

Issues raised by the Petitioners in their 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 September 20, 2017.

**Procedural History:**

On September 20, 2017, a request to initiate due process hearing procedures was received by the Arkansas Department of Education (hereinafter referred to as the "Department") from **XXXXXXXX and XXXXX XXXX** (Petitioners) (hereinafter referred to as "Parents"), the parents and legal guardians of **XXXXX XXXX** (hereinafter referred to as "Student"). At that time the Parents believed that the Searcy County 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 as stated above.

The Department responded to the Petitioner's request for the hearing by assigning the case to an impartial hearing officer and establishing the date of October 20, 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 September 20, 2017. The required resolution conference was held on September 29, 2017; however, no agreement was reached by the parties.

Having been given jurisdiction and authority to conduct the hearing pursuant to Public

Law 108-446, as amended, and Arkansas Code Annotated 6-41-202 through 6-41-223, Robert B. Doyle, Ph.D., Hearing Officer for the Arkansas Department of Education, conducted a closed impartial hearing. The Parent was represented by Theresa L. Caldwell, attorney of Little Rock, Arkansas and the District was represented by Sharon Carden Streett, Attorney of Little Rock, Arkansas.

The District responded as directed in the pre-hearing order by providing a response to the Parents' complaints on September 28, 2017. On the same date the District submitted a motion to limit the length of the hearing. On October 20, 2017, the hearing began as scheduled; however, at the end of the day the Petitioners requested and were granted without objection, for the hearing to be continued. An order of continuance was issued on October 20, 2017, for the case to be heard for a second and third day on October 26 and 27, 2017. At the close of the hearing on October 27, 2017, the Petitioners again requested a continuance in order to complete the presentation of their case. On October 28, 2017, an order was issued granting the continuance and for the case to be heard on November 3, 9, and 10, 2017. At the close of the hearing on November 10, 2017, the Respondent was granted on the record, without opposition, for the hearing to be continued for an additional day in order for the Respondent to complete the presentation of their case. An order of continuance for the seventh and final day of the hearing was issued on November 12, 2017.

In the process of the hearing a dispute was generated regarding the disclosure of evidence after the "five day rule." The Respondent issued a brief in support of a hearing officer's discretion to admit records not received before the five day rule and is contained the Hearing Officer's exhibits. Also contained in the Hearing Officer's exhibits is a copy of the Petitioners

motion to limit the length of the hearing.

The Parents 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 the Respondent's post hearing brief. A post hearing brief by the Petitioner was not received prior to the completion of this final decision in order for it to be included as a part of the official record.

The Student has been a child in need of special education services since entering school in the District as a pre-kindergarten student. The contested school years according to the Parents' complaint are the Student's kindergarten, first, and second grades (2015-16, 2016-17 and 2017-18); however, the information entered as evidence included his pre-kindergarten year with the District.

### **Findings of Fact:**

#### **Pre-Kindergarten (2014-15)**

At the time the Parents submitted their formal complaint to the Department the Student was a seven (7) year old male enrolled in the District's second grade. He initially entered the District at age five (5) as a pre-kindergarten student entitled for special education services having been identified as needing special education services due to academic and social deficits secondary to his diagnosis of autism. Prior to becoming the District's responsibility for special education services he was receiving early intervention services for developmental purposes from

Friendship Pediatric Services.<sup>1</sup> According to an annual review conducted by an evaluator at Friendship Pediatric Services on October 19, 2012, the Student demonstrated a need for their early intervention services. At that time they did not recommend evaluations or treatments for speech-language therapy, occupational therapy, or physical therapy.<sup>2</sup> The following January (1 & 31, 2013) a developmental evaluation was conducted by an employee at Friendship Pediatric Services who recommended that he receive 1500 minutes weekly of day habilitation services as well as 180 minutes weekly of speech, occupational, and physical therapies.<sup>3</sup> According to testimony by the Parents, the Student continued to receive the recommended services at Friendship until being referred for services with the District in February 2015.

While receiving developmental services at Friendship Pediatric Services a speech-language evaluation was conducted on October 3, 2014. The results revealed a profound receptive and expressive language delay as well as severely delayed articulation skills. The evaluator's clinical opinion was that the Student would benefit from speech-language therapy to improve articulation skills. At that time the recommendation was for him to be enrolled in an expressive/receptive language program for 180 minutes weekly.<sup>4</sup>

Four days later on October 7, 2014, an occupational therapist at Friendship Pediatric Services conducted an occupational therapy evaluation. Those findings were, that although the

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<sup>1</sup> Friendship Pediatric Services is a service provided by Friendship Community Care, a non-profit organization that provides services for children aged six weeks to five years with developmental disabilities or delays and children who qualify for the Arkansas Better Chance program.

<sup>2</sup> Parent Binder, Page 178-179

<sup>3</sup> Parent Binder, Page 175-177

<sup>4</sup> Parent Binder, Page 187-194

Student's chronological age was 55 months (4 ½ years old), he scored at an age equivalent of 23-24 months (2 years old), indicating a 31 month or 53% delay in fine motor skills. At that time the evaluator recommended that the Student be enrolled in direct occupational therapy services 180 minutes per week to address fine motor, self-help, sensory processing, and visual perceptual/visual-motor delays.<sup>5</sup> The Student's current occupational therapist testified that this earlier evaluation was indicative of the difficulty that he was having with doing things with his hands such as writing and that early intervention with occupational therapy was necessary.<sup>6</sup> The occupational therapist testified that she began working with the Student in April and May 2015 when he entered the District's pre-kindergarten program. She stated that she used her clinical judgment to reduce the amount of occupational therapy time from the previous evaluator's recommendation of 180 minutes per week to 60 minutes. She also noted that the Student's mother "wanted to give him [only] 60 minutes and see how he did" and that he also continue to receive occupational services at Friendship Pediatric Services.<sup>7</sup> This is consistent with the IEP developed for his pre-kindergarten year which indicated that he would receive 60 minutes of occupational therapy per week by the District's occupational therapist.<sup>8</sup>

On October 6 and 7, 2014, a physical therapist at Friendship Pediatric Services conducted a physical therapy evaluation. The examiner concluded that based on the test results, informal observations, and parent/teacher reports that the Student's gross motor skills were severely

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<sup>5</sup> Parent Binder, Page 205-208

<sup>6</sup> Transcript, Vol II, Page 109-110

<sup>7</sup> Ibid, Page 117

<sup>8</sup> District Binder, Page 1-24

delayed as compared to his chronological age. The evaluator recommended that the Student receive physical therapy for 180 minutes per week.<sup>9</sup>

An annual evaluation for developmental services was conducted by an employee at Friendship Pediatric Services on February 2, 2015. It was noted in the report that the Student was enrolled at Friendship Pediatric Services where he was receiving speech therapy, occupational therapy, and physical therapy. Instead of recommending continuation of the early developmental intervention services as in the previous annual evaluation, the recommendation now was for him to receive early childhood special education services as well as continued evaluation/treatment in the areas of speech-language therapy, occupational therapy, and physical therapy.<sup>10</sup> The following day, February 3, 2015, the evaluator completed a referral form for the Student to be considered for the recommended special education services at the District.<sup>11</sup>

On February 6, 2015, the District's due process coordinator sent the Parents a notice of a referral conference to be held on February 20, 2015 at Friendship Community Care and again on February 20, 2015, for the conference to be held at Friendship Community Care on March 6, 2015.<sup>12</sup> On February 25, 2015, the record shows that the Student passed the required screening hearing and vision evaluations.<sup>13</sup> On February 28, 2015, the Parents completed the required

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<sup>9</sup> District Binder, Page 642-646

<sup>10</sup> Parent Binder, Page 180-182 and District Binder, Page 153

<sup>11</sup> Parent Binder, Page 125 and District Binder, Page 118

<sup>12</sup> District Binder, Page 120-123

<sup>13</sup> District Binder, Page 135, 158, and 198



social history.<sup>14</sup>

On March 6, 2015, a referral conference was conducted at Friendship Community Care with the members of the team consisting of an early childhood special education teacher, the Student's mother, a speech-language pathologist, a special education teacher, the evaluator from Friendship Community Care and the director of Friendship Pediatric Services. The IEP team decided that since the previous evaluations indicated the possible need for special education services that an initial comprehensive evaluation was needed. The Parents acknowledged receipt of their rights under the IDEA and provided informed consent and agreed to the team's decision.<sup>15</sup>

On March 19, 2015, a curriculum based assessment was conducted by a District general education teacher. The teacher's three biggest concerns were (1) language (verbal); (2) relationship building - interaction with others; and (3) potty training.<sup>16</sup> On March 23, 2015, a District general education teacher conducted a teacher observation report/classroom based assessment. The observing teacher concluded that the Student's strength was comprehension skills, in that he understood and responded to communications from adults. His weakness was verbal communications, in that he was not able to express himself through verbal language. She determined his cognitive skills to be slightly below age level; his communication skills considerably below age level; his motor skills to be considerably below age level; his social/emotional development to be considerably below level; and his self-help development to

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<sup>14</sup> District Binder, Page, 124-125 and 154-155, and Parent Binder, Page 126-127

<sup>15</sup> Parent Binder, Page 140-142 and District Binder, Page 125 and 129-131

<sup>16</sup> District Binder, Page 147-148; 171-172; & 184-185; and Parent Binder Page, 511-512

be slightly below age level.<sup>17</sup> Also on March 23, 2015, a developmental evaluation was conducted by the District's early childhood special education teacher. In addition to the hearing and vision screening conducted in February 2015, she considered the Learning Accomplishment Profile conducted on February 2, 2015, along with the above classroom-based assessment and curriculum based assessment and concluded that the results indicated that the Student was exhibiting below age academic skills in all areas. She also recommended that the Student be evaluated by a physical therapist, an occupational therapist, and a speech pathologist. She further recommended that he be placed for services in the District's early childhood special education program for remediation in all areas.<sup>18</sup>

On April 6, 2015, the District's due process coordinator notified the Parents of an initial evaluation/programming conference to be held on April 20, 2015, in the District's elementary school conference room.<sup>19</sup> The team determined that the Student's primary disability was autism and that due to his skills being below age expectancy he would need special education remediation services in all areas. Additionally, it was determined that he would need speech and occupational therapy. Those in attendance in addition to both Parents were a speech/language pathologist, an occupational therapist, a special education teacher and a general education teacher. Once again the Student's mother acknowledged receipt of her rights under IDEA.<sup>20</sup> The Student's father signed the informed consent agreeing to the proposed initial placement for

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<sup>17</sup> Parent Binder, Page 128 and District Binder, Page 146; 170; & 183

<sup>18</sup> Parent Binder, Page 171-174 and District Binder, Page 149-152

<sup>19</sup> Parent Binder, Page 153 and District Binder, Page 136-137

<sup>20</sup> District Binder, Page 140-143 and Parent Binder, Page 129

services. That which the Parents agreed to included placement for services in occupational therapy, speech therapy, and developmental services. The notice of action also included the statement that although the Student needed physical therapy the District did not have a physical therapist. The District noted on the IEP that the “Parents were given options to seek physical therapy.”<sup>21</sup>

The IEP developed at the evaluation/programming conference on April 20, 2015, was designed to be the Student’s special education program for the second semester of his pre-kindergarten year from April 20, 2015 to May 29, 2015. He was programmed to receive cognition, fine motor, gross motor, language, social, adaptive, and speech therapy in the special education early childhood education classroom for ninety (90) minutes weekly. He was programmed to receive four fifteen (15) minute occupational therapy sessions per week as well as four fifteen (15) minute speech therapy sessions as related services. The related services were scheduled to be provided at the Friendship Care facility. The listed parental concerns included their concern about the Student not being ready for kindergarten. Primarily because of his inability to use verbal communication in order to be successful at being a part of the classroom environment.<sup>22</sup> The Student’s mother testified that she had a discussion with the lead therapist who provided therapy services in the home about the Student being ready for going to kindergarten. Her response to the therapist who suggested summer services to prepare the Student for the school environment was “no way, no....he is nowhere near ready to go to

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<sup>21</sup> District Binder, Page 144-145 and Parent Binder, Page 130-131 &136-137

<sup>22</sup> District Binder, Page 002–024

kindergarten.”<sup>23</sup>

According to occupational therapy progress notes of the eleven school days for that second semester the Student received nine therapy sessions and was absent for two sessions.<sup>24</sup> There were no progress notes presented as evidence regarding the Student’s speech or physical therapy for the remainder of his pre-kindergarten school year.

### **Kindergarten (2015-16)**

Prior to the end of that second semester in pre-kindergarten, on May 15, 2015, the Parents were notified of an annual review conference to be conducted on May 27, 2015, for the purpose of programming for the Student’s kindergarten school year.<sup>25</sup> On May 15, 2015, the District’s psychological examiner conducted a psychoeducational evaluation. The examiner did not testify at the hearing, but her report notes that she was unable to obtain a intelligent quotient even using a nonverbal measure of intelligence. On the adaptive behavior assessment she stated that he was at risk for hyperactivity, attention problems, and adaptability; and that he was considered to be clinically significant for atypicality, withdrawal, social skills, and functional communication. The examiner recommended a reduction in orally presented directions accompanied by increased visual aids; to allow ample class time to work on assignments; to allow for brief breaks during lessons in which students stop, stand, and stretch before returning; for the Student to be provided simple, written or visual directions so he doesn’t forget what to do while working on a task; and

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<sup>23</sup> Transcript, Vol VI, Page 105

<sup>24</sup> Parent Binder, Page 208A-208B

<sup>25</sup> District Binder, Page 159-160 and Parent Binder, Page 154

to continue his related services of occupational therapy, physical therapy, and speech therapy.<sup>26</sup>

Proceeding with the Student's diagnosis of autism as the disability for which he qualified for special education services his IEP team met on May 27, 2015, to develop his kindergarten IEP and decide on the type and amount of special education services that he needed. It was decided that due to the severity of the Student's disability he was not ready for a full schedule and would attend school three days a week; with the time extended as the need arose.<sup>27</sup> He was scheduled to receive special education academic instruction for 720 minutes, including 90 minutes of speech therapy, per week. He was scheduled to receive related services of occupational therapy for 90 minutes a week. Although he needed physical therapy services as a related service the District did not have a physical therapist to provide the services. According to the prior written notice of action provided to the Parents they would take the Student to the Friendship Community Care program where he had been receiving physical therapy.<sup>28</sup> The Parents received a copy of their rights under the IDEA on May 26, 2015, and agreed to the action taken by the IEP team.<sup>29</sup>

In testimony both Parents expressed consternation about not being able to observe the Student at school or participate in providing the teaching staff with their suggestions as to how to address the Student's adjustment to the school environment and how to respond to any maladaptive behaviors he may exhibit. They found the District's response in this regard to be the

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<sup>26</sup> Parent Binder, Page 168-170

<sup>27</sup> Parent Binder, Page 157

<sup>28</sup> Parent Binder, Page 155-156 and District Binder, Page 166-169

<sup>29</sup> District Binder, Page 165 and 167

opposite as to what they had experienced when the Student was receiving developmental services at Friendship Pediatric Services.<sup>30</sup> When asking about being able to be a part of the Student's kindergarten by observing him, the Student's mother recalled being told "that I would be allowed to come with him...every day, as much as [I] felt necessary."<sup>31</sup> She believed this would be similar to what she experienced at Friendship Pediatric Services where she "wasn't there every day, but I was there a lot, I felt that it was important."<sup>32</sup> When advised as to the differences between developmental services provided in the Friendship Pediatric Services program as compared to the academic services in the school setting she stated "Friendship warned me that when they start school, they don't usually get all the minutes they are entitled to...but they couldn't assure [me] that [it] was going to happen with [the Student]....and when we met with the [school] staff that first couple of meetings, they told us they would have to check into it to see how many minutes he could get because they had other students who needed services, also, and they had to make sure that all the students who needed services were allowed services."<sup>33</sup> She also testified that the District's director of special education services informed her during the first week that the Student attended kindergarten that unlike her participation in his program at Friendship she would only be allowed to be at the school two days a week rather than every day, as she was previously told, to observe the Student. Although it was not entered as evidence she testified that she had signed a confidentiality agreement with regard to the other students in the school, but she

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<sup>30</sup> Transcript, Vol VI, Page 82-83 & 96-97

<sup>31</sup> Ibid, Page 106

<sup>32</sup> Ibid, Page 109

<sup>33</sup> Ibid, Page 113

stated that she “could care less about the other kids or anything else that happens here...I’m here to help - - observe my child and to help him make this transition.”<sup>34</sup> This was apparently a very difficult, and at times hostile, relationship between the District staff and the Parents. On cross examination by counsel for the District the Student’s father expressed his belief that the Student had not been properly represented by the District. When asked what he thought would remedy the situation he replied “the person sitting next to you (the District’s director of special education services), if she was fired, that would solve all my problems.”<sup>35</sup>

The IEP developed on May 27, 2015, was updated on August 19, 2015. The Student was scheduled to receive 585 minutes per week in the general education setting where he would receive instruction in art, music, PE, computers, and library; with 540 minutes per week receiving special education instructions in reading, writing, math, science, social studies, and speech therapy. As previously noted he would not be receiving physical therapy in the District, but would be receiving 90 minutes weekly of occupational and speech therapy as related services.<sup>36</sup> Those in attendance in addition to the Parents were the Student’s kindergarten teacher, his special education teacher, the District’s special education supervisor, a physical therapist, and a speech language therapist. As previously noted he was scheduled to attend school three days a week. Also included in the notice of decision was the statement that the Student was participating in an in-home therapy program.<sup>37</sup>

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<sup>34</sup> Ibid, Page 114-115

<sup>35</sup> Transcript, Vol V, Page 258

<sup>36</sup> Parent Binder, Page 53-91 and District Binder, Page 27-60

<sup>37</sup> Parent Binder, Page 104-106 and District Binder, Page 180-182

On August 31, 2015, the Parents received notice of an IEP conference to be held on September 8, 2015. The notice indicated that the Parents requested to have the Student's aunt as well as his home speech lead therapist to attend. The lead therapist was providing services in the home through the Arkansas autism waiver program.<sup>38</sup> Those in attendance in addition to the Parents and the in-home ABA therapist were the District's director of special education services, the Student's kindergarten teacher, and the Student's special education teacher. The notice of decision rendered that date indicated that the team discussed the use of the PECS training system and ICM. Further noted was the Parents' request that the Student go to his physical therapy sessions at the Friendship Pediatric Services during his recess. The Parents were sympathetic to the District's not having a physical therapist in the school setting. The Parents also requested and desired that the Student verbalize as much as possible. They agreed that he would continue to attend school only three days a week; however, it was noted that he had "shown a lot of progress verbalizing more."<sup>39</sup> As noted above the Student's ability to talk and express himself verbally was a major concern for the Parents. Consequently, they insisted on additional time in speech therapy. His father was also concerned about the Student's physical skills such as being able to throw a ball with him. Thus he insisted on more physical therapy intervention.

A notice of conference was provided the Parents on September 24, 2015, with a separate programming conference to be held on October 8, 2015. At the conference the Parents received a copy of their rights under the IDEA.<sup>40</sup> The District requested the conference due to the need for

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<sup>38</sup> District Binder, Page 188-189

<sup>39</sup> District Binder, Page 189-194

<sup>40</sup> District Binder, Page 199-201



additional data; specifically a reevaluation of the Student's occupational therapy as well as a reevaluation of his speech/language therapy. Which according to the record was needed for Medicaid billing purposes. Those in attendance in addition to the Student's Parents were the Student's special education teacher, and his kindergarten teacher.<sup>41</sup> The Student's mother provided an updated social history at the conference.<sup>42</sup> The Parents were provided with a copy of the prior written notice of action which stated that the team decided to conduct an occupational therapy evaluation.<sup>43</sup> Although the document is undated the Parents provided a note from Friendship Pediatric Services stating that an occupational therapy evaluation was not required "due to the current evaluation from the school."<sup>44</sup> Apparently the evaluation to which the note refers was an evaluation conducted by the District's occupational therapist on October 12 and 15, 2015. The assessment concluded that the Student demonstrated within functional limits for muscle strength, range of motion, and muscle tone. However, he demonstrated significant deficits in visual motor integration, visual perception, motor coordination, grasping, hand use, eye hand coordination, manual dexterity, sensory processing, self care and handwriting skills. The evaluator determined that the deficits could have a negative impact on the Student's success in his academic environment. The evaluator recommended that he receive 90 minutes per week of direct occupational therapy services to address the demonstrated deficits.<sup>45</sup> In testimony when

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<sup>41</sup> District Binder, Page 202-208 & Page 211-211

<sup>42</sup> District Binder, Page 209-210

<sup>43</sup> Parent Binder, Page 107-108

<sup>44</sup> Parent Binder, Page 109

<sup>45</sup> District Binder, 380-387

questioned as to why it was recommended that the Student receive only 90 minutes versus the previous evaluators recommendation of 180 minutes, she replied that it was “because he went from an early childhood medical facility to a school-based [facility] where he has other objectives he has to meet.”<sup>46</sup> She also altered the goal and objectives for occupational therapy in order to make them more appropriate for the school academic setting.<sup>47</sup> When challenged on direct examination as to why she altered the occupational objectives that were established by the therapist at Friendship Pediatric Services she replied that “Yes, I got those from Friendship and I didn’t feel like they fit with him and school.”<sup>48</sup> The occupational therapist also provided the Student with a sensory diet based on the sensory profile from the occupational therapy evaluation as well as a deep pressure and proprioceptive technique that could be beneficial for the Student.<sup>49</sup> By the end of his kindergarten year the Student had mastered four of the nine occupational therapy goals established for him during that year.<sup>50</sup> Since she has seen the student for the past two years her observations and report of progress has to be seen in such light of time. However, she testified that she has seen change as a consequence of her therapies as well as her assisting the classroom teachers with implementing sensory strategies in the classroom. She testified that she instructed the teachers and paraprofessionals in how to conduct “deep pressure with a ball,”

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<sup>46</sup> Transcript, Vol II, Page 163

<sup>47</sup> Parent Binder, Page 210A-210AA

<sup>48</sup> Transcript, Vol II, Page 153

<sup>49</sup> District Binder, Page 388-390

<sup>50</sup> Parent Binder, Page 77, 79, & 81

how to implement “brushing” as well as the use of a “weighed blanket.”<sup>51</sup>

On October 8 and 10, 2015, a physical therapy evaluation was conducted by the physical therapist at Friendship Pediatric Services. At that time as noted above the Student was receiving his designated related service of physical therapy in the clinic component of Friendship Community Care rather than being provided at the school by the District. The evaluation noted that he had met some of his short-term objectives, but was still working on others. His overall level of function was thirty-six months as compared to his chronological age of sixty-seven months. The recommendation was for him to be enrolled in direct physical therapy services for up to 180 minutes per week.<sup>52</sup> Although the evaluator recommended 180 minutes per week of physical therapy the physical therapist who the District eventually contracted with and who testified at the hearing, stated that she in combination with the physical therapist at Friendship Pediatric Services provided the number of minutes as specified in the Student’s IEP which was 120 minutes.<sup>53</sup> However, she testified to the difference between a medical model of assessing such as that at Friendship Pediatric Services and providing physical therapy there as opposed to an educational model of assessing and providing physical therapy in an academic setting to allow the Student to participate in an educational environment versus a developmental or medical setting.<sup>54</sup>

The District’s physical therapist testified that on September 16, 2015, the Student’s

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<sup>51</sup> Transcript, Vol III, Page 45-46

<sup>52</sup> Parent Binder, Page 219-223 and District Binder, Page 647-651

<sup>53</sup> Transcript, Vol II, Page 10-12

<sup>54</sup> Ibid, Page 14-16 and Page 81-82

mother sat in on one of her therapy sessions with the Student. The Parent confronted her about reducing the therapy time from the designated 120 minutes to 90 minutes per week. She testified that she informed the Parent that the Student was not tolerating that amount of time with her. To which she stated that the Parent indicated that she would “seek out Friendship to get the other 30 minutes.”<sup>55</sup> An IEP meeting was not conducted prior to this decision. The justification given by the therapist was that the issue was discussed with the District’s director of special education and that “we were trying to reduce the number, amount of times, he was being pulled out of the class to cut down on his transitions in and out of the classroom.”<sup>56</sup> She stated that when “we would reach the 45-minutes mark, and sometimes even prior to that, he would shut down on me and refuse to do anything that I wanted him to do....he would either start fixating on lines, flipping light switches....he even became aggressive towards me once and grabbed my glasses off my face and threw them...and what I felt best for the child was to eliminate that negative stimulus that apparently I was causing him at the moment and get him back to an environment that he felt comfortable in.”<sup>57</sup> She stated that she used her clinical judgment to make the decision to reduce the Student’s physical therapy time from 120 minutes to 90 minutes per week; however, by December 2016 (the next school year) she stated that she was able to return to the full 120 minutes.<sup>58</sup> The physical therapist at Friendship Pediatric Services recorded progress on the sixteen objectives of the Student’s physical therapy goals on December 10, 2015. Of the sixteen

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<sup>55</sup> Ibid, Page 31-32

<sup>56</sup> Ibid, Page 32

<sup>57</sup> Ibid, Page 33

<sup>58</sup> Ibid, Page 34

objectives, five were not initiated, with the remainder being marked as continued, and none were mastered.<sup>59</sup>

On October 22, 2015, the District's speech language pathologist conducted a speech language evaluation. The results indicated that the Student's voice and fluency skills were informally judged to be age-appropriate. An oral peripheral exam suggested adequate structure and function for the production of intelligible speech. His language skills were found to be in the pre-linguistic stages for the areas of joint attention and social reciprocity, and in the emerging language state in the area of behavior and emotional regulation and overall his articulation skills were appropriate for his current stage of language development. However, based on the results of a curriculum-based and classroom-based assessment his language deficits were determined to adversely affect acquisition of skills in the kindergarten curriculum in the area of speaking and listening by preventing development of skills in participating in conversations and presenting knowledge and ideas to others. The evaluator further judged the Student's language deficits to cause a functional deficit of communicating basic wants and needs to others, and understanding basic safety rules. The speech language pathologist recommended that he continue to receive speech therapy, while also fostering communication skills in other settings such as the classroom and recess.<sup>60</sup> The evaluator did not recommend a certain amount of speech therapy per week to be included in the Student's IEP.

Following the evaluations the District established a programming conference on November 12, 2015, as requested by the Parents; however, it was later rescheduled to November

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<sup>59</sup> Parent Binder, Page 237-240 and District Binder, Page 674-677

<sup>60</sup> Parent Binder, Page 183-186B

20, 2015.<sup>61</sup> Those in attendance in addition to the Parents were the Student's kindergarten teacher, the Student's special education teacher, and the speech language therapist.<sup>62</sup> After reviewing the evaluation data the team decided to continue the Student's speech therapy as well as his occupational therapy. No decision was made regarding his physical therapy. There is no record that the Parents agreed to the decision.<sup>63</sup>

At the end of the first semester of kindergarten the physical therapist recorded progress on the Student's objectives towards his therapy goals. Of the sixteen objectives the Student had not mastered any of the eleven objectives attempted, with five not being initiated.<sup>64</sup>

On February 3, 2016, the District provided the Parents with a notice of conference to be held on February 17, 2016.<sup>65</sup> On the day of the conference the Parents were provided with a copy of their rights under the IDEA.<sup>66</sup> Those in attendance at the conference in addition to the Parents included the Student's kindergarten teacher and two special education teachers. Although the Student was still receiving in-home therapy the team decision was for him to begin a full five-day a week school schedule, with the Parents providing their consent for the action.<sup>67</sup>

On March 19, 2016, the Student's special education teacher conducted a curriculum

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<sup>61</sup> District Binder, Page 217-220

<sup>62</sup> District Binder, Page 222

<sup>63</sup> District Binder, Page 224-225

<sup>64</sup> Parent Binder, Page 237-240 and District Binder, Page 674-677

<sup>65</sup> District Binder, Page 228-229

<sup>66</sup> District Binder, Page 231

<sup>67</sup> District Binder, Page 232-234 and Parent Binder, Page 110-112

based assessment using the checklist of early childhood curriculum skills. For language she assessed him as “does sometimes” on only one of the nine items, with the remainder being marked as “does not” do. In language arts she assessed him as “does sometimes” on two of the nine items, with the remainder being marked as “does not” do. On the social/emotional items she assessed him as “does consistently” on one item; as “does sometimes” on two items; with the remaining two items being assessed as “does not” do. On the math and science items she assessed him as “does sometimes” on two of the eleven items, with the remainder being assessed as “does not” do. On the creative/aesthetic items she assessed him as “does sometimes” on three of the four items, with the remaining item being assessed as “does not” do. On the social studies items she assessed as “does sometimes” on one of the five items, with the remaining items being assessed as “does not” do. She assessed him as “does sometimes” on all three of the health and nutrition items. On the fine motor items she assessed him as “does sometimes” on one of the three items, with the remaining two items being assessed as “does not” do. On the gross motor items she assessed him as “does sometimes” on two of the five items, with the remaining three items being assessed as “does not” do. Her three biggest concerns following the assessment was listed as language (verbal), relationship building - interaction with others, and potty training.<sup>68</sup>

On April 9, 2016, the Student’s kindergarten teacher completed a teacher observation report based on a kindergarten curriculum. She determined that his reading and math skills were below grade level. She judged his classroom behavior and attitude to be acceptable; that he interacted and behaved appropriately in both small and large groups; and that his work habits were acceptable. She identified his classroom skills as being able to identify numbers and shapes

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<sup>68</sup> Parent Binder, Page 511-512

as well as being affectionate. His weaknesses were understanding the concepts of more than/less than, addition/subtraction, blends/digraphs, and attention. The modifications that she implemented in the classroom for the Student included one step directions, visual prompts/cues, and the assistance of a paraprofessional aide.<sup>69</sup>

His kindergarten teacher for regular education testified that the Student came to school three days a week and that he was “not entirely” nonverbal in that he communicated with single words of things that he needed. She also testified that he “gained a lot of skills as the year went on.”<sup>70</sup> She testified that she was aware of the Student’s home training with ABA therapy. She stated that she was not aware of what ABA therapy was or that the Parents requested that it be continued in the school environment once his waiver for the home program ended. She did however, recall the Parents requesting the use of the Picture Exchange Communication System (PECS) be used in the school environment.<sup>71</sup> She further testified that the Student did not exhibit any behaviors that interfered in any significant way with class activities.<sup>72</sup> She also testified that she did not recall the Parents asking that the Student be retained in kindergarten.<sup>73</sup>

On April 25, 2016, the Parents received their first notice for the Student’s annual review conference and a second notice provided on May 2, 2016. At the Parents’ request the conference

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<sup>69</sup> Parent Binder, Page 509 & 510 and District Binder, Page 262 and 264

<sup>70</sup> Transcript, Vol II, Page 135-136

<sup>71</sup> Ibid, Page 137-138

<sup>72</sup> Ibid, Page 140-141

<sup>73</sup> Ibid, Page 152



was scheduled for May 18, 2016.<sup>74</sup> The conference was held as scheduled with those in attendance, in addition to the Parents, being two special education teachers, the kindergarten teacher, the District's director of special education services, an occupational therapist, and a speech language therapist. The notice of decision reflected that the Student had mastered three of his four reading objectives and six of his eight functional objectives. Although he had not mastered any of his math objectives, according to the notice he had made progress. In speech therapy he had mastered two of four objectives towards one language goal, three of three objectives for a second language goal, and two of four objectives towards a third language goal. As noted above, the kindergarten teacher's classroom assessment revealed no significant progress in the English language arts, social studies, math, or science curriculum. Whereas he was successful on two of the seven skills of science. Due to the Student's rate of progress the committee decided that he would benefit from extended school year services (ESY).<sup>75</sup> The committee decided that the Student needed fourteen days of ESY in reading, writing, and math to maintain skills; as well as related services in speech and occupational therapy for sixty minutes during a three hour school day.<sup>76</sup>

In addition to developing the Student's IEP for his first grade school year the committee also discussed having a CIRCUIT referral for the next school year to assist with his academic needs.<sup>77</sup> The IEP developed on May 18, 2016, continued the Student's academic instruction in

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<sup>74</sup> District Binder, Page 249-252

<sup>75</sup> District Binder, Page 253-257 and Parent Binder, Page 114-116 & 248-249

<sup>76</sup> District Binder, Page 258-259 and Parent Binder 117-118

<sup>77</sup> District Binder, Page 260-261

reading, writing, math, science, social studies and speech therapy in the special education classroom for a total of 1,260 minutes weekly and for him to receive art, music, computer, and library in the general education setting for a total of 840 minutes weekly. He was scheduled to receive 90 minutes weekly in occupational therapy and speech therapy as related services and the related service of physical therapy was to continue to be provided at Friendship Community Care.<sup>78</sup>

On May 20, 2016, the Parents took the Student to Little Rock for a consultation and recommendations at the Dennis Developmental Center at the University of Arkansas for Medical Science (UAMS). It is uncertain from the testimony as to when the final report was received by either the Parents or the District. The report entered as evidence has two pages of the second part of the report missing. The report states that: “The patient is a 6 year, 2 month old male who presents in the clinic today for an evaluation. The informant used by the evaluation team was the Student’s mother. The report states that the patient was seen on that date by a multi-disciplinary evaluation team. Although the findings are reported in separate notes the examiners used team collaboration and discussion to reach impressions and recommendations. The team consisted of a developmental behavioral pediatrician and a psychological examiner.<sup>79</sup> In addition to their examination and testing the team had the results of the testing previously completed by the District as well as those completed by personnel at the Friendship Community Care organization. The impressions listed by the pediatrician were that in addition to the diagnosis of autism, that “based on today’s psychological evaluation he has overall cognitive skills in the delayed range

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<sup>78</sup> District Binder, Page 62-90

<sup>79</sup> Parent Binder, Page 158

and adaptive skills that are in the low range,” and that he “meets criteria for Intellectual Disability.”<sup>80</sup> This information was met with extreme difficulty by the Student’s mother and father. In lieu of “intellectual disability” they heard “mental retardation.”

When asked if the Student’s skills were delayed, the Student’s father replied “Mentally retarded...that’s what we have been told...and I’m just saying ‘below average’ to be nice about it...’mildly’ is how they said it, but they did consider him mentally retarded, is what I was told.”<sup>81</sup> Even when confronted by his counsel with the report’s language of ‘intellectual disability’ the Student’s father persisted, “but again, you know, that was the upper level of it...you know, because what they had actually said, it was actually mental retardation, is what they actually said.”<sup>82</sup> The truth of the matter will remain unknown in that no one from the multi-disciplinary team testified to the accuracy as to what was verbally presented to the Student’s mother following the evaluation. However, what is critical in this case is the consternation experienced by the Parents in believing that the Student was delayed intellectually. They easily acknowledged that he is developmentally delayed. At the same time his father was able to recognize that the Student is academically below average. “We knew he was below level just because we know [him].”<sup>83</sup>

The Student’s father was not present at the evaluation when the UAMS team discussed their impressions with the Student’s mother. Their report recommended continuation of the

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<sup>80</sup> Parent Binder, Page 160

<sup>81</sup> Transcript, Vol V, Page 195

<sup>82</sup> Ibid, Page 199

<sup>83</sup> Ibid, Page 194

Student's educational placement and programming. They also recommended an increase in individual speech therapy services "if at all possible" and that if individual therapy services was not available, they recommended group therapy with the aid of a paraprofessional. The UAMS team apparently intended for the Student to return for additional and/or follow up assessments. They provided the Student's mother with school forms and behavioral rating forms with instructions for her to have them completed by the school personnel who were most familiar with the Student.<sup>84</sup>

When asked about whether or not the Parents asked for more speech therapy services as recommended by the UAMS team, the Student's father replied that "as far as I can remember, we asked the school to increase it, but they said they couldn't" because "it seemed to me as they were doing a balancing act of therapy versus schooling, therapy versus schooling."<sup>85</sup> Based on the Student's father's response the action taken by the District in regard to providing more speech therapy was unacceptable. The Student's speech therapist did not recall the Parents requesting additional speech therapy at the IEP meeting she attended, but did recall the Parents being concerned about him not be ready for kindergarten because of his inability to communicate in the classroom. She also testified that she had never seen the UAMS team evaluation and recommendations report obtained by the Parents in May 2016 suggesting additional speech therapy.<sup>86</sup> The District's director of special education services testified that she had never seen the report until the day before the hearing started. She did know that the Parents had obtained an

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<sup>84</sup> Parent Binder, Page 160

<sup>85</sup> Transcript, Vol V, Page 201

<sup>86</sup> Transcript, Vol III, Page 92-94

IQ score and that they were upset about it.<sup>87</sup>

The first two pages of the UAMS psychological examiner's report were not available for entering as evidence. The examiner apparently provided the Student with an intellectual measurement with the results indicating a mild intellectual disability. The examiner determined that his overall cognitive abilities were in the moderately delayed range and that his overall adaptive behavior skills were assessed to be in the extremely low to low range. The examiner recommended that the Student continue to be placed in the self-contained special education classroom with the para-professional working directly with him. The examiner also recommended that the Student continue to receive speech-language, occupational, and physical therapy services.<sup>88</sup> The Student's special education teacher completed the school report for the UAMS team on May 23, 2016, and faxed her results to them.<sup>89</sup> The final report, as noted above, was apparently not provided to the District until the disclosure of evidence for the hearing.

One of the Student's special education teachers was a mentor of the other special education teacher. The newer teacher had previously worked for two and a half years in the Friendship Community Care program and had been with the District for the past two years. The Student's kindergarten year was her first year as an employee of the District. As part of her mentoring program she maintained a daily log of the Student's activities and his response to academic interventions.<sup>90</sup> She also provided daily Parent Teacher Communication notes as a

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<sup>87</sup> Transcript, Vol I, Page 132-133

<sup>88</sup> Parent Binder, Page 162-163

<sup>89</sup> Parent Exhibit, Page 165-167

<sup>90</sup> District Binder, Page 812-850

means of keeping the Parents apprised as to the Student's activities and response to academic interventions.<sup>91</sup> Although the Parents complained that they did not receive information regarding the educational progress of the Student, the documents entered as evidence in the Parents Binder show that not to be accurate. Weekly behavior charts for his kindergarten year show that the Student's mother initialed and on some weeks wrote responses to the teacher's note.<sup>92</sup> Additionally, the Parents Binder contains daily Parent Teacher Communication notes throughout the year.<sup>93</sup> The Student's grade report at the end of his kindergarten year, as recorded by his special education teacher, reflected satisfactory completion in all areas based on the modifications required by his IEP.<sup>94</sup>

#### **Extended School Year Services (2016)**

The only data available for the Student's ESY following his kindergarten year was that provided by the speech-language therapist and the occupational therapist. The speech therapist saw him for a total of six sixty-minute training sessions between June 14, 2016, and July 27, 2016.<sup>95</sup> The occupational therapist saw him five out of six scheduled sessions from June 13, 2016, through July 25, 2016.<sup>96</sup>

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<sup>91</sup> Parent Binder, Page 481-508

<sup>92</sup> Parent Binder, Page 420-450

<sup>93</sup> Parent Binder, Page 45-508

<sup>94</sup> Parent Binder, Page 514

<sup>95</sup> Parent Binder, Page 119-124

<sup>96</sup> Parent Binder, Page 210N

**First Grade (2016-17)**

The Student's IEP for the first grade was developed, as noted above, at the annual review conference on May 18, 2016. Those in attendance at the conference in addition to the Parents were the District's director of special education services, the speech language therapist, the kindergarten teacher, and his two special education teachers.<sup>97</sup> On August 24, 2016, the Parents were provided with a notice of separate programming conference to be held on September 7, 2016, for the purpose of reviewing and revising the Student's IEP.<sup>98</sup> Those in attendance in addition to the Parents were the District's director of special education services, the Student's special education teacher, a regular classroom teacher, and two registered nurses from DDS Children's Services. It was noted on the IEP that the Student's mother would like to have had the Student's physical therapist present and requested that she be able to schedule a meeting with the therapist.<sup>99</sup> According to the District's director of special education services she contacted the physical therapist and instructed her to get in contact with the Parent.<sup>100</sup> Although the Student's first grade IEP indicated that the Student would be receiving 120 minutes weekly of physical therapy, the location was listed as being a continuation by the physical therapist at the Friendship Community Care program.<sup>101</sup> At this time; however, the District had contracted with a physical therapist to provide the services at the school. According to the District's director of

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<sup>97</sup> Parent Binder, Page 23-51

<sup>98</sup> District Binder, Page 269-270

<sup>99</sup> Parent Binder, Page 93-95 & District Binder, Page 271-273

<sup>100</sup> Transcript, Vol I, Page 111

<sup>101</sup> Parent Binder, Page 23

special education services the 120 minutes was “what Friendship was going to deliver prior to us obtaining a contract.”<sup>102</sup> The physical therapist also explained the difference between the medical model of physical therapy such as that used for services at the Friendship Pediatric Services as opposed to physical therapy services used for providing related services under the IDEA in public schools. She stated that the difference is that “we are here to assist him to be functional in the classroom....that he was functional and making some progress...to help him with his delays that he was having in other areas.”<sup>103</sup>

The Parents agreed with the action to be taken at the conference and gave informed consent for the District to submit a CIRCUIT referral. The CIRCUIT referral was submitted on September 16, 2016, by the District’s special education supervisor.<sup>104</sup> The District also completed and submitted the CIRCUIT intake information regarding the academic issues exhibited by the Student and the effectiveness of interventions that had been tried.<sup>105</sup> The referral report was completed on October 21, 2016, and shared with the Parents and others on the Student’s IEP team. When asked on cross examination as to why she did not recommend augmentative communication devices or any assistive technology she replied that she did not consider that a primary need after the initial visit. She went on to explain that “for someone like [the Student] , after seeing how echolalic he was, and that [he] did have a lot more verbal language, that would be a recommendation that I, as a teacher, would make...I’m hesitant to make

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<sup>102</sup> Transcript, Vol I, Page 111-112

<sup>103</sup> Transcript, Vol II, Page 81-82

<sup>104</sup> District Binder, Page 274B & Parent Binder, age 210EE

<sup>105</sup> District Binder, Page 1091-1093



a lot of comments about communication as a teacher and not as a speech pathologist, but as someone who, as a consultant, that is a thought that - - that's kind of the first place I would go, because what I would be looking for is the functional use of the language that he does have...and children who are echolalic often have a lot of language, but they don't necessarily know how to use it functionally."<sup>106</sup> The examiner recommended that the classroom teacher and special education teacher use discrete trial (DT) in teaching receptive and expressive language skills as well some academic and pre-academic skills. It was also recommended that they use pivotal response training (PRT) to teach verbal language and play skills. A recommendation for the use of functional routines in the classroom was suggested as a means of helping the team determine the Student's level of independence and provide him the opportunity to generalize that which he was learning through the DT and PRT approaches.<sup>107</sup> When asked on cross examination if she was asked to discuss her report at an IEP meeting her response was "no" that she and other examiners are "not a members of the team and we do not help make decisions for the team."<sup>108</sup>

The Student's special education teacher testified to the use of the STAR curriculum in her classroom with the Student as well as having received STAR training in December 2016; however, the ordered STAR materials didn't arrive for use until later in the school year.<sup>109</sup> Counsel for the Parents contended that her examination and recommendations was an "evaluation" to which she corrected Parents counsel by stating that "it's not an evaluation, so it's

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<sup>106</sup> Transcript, Vol VII, Page 167-168

<sup>107</sup> District Binder, Page 334-340

<sup>108</sup> Transcript, Vol VII, Page 158-159

<sup>109</sup> Transcript, Vol IV, Page 94

not - - those recommendations, they are not required to follow them, and it's not an evaluation."<sup>110</sup>

On November 10, 2016, the Student's mother sent a message the Student's due process coordinator stating that she had "been planning to schedule an IEP meeting with the physical therapist and would like to know what is planned for [the Student] to receive occupational therapy while [the therapist] is on maternity leave."<sup>111</sup> The occupational therapist testified and provided evidence of having provided the Student with services between December 15, 2016, and January 12, 2017, specifically outlining where the missed sessions had been made up while she was on maternity leave.<sup>112</sup> When asked if the Parents were involved in the Student's occupational therapy she testified that the Student's mother brought the Student and "stayed with him through the session, or stayed and waited on him."<sup>113</sup>

On November 15, 2016, the Parents received a notice for a separate programming conference to be held on November 29, 2016, for the purpose of reviewing and revising the Student's IEP. On that date, however, the Student's mother informed the District that she had written down the wrong date for the conference and asked that it be rescheduled for December 13, 2016.<sup>114</sup> A second notice was completed by the due process coordinator on November 29,

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<sup>110</sup> Transcript, Vol VII, Page 159

<sup>111</sup> District Binder, Page 289

<sup>112</sup> Parent Binder, Page 209-210 and Transcript, Vol II, Page 202 & Vol III, Page 61

<sup>113</sup> Transcript, Vol III, Page 61

<sup>114</sup> District Binder, Page 281-282

2016, scheduling the meeting as the Student's mother requested for December 13, 2016.<sup>115</sup>

Prior to the scheduled conference, on December 6, 2016, the Student was reported to have scratched and hit other students as well as a teacher.<sup>116</sup> The referral note sent home to the Parents indicated that he would be in detention during lunch and recess and that the next offense would result in "swats."<sup>117</sup> The Student's mother signed a Refusal of Corporal Punishment form for the Student on December 7, 2016, not permitting the District to punish the Student with swats.<sup>118</sup> Also on December 7, 2016, the Parents expressed in person, their displeasure with not being called about the Student's behavior and were upset that he was in detention in the office. They requested more data to be taken about his behaviors, especially the antecedent behaviors.<sup>119</sup> Two days later on December 8, 2016, the Student was reported to have grabbed a student's glasses and having thrown them hitting the student in the eye.<sup>120</sup> The District's elementary school principal notified the Parents on December 8, 2016, that the Student would be suspended from school for one day.<sup>121</sup> The next day on December 9, 2016, the Student was reported to have scratched another student on the arm, hitting, scratching, and damaging property. For the offense the Parents were notified on the same date that the student would be suspended out of school for

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<sup>115</sup> District Binder, Page 278-279 and Parent Binder, Page 96

<sup>116</sup> Parent Binder, Page 295 and District Binder, Page 981

<sup>117</sup> Parent Binder, Page 296

<sup>118</sup> Parent Binder, Page 297

<sup>119</sup> District Binder, Page 982 and Transcript, Vol VI, Page 133, 153, and 178

<sup>120</sup> Parent Binder, Page 298-299

<sup>121</sup> Parent Binder, Page 300

three days.<sup>122</sup>

The Student's maladaptive behaviors at the school became the focus of the conference on December 13, 2016. Those in attendance in addition to the Parents included the special education teacher, the District's director of special education services, a physical therapist, an elementary school counselor, the elementary school principal, and a child and family advocate. The committee decided to obtain parental consent to conduct a Functional Behavior Assessment (FBA) and request another CIRCUIT referral to assist in addressing the Student's behaviors. The committee developed a temporary behavior intervention plan and reduced the Student's activity time to 30 minutes per day, except for physical education.<sup>123</sup>

As the Student's mother suggested, the team discussed the Student's need for physical therapy with the Parents agreeing to obtain a physical therapy evaluation from Children's Hospital in Little Rock. The Parents were informed that the District did not have a physical therapist under contract and they agreed that he would continue to receive physical therapy at Friendship Pediatric Services.<sup>124</sup> They were not aware that it was the District's responsibility to make sure that the Student received all related services that were necessary in order for him to access his education. The Student's mother testified that she "made phone calls to [the Friendship physical therapist]....and I told her the situation...and she said she would be happy to see [the Student] , but she had other kids that, you know, she had to see, too...we would have to work it out in the schedule..and the only time that I could see that was really going to work was

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<sup>122</sup> Parent Binder, Page 301-302

<sup>123</sup> Parent Binder, Page 97-100 and District Binder, Page 287-289 & 317

<sup>124</sup> District Binder, Page 283-294 and Transcript, Vol VI, Page 167-168

him skipping out on his recess to go across the street and get PT with [their physical therapist]... and we discussed it with the school, and they - - that's what we ultimately ended up doing for quite some time."<sup>125</sup> The evidence presented indicates that between December 2, 2016, and April 28, 2017, the Student received twenty-nine physical therapy sessions; that he was absent five days; that he was on a field trip one day; that he missed one day due to the District's spring break; that the school was out on two snow days; and that he missed one day due to a scheduling conflict. There was no indication that the missed therapy sessions were ever made up.<sup>126</sup>

As recommended by the psychologist who conducted the CIRCUIT referral to address the Student's behaviors the special education teacher began using daily behavior logs which were copied and forwarded to the Parents each day. On December 19, 2016, the teacher indicated that the Student scratched a peer which resulted in following the behavior intervention plan by giving him thinking time and a social story. The Student's mother was very active in responding to the behavior charting. On the same date of the first report the Student's mother responded by asking the District's educational staff to indicate the time of a behavior occurrence, the antecedent of the behavior with details of exactly what happened prior to and immediately following the behavior.<sup>127</sup> The daily behavior logs were subsequently modified to address the Parents concerns and continued to be produced daily from December 19, 2016, through May 19, 2017.<sup>128</sup> The information contained on the forms became more informative as the Student's mother had

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<sup>125</sup> Transcript, Vol VI, Page 168

<sup>126</sup> Parent Binder, Page 227-233

<sup>127</sup> Parent Binder, Page 309-311

<sup>128</sup> District Binder, Page 313-419

requested. The Student's mother signed the notification of the CIRCUIT support specialist's involvement on December 20, 2016 and was provided with an updated behavior support plan.<sup>129</sup>

An additional programming referral was conducted through the outreach program of Easter Seals on January 10, 2017. The psychological examiner who conducted the observation stated in her report that the purpose of the report was to provide additional observation of the Student that was needed by his school team for identification and for planning for effective academic programming. In the classroom she recommended (1) the use of materials from the STAR Autism Support program; (2) the use of visual strategies to help the Student learn to use visual reminders to complete tasks and decrease his need for cueing from others; (3) the use of a reinforcement inventory; and (4) the use of a penny board.<sup>130</sup> The District's director of special education services stated that following receipt of the Easter Seals report the District sent the Student's special education teacher for training in the use of the STAR method and the following summer they sent his paraprofessionals for training.<sup>131</sup> On cross examination by counsel for the Parents when asked about the STAR program and whether or not it could be implemented immediately by the District the examiner stated that "they could have begun to implement it, yes..if you ask the developers of the curriculum, they often will say it typically takes one to three years for full implementation of the curriculum, and it's a multi-step process." She went on to say that it's a multi-layered program and that there are many things that need to be done such as structuring the classroom and training and material - - lots of material to purchase and a lot of

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<sup>129</sup> Parent Binder, Page 256-257

<sup>130</sup> Parent Binder, Page 252-255 and District Binder, Page 372-375

<sup>131</sup> Transcript, Vol III, Page 187

different things to do that, looked at individually, may not seem difficult..but coordinating can be challenging..so it's a multi-step process than can take some time."<sup>132</sup>

On January 25, 2017, an incident on the playground was reported by one of the Student's paraprofessionals who reported that he "took off running down the hill towards the fence and that without the assistance of another student he could have ran through an opening in the fence and off the playground."<sup>133</sup> This was a strong emotional concern for the Parents in that the Student's mother testified that "he has gotten away from us and gotten in the street...he gets out there and he wants to line his spine up with the yellow lines in the pavement...he has gotten out the door, or he has somehow gotten loose from my hand, and he is so fast, he runs so fast, and he only can see those yellow lines in the road, he gets out there and he will line his spine up...and it's all I can do to get to him on – you know, get him out of the road."<sup>134</sup> When asked on direct examination the District's director of special education services testified that "there has been a lot of construction this year that the fencing was tore down...they are installing it now...I haven't been over there in a couple of days..it could be finished." At the time of the above incident she stated that "there was fencing, but it wasn't closed-in fencing."<sup>135</sup>

An issue raised in the Parents initial complaint was the District's failure to provide specialized transportation for the Student. There was no documented evidence of the issue; however, the District's director of special education services testified when asked on direct

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<sup>132</sup> Transcript, Vol VII, Page 171-172

<sup>133</sup> District Binder, Page 1107

<sup>134</sup> Transcript, Vol VI, Page 154-155

<sup>135</sup> Transcript, Vol III, Page 199

examination if it were an issue between the District and the Parents, to which she replied “not at all.” She went on to state that she “offered [it] in a conference, and it was not written in the conference documentation, but I did offer it and she [the Student’s mother] told me that she had to bring the little brother, anyway, and so that she would bring [the Student] as well.”<sup>136</sup>

On January 11, 26, & 31, 2017, and February 2 & 10, 2017, the CIRCUIT referral psychologist conducted a functional behavioral assessment, with her report sent back to the District, dated February 10, 2017. After reviewing the relevant data and making her observations she concluded that there was a need to target three behaviors for intervention. They included physical aggression, elopement, and falling to the floor and work refusal. She provided the District staff responsible for implementing the behavior interventions with a behavior support plan, a behavior map of the Student’s behavior, and suggested daily behavior logs.<sup>137</sup>

On March 2, 2017, an evaluation/programming conference was conducted. In addition to the Parents the IEP team included the Student’s special education teacher, his first grade teacher, the District’s director of special education services, the elementary school principal, and the psychologist who conducted the functional behavior assessment (FBA). In addition to discussing the FBA, the Parents provided the District with an updated social history and agreed to provide the District of a copy of the evaluation conducted at the Dennis Development Center (UAMS), almost a year earlier (May 20, 2016).<sup>138</sup>

On April 14, 2017, the Student’s first grade teacher completed an observation report.

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<sup>136</sup> Ibid, Page 198-199

<sup>137</sup> Parent Binder, Page 241-251 and District Binder, Page 320-333

<sup>138</sup> District Binder, Page 307-310 and Parent Binder Page 101-103



With regard to behavior she noted that overall his behavior is acceptable; however, he distracts other students. She noted that he struggled reading sight words; that with assistance he can write his name; and that he enjoys playing a math game on the white board. She stated that his strengths were that he improved in greeting the class and saying good-bye and that when provided a snack was now saying “thank you.” His weaknesses were described as his making noise and disrupting the class and being unable to work at his desk independently.<sup>139</sup>

On April 27, 2017, the Parents were provided with a notice of conference to conduct an annual review and develop an IEP for the Student’s second grade as well as consider extended school year services.<sup>140</sup> The conference was held as scheduled on May 11, 2017, with those in attendance in addition to the Parents being the Student’s regular education teacher, his special education teacher, the District’s director of special education services, the elementary school principal, the speech-language therapist, and the occupational therapist.<sup>141</sup>

The speech-therapist indicated that the Student had mastered three of five objectives towards his goal for answering questions; one of his four objectives towards his goal for following directions, and four of four objectives on the goal for functional play. When asked about the UAMS evaluation and recommendation for more speech therapy she testified that she had not seen the report or the recommendation, but had it been made available to the Student’s IEP team that she believed they would have considered the recommendation.<sup>142</sup> When asked

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<sup>139</sup> Parent Binder, Page 103P

<sup>140</sup> Parent Binder, Page 103C-103D & 103F-103I

<sup>141</sup> District Binder, Page 114

<sup>142</sup> Transcript, Vol III, Page 95-96

about the use of assistive technology methods such as the PECS, she testified that from her observations the Student had already exceeded in performance for the PECS program, but that she used other pictures to implement the technique.<sup>143</sup> When asked to describe the Student's progress the speech therapist stated that he was not potty trained when she first started working with him and now he is; he now washes his hands without playing in the water, and "improved a lot in following directions, and following more specific directions that involve number and color."<sup>144</sup> In response to cross examination regarding the UAMS findings of his having an intellectual disability, she stated that although she had not seen the report that she was not surprised by the findings and that his intellectual diagnosis would not have changed the manner in which she worked with him in speech therapy.<sup>145</sup> This also held true for the CIRCUIT examiner's testimony on cross examination by counsel for the Parents. When asked if she was aware of or knew anything about the Student's IQ she responded "I don't typically have a specific IQ...I don't typically know a specific IQ when I go in [to observe]...Often I have read a psych eval and I may have seen a number, but the number is not something that I hold in particular regard when I walk into a classroom...it doesn't really matter to me, specifically...I look more at the particular circumstances and the uniqueness of the child when I walk in the classroom."<sup>146</sup>

His occupational therapist reported that he had mastered five of ten objectives and had made progress on one other objective; however, he continued to demonstrate difficulty with fine

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<sup>143</sup> Transcript, Vol III, Page 118

<sup>144</sup> Ibid, Page 163-164

<sup>145</sup> Ibid, Page 179

<sup>146</sup> Transcript, Vol VII, Page 164-165

motor and self care skills.<sup>147</sup> The physical therapy annual review report submitted to the IEP team indicated that he had met three of the sixteen objectives on his first grade IEP. The therapist established seven functional goals for his 2017-18 school year.<sup>148</sup> His special education teacher completed the Student's assessment based on a kindergarten curriculum rather than a first grade curriculum because he "was unable to do any of the skills on the 1<sup>st</sup> grade checklist."<sup>149</sup> Academically he had a seventeen percent accuracy on oral reading fluency and had eight sounds and one word on nonsense word fluency (he should have 58 sounds and 13 words).<sup>150</sup> According to the first grade DIBELS benchmark results he began the year and ended the year in the "at risk" category in all areas of assessment.<sup>151</sup>

On May 11, 2017, the Parents acknowledged receipt of their rights under IDEA.<sup>152</sup> They also received the District's notice of action to be taken with regard to the Student's IEP for his second grade year.<sup>153</sup> The Student's second grade IEP indicated that he qualified for extended school year services (ESY) for thirty minutes, three times a week for academic objectives. They established twelve goals with objectives in academics, speech, and occupational therapy. He was

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<sup>147</sup> Parent Binder, Page 103J

<sup>148</sup> Parent Binder, Page 103L-103N and District Binder, Page 652-653

<sup>149</sup> Parent Binder, Page 103R

<sup>150</sup> Parent Binder, Page 103U

<sup>151</sup> Parent Binder, Page 103V

<sup>152</sup> Parent Binder, Page 103E

<sup>153</sup> Parent Binder, Page 103J-103K

scheduled to continue both speech therapy and occupational therapy as related services.<sup>154</sup> As previously noted he was scheduled to continue to receive his physical therapy by a private provider outside the District even though physical therapy was considered a needed related service in order for him to access his education. The physical therapist presented the Student's IEP team with seven goals for his second grade year.<sup>155</sup>

The Parents were provided with daily logs from the Student's special education teacher as to what he worked on throughout the first grade.<sup>156</sup> The special education teacher maintained a daily log noted to be "Mentor/Novice Teacher Mentor Log (First Grade)" as well as "Teacher/Parapro Parent Notes."<sup>157</sup> The Student's grade report for the first grade indicated that he made satisfactory performance in all academic areas including an "A" in Reading.<sup>158</sup> The Student's special education teacher testified that the only letter grade required of first grade students is for reading. She also testified that the grades received by the Student were modified according to his special education goals and objectives.<sup>159</sup>

### **Extended School Year Services (2017)**

Although the Student was scheduled to receive academic, speech therapy, and occupational therapy between his first and second grade the only evidence presented was from

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<sup>154</sup> District Binder, Page 93-114 and Parent Binder, Page 1-21

<sup>155</sup> District Binder, Page 115 & Page 654

<sup>156</sup> District Binder, Page 900-977; 979-980; 982-1090; and 1092-1391

<sup>157</sup> District Binder, Page 1386-1391 and Parent Binder, Page 451-480

<sup>158</sup> Parent Binder, Page 513

<sup>159</sup> Transcript, Vol IV, Page 53

his occupational therapist. The occupational therapy notes indicate that he received four therapy sessions between June 21, 2017, and July 19, 2017.<sup>160</sup>

**Second Grade (2017-18)**

The Parents testified that they did not want the Student to go into the second grade and instead believed that he needed to repeat the first grade. The Student's father testified that at the annual review conference "we repeated ourselves again from kindergarten...this time, at this point in time, I was really adamant about holding him back...because I didn't see - - myself, I didn't see any progression - - between kindergarten and first grade."<sup>161</sup> However, when asked who made the decision for the Student to go on to second grade his father testified that "I feel like it was put on my shoulders to make the decision...and I feel that I made a mistake."<sup>162</sup> His concerns appeared from testimony to be the Student's lack of verbal skills and not being able to communicate. The Student's special education teacher testified as to how the Student's verbal skills progressed from kindergarten through first grade. She stated that when he came to her class as a kindergarten student that "he was kind of my baby...he was really sweet, and he came in, he was the youngest, and he didn't have a lot of words..I would say...probably 15 or ...ten to fifteen something like that...but he communicated his needs with [single words] or sign language."<sup>163</sup> During the first grade year she testified that for communication she used a

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<sup>160</sup> Parent Binder, Page 210BB

<sup>161</sup> Transcript, Vol V, Page 224-225

<sup>162</sup> Ibid, Page 227

<sup>163</sup> Transcript, Vol IV, Page 19-20

modification of the PECS system.<sup>164</sup> She also testified that her relationship with the Parents deteriorated after the Student started having behavior issues in the first grade, stating that “I felt like they were upset, or didn’t like me.”<sup>165</sup>

The District’s director of special education services testified that she understood the Parents concern about his repeating first grade to be that the Student was not at the level academically as his peers. Even though she agreed that the Student was not at the same academic level as his peers she did not recall expressing her opinion during the conference where the Parents raised it as a concern.<sup>166</sup> When asked on direct examination the Student’s first grade teacher testified that of the fourteen students in her class last year she recommended retention for one student; however, that particular student was not receiving special education. Her experience with promotion of special education students was limited and expressed no specific knowledge about special education other than the requirement of following a student’s IEP.<sup>167</sup>

Consistent with the IEP the Student’s second grade class schedule indicated that he was programmed to receive special education academic services as well as related services of occupational therapy, speech therapy and physical therapy.<sup>168</sup> Therapy progress notes by the occupational therapist reflect that he received eleven therapy sessions prior to the filing of the

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<sup>164</sup> Ibid, Page 28

<sup>165</sup> Ibid, Page 34

<sup>166</sup> Transcript, Vol III, Page 238-239

<sup>167</sup> Transcript, Vol V, Page 37-43

<sup>168</sup> Parent Binder, Page 22

Parent's complaint for a due process hearing on September 20, 2017.<sup>169</sup> The District continued the use of the more informative daily behavior log in August 2017 when he started his second grade. The daily behavior log collection of data required the observer to reflect the time, the event, the behavior, the reward earned and type of reward earned. According to the logs between August 28, 2017, and September 15, 2017, the Student attended school for thirteen days. In that time the logs reflect of the 138 possible "good behavior" ratings that he received 120. The 18 problem behaviors included throwing items, using inappropriate language and hand gestures, dumping food trays, and putting his underwear in a toilet. One reported incident involved the Student's mother who had a verbal confrontation with some of the teachers.<sup>170</sup> The Student's mother was present on a day the Student's class was on a field trip to the fair when she questioned the teachers and staff as to why the Student was not returning to school with his class and was instead returning to school with a first grade class.<sup>171</sup> On September 16, 2017, the Student bit his paraprofessional for which the elementary principal assigned him lunch detention.<sup>172</sup>

On September 1, 2017, prior to the biting incident noted above, the District notified the Parents of a planned separate programming conference to be held on September 18, 2017, for the purpose of reviewing and revising the Student's IEP.<sup>173</sup> On September 14, 2017, the psychologist

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<sup>169</sup> Parent Binder, Page 210CC-210DD

<sup>170</sup> District Binder, Page 1245-1259

<sup>171</sup> District Binder, Page 1253-1254

<sup>172</sup> Parent Binder, Page 266 & 275

<sup>173</sup> District Binder, Page 312-313

from the Educational Service Cooperative, acting as a behavior support specialist, conducted a school visit for the purpose of observing the Student and providing feedback on his behavior. Her visit did not produce any observations of inappropriate behavior. This was reported as not being uncommon and she agreed to provide additional visits during the weeks of September 25 and/or October 2, 2017.<sup>174</sup> On September 18, 2017, the date established for the programming conference, the Parents informed the District's director of special education services that "due to our disagreements over [the Student's] programming and services, the District's approach to his autistic behaviors, and our inability to participate in his educational process, we have hired an attorney who will be filing a Due Process Complaint later this afternoon. In light of this development, we would ask that the IEP Conference for today be postponed and we will discuss any concerns at the Resolution Conference within the next 2 weeks."<sup>175</sup>

### **Summary of the Due Process Complaints and Findings of Fact**

The facts as generated in the testimony and evidence have to answer whether or not the District violated the procedural and substantive obligations of the IDEA by:

1. Failing to provide an appropriate second grade IEP that adequately addressed (1) the Student's language and communication deficits; (2) His social, emotional, and behavioral needs; (3) His assistive technology needs; (4) His sensory needs; (5) His disability related behaviors; and (6) His social skills needs, appropriate supports, and related services necessary to address his

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<sup>174</sup> District Binder, Page 318-319

<sup>175</sup> District Binder, Page 315



disabilities and prevent exclusions.

2. Failing to acknowledge and program for the Student's intellectual disability and program for his speech therapy as recommended by an independent evaluation.

3. Failing to appropriately implement the Student's first grade IEP by: (1) Not providing the education and related services as programmed; (2) Making up related services time by pulling the Student from his special education and other classes; and by (3) Not addressing the Student's language and communication deficits; his social, emotional, and behavioral needs; his assistive technology needs; his sensory needs; his disability related behaviors; and his social skills needs, appropriate supports, and related services necessary to address his disabilities and prevent exclusions;

4. Failing to use peer reviewed or evidence based practices.

5. Failing to address the Student's related service of specialized transportation.

6. Punishing the Student for disability related behaviors.

7. Denying the Parents access to information concerning the Student's school day and denying them access to observe the Student.

8. Failing provide appropriate playground equipment.

9. Refusing the Parents with meaningful communication in the IEP development.

10. Failing to implement the Behavior Plan recommended by the Behavior Consultant with fidelity to address the Student's behaviors.

11. Failing to provide necessary training for the Student's teachers and aides to implement evidence based practices.

**Item 1:**

With regard to the allegation that the District failed to provide an appropriate second grade IEP that adequately addressed: (1) The Student's language and communication deficits; (2) His social, emotional, and behavioral needs; (3) His assistive technology needs; (4) His sensory needs; (5) His disability related behaviors; and (6) His social skills needs, appropriate supports, and related services necessary to address his disabilities and prevent exclusions, the evidence and testimony shows that:

1. The second grade IEP contains three speech/language goals, with a total of ten objectives towards those goals. If appropriately and effectively implemented they are designed in such a manner to address the Student's speech and language deficits as assessed by the speech/language evaluations. The total of 90 minutes of speech therapy per week is also consistent with the recommendations of the evaluations.

2. The Behavior Intervention Plan (BIP) as developed and monitored by the behavior consultant contains sufficient information with appropriate targets to address the Student's social, emotional, and behavioral deficits. The educational and therapy staff need opportunity to implement the BIP and with ongoing monitoring by the behavior consultant appears to be appropriate for the Student.

3. The second grade IEP does not indicate the need for any assistive technology devices other than text-to-speech audio as an accommodation. No evidence or testimony was presented by the Parents to show that the District failed to assess for the need or implement any assistive technology devices.

4. The second grade IEP has the Student receiving 90 minutes weekly of occupational

therapy. The occupational therapist has provided the staff with a sensory diet and if implemented should meet the needs of the Students sensory deficits.

5. The second grade IEP notes that behavior strategies are included in the IEP which address the Student's behavior. As noted in item two (2) above, if appropriately implemented the BIP as developed will address the Student's disability related behaviors.

6. With the exception of not including the needed related service of physical therapy all other areas of concern with regard to appropriate supports and related services are included in the Student's second grade IEP.

**Item 2:**

With regard to failing to acknowledge and program for the Student's intellectual disability and program for his speech therapy as recommended by an independent evaluation, the facts show that:

1. The measure of the Student's intellectual level of functioning was not determined until the May 20, 2016, evaluation conducted at UAMS by the Parents. The District was not made aware of the specifics of the evaluation until a year later. It was the Parents who did not like the idea of their child being intellectually disabled and preferred to see his developmental delays as being totally related to his autism. However, the Student's IEPs and his failures to progress academically on grade level are and should have been indications of his intellectual disability and should have been appropriately evaluated and programmed for no later than his first grade IEP.

2. The evaluation to which this complaint refers recommended continuation of the District's programming with an increase in speech therapy only if possible. In order to justify additional speech therapy time the Student's school day would have to be lengthened or some other

area of the academic programming would have to be removed or decreased in time. In this instance neither the speech therapist nor the District can be faulted for making the decision of not expanding the speech therapy time. However, the record shows that the District failed to appropriately evaluate and program for the Student's intellectual deficits.

**Item 3:**

With regard to the District failing to appropriately implement the Student's first grade IEP by: (1) Not providing the education and related services as programmed; (2) Making up related services time by pulling the Student from his special education and other classes; and by (3) Not addressing the Student's language and communication deficits; his social, emotional, and behavioral needs; his assistive technology needs; his sensory needs; his disability related behaviors; and his social skills needs, appropriate supports, and related services necessary to address his disabilities and prevent exclusions.

1. The only related service not provided as programmed was the Student's need for physical therapy. Although the Parents stepped in and assisted the District with providing access to the therapy it was and remains the responsibility of the District to provide services that are deemed necessary in order for the Student to access his education. There was no evidence or testimony shown that would indicate that the District failed to implement the educational component of the Student's first grade IEP. In fact the District used the expertise of outside evaluators to assist in the application of techniques to be used in the classroom.

2. The only evidence and testimony of making up related service time was that by the occupational therapist who was on maternity leave and indicated in her record of having made up for the sessions missed during that period of time. There was no indication in evidence or

testimony that this was a major issue or concern by the Parents.

3. The concern for the failure to develop and implement the IEP for the first grade is identical to that for the second grade as noted above and need not be repeated here for the findings are the same.

**Item 4:**

With regard to the District failing to use peer reviewed or evidence based practices. There is no IDEA requirement for the use of evidence-based practices or therapies. There is however, the requirement that the teaching practices used by special education be those that have been peer reviewed. The Parent did not show that any of the teaching methods used by the Student's teachers were not peer reviewed.

**Item 5:**

With regard to the District failing to address the Student's related service of specialized transportation. This issue was never addressed either by evidence or testimony in the course of the seven days of hearing, other than the District's director of special education services statement that the Student's mother agreed to transport the Student since she would be bringing his younger brother to school.

**Item 6:**

With regard to the District punishing the Student for disability related behaviors. The evidence and testimony reflects this allegation to be accurate. Even though the Student had a behavior intervention plan, some of the District's personnel were not aware of or chose to not follow the plan when using punishment following some of the Student's acting out behaviors.

**Item 7:**

With regard to the District denying the Parents access to information concerning the Student's school day and denying them access to observe the Student. There is no evidence to support the allegation that the Parents were denied access to information concerning the Student's school day. In fact the data would indicate otherwise. The testimony and evidence also supports the District's decision in restricting the Parents from conducting observations of the child. The evidence shows that the Student's mother was quite adamant and with some testimony indicating that her behavior was interpreted as forceful and intimidating. Such actions would not only be potentially detrimental to other students, but to the teachers and staff responsible for not only their son, but all children in the District.

**Item 8:**

With regard to failing provide appropriate playground equipment, the only testimony provided was fencing around the playground with an opening to which the Student attempted to escape. The IDEA does not address such items as playground equipment other than the provision of supports and services to appropriately accommodate a student's recreational needs.

**Item 9:**

With regard to the District refusing the Parents with meaningful communication in the IEP development. Hereto the evidence does not support this allegation. The testimony by the Parents was that they felt like the IEP meetings were rushed and did not give them time to absorb all of that was being said. Such a complaint however, even if true, does not rise to the level of constituting a procedural violation of the IDEA.

**Item 10:**

With regard to the District failing to implement the Behavior Plan recommended by the Behavior Consultant with fidelity to address the Student's behaviors. The only evidence produced to support this complaint was contained in item six (6) above where the District punished the Student for behavior related to his disability. Otherwise the evidence produced by the District shows that those immediately responsible for the Student followed the plan.

**Item 11:**

With regard to the District failing to provide necessary training for the Student's teachers and aides to implement evidence based practices. As noted previously the IDEA does not require District's to use evidence based practices. There was testimony produced however, which indicated that those directly responsible for the education of the Student had received additional training in different teaching strategies.

**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.<sup>176</sup> 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

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<sup>176</sup> 20 U.S.C. § 1412(a) and 34 C.F.R. § 300.300(a)

services.<sup>177</sup> The term “special education” means specially designed instruction, provided at no cost to the parents, that is intended to meet the unique needs of a child with a disability, including: (1) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and (2) instruction in physical education.<sup>178</sup> The term includes: (1) speech-language pathology services, or any other related service, if the service is considered special education rather than a related service under state standards; (2) travel training; and (3) vocational education.<sup>179</sup> “Specially designed instruction” means adapting, as appropriate, to the needs of an eligible child the content, methodology, or delivery of instruction - - (1) to address the child’s unique needs resulting from the disability; and (2) ensuring the child’s access to the general curriculum so that the child can meet the educational standards that apply to all children within the jurisdiction of the public agency.<sup>180</sup> The unique needs of a student with a disability encompass more than a mastery of academic subjects. Unique needs are broadly construed to include academic, social, health, emotional, physical, and vocational needs, all as relating to the provision of preschool, elementary, and secondary education services.<sup>181</sup>

A district cannot circumvent the “at no cost” requirement by requiring a student’s parents to make the final decision about the student’s placement or services. The “at no cost”

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<sup>177</sup> 20 U.S.C. § 1401(3)(A)

<sup>178</sup> 20 U.S.C. § 1402(29) and 34 C.F.R. § 300.39(a)(1)

<sup>179</sup> 34 C.F.R. § 300.39(a)(2)

<sup>180</sup> 34 CFR § 300.26(b)(3) and 34 C.F.R. § 300.39(b)(3)

<sup>181</sup> See *Country of San Diego v. California Special Educ. Hearing Office*, 24 IDELR 756 (9<sup>th</sup> Cir. 1996)



requirement also applies to evaluations needed to develop an appropriate program for a child with a disability.<sup>182</sup>

The current case involves in part, at least an understanding of Part C of the IDEA. Specifically on differentiating therapy that is primarily for developmental purposes from therapy that is primarily for educational purposes. “Early intervention services” under Part C are those services that “are designed to meet the developmental needs of each child eligible under this part and the needs of the family related to enhancing the child’s development.”<sup>183</sup> With respect to the Student in this case “early intervention services” includes “physical therapy services.”<sup>184</sup> The Part C regulations state that physical therapy “includes services to address the promotion of sensorimotor function through enhancement of musculoskeletal status, neurobehavioral organization, perceptual and motor development, cardiopulmonary status, and effective environmental adaptation.”<sup>185</sup>

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

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<sup>182</sup> See, e.g., *Madison Metro. Sch. Dist. v. P.R.*, 51 IDELR 269 and 52 IDELR 220 (W.D. Wis. 2009); see also *N.B. and C.B. v. Hellgate Elem. Sch. Dist.*, 50 IDELR 241 (9<sup>th</sup> Cir. 2008); and see also *South Monterey County (CA) Joint Union High Sch. Dist.*, 112 LRP 28705 (OCR 04/18/12)

<sup>183</sup> 34 C.F.R. § 303.12(a)(1)

<sup>184</sup> 20 U.S.C. § 1432(4)(E)(v)

<sup>185</sup> 34 C.F.R. § 303.12(a)(9)

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.<sup>186</sup> In this case the Parents have challenged the District as to whether or not they have complied not only with the procedural but also the substantive obligations of the Act in providing a free and appropriate education (FAPE) as defined above.

The record shows that the Student has been the educational responsibility under the IDEA since entering pre-kindergarten. The evidence and record shows that the Student's primary disability which requires special education to be a pervasive developmental disorder on the autism spectrum scale; however, as previously noted the Parents subsequently have alleged that the disability for which he is also eligible is an intellectual disability. By definition of his failure to progress academically the intellectual difficulties are quite apparent; however, the autism spectrum disorder more likely than not accounts for the Student's inability to progress as a pace consistent with non-disabled peers. The Student's communication deficits associated with his autism adversely affect his acquisition of skills in the area of speaking and listening, by preventing development of skills in responding appropriately to information presented by others. Additionally his deficits in visual motor integration, visual perception, motor coordination, grasping, hand use, eye hand coordination, manual dexterity, sensory processing, self-care and handwriting skills negatively impact his ability to produce effective written communication skills

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<sup>186</sup> *Special Education and Related Services: Procedural Requirements and Program Standards*, Arkansas Department of Education (2008), Section 10.01.22.1

and participate in the classroom. Emotionally and behaviorally his deficits include attention regulation, impulse control, behavioral flexibility, and emotional regulation. As a consequence of these multiple deficits the Student has presented not only the District, but the Parents with challenges in meeting his education and social needs as he has advanced from kindergarten to the second grade in the public school setting where he has been guaranteed to receive a free and appropriate public education (FAPE).

In 1982, the Supreme Court was asked, and in so doing provided courts and hearing officers with their interpretation of Congress' intent and meaning in using the term "free appropriate public education." Given that this is the crux of the Parents' contention in this case it is critical to understand in making a decision about the Parents' 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?<sup>187</sup>

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

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<sup>187</sup> *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-207 (1982)

objectives.<sup>188</sup> 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."<sup>189</sup> 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.'"<sup>190</sup> 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.<sup>191</sup>

With respect to a child, such as the Student in this case, who is not fully integrated in a regular classroom and is not able to achieve on grade level, the IEP must be "appropriately ambitious," thus giving the Student a "chance to meet challenging objectives."<sup>192</sup> 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 the nature of the IEP process

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<sup>188</sup> *Honig v. Doe*, 484 U.S. 305 (1988)

<sup>189</sup> *Endrew F. v. Douglas County Sch. Dist. RE-1*, 69 IDELR 174 (U.S. 2017).

<sup>190</sup> *Ibid*, Citing *Board of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 553 IDELR 656 (U.S. 1982)

<sup>191</sup> *Ibid*, Citing 20 USC 1401 (29) and 20 USC 1401 (14)

<sup>192</sup> *Endrew F. v. Douglas County Sch. Dist. RE-1*, 69 IDELR 174 (U.S. 2017).

ensures that parents and school representatives will "fully air" their respective opinions on the degree of progress a child's IEP should pursue.<sup>193</sup> This finding is important in that testimony elicited from both Parents in this case was their allegation that their concerns and recommendations for educating the Student were not being heard or considered in the development or the implementation of his IEPs.

The Parents alleged that the Student's IEPs did not show progress towards the goals and objectives in light of his failure to progress to the same age and grade level as his non-disabled peers. 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."<sup>194</sup> This opinion is consistent with the findings by the Eighth Circuit Court of Appeals in answering whether or not a student made gains in his areas of need. The Court opined that it would not compare the student to his nondisabled peers.<sup>195</sup>

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 strong desires exhibited by the Parents multiple

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<sup>193</sup> Ibid.

<sup>194</sup> *H.C. v. Katonah-Lewisboro Union Free Sch. Dist.*, 61 IDELR 121 (2d Cir. 2013, unpublished)

<sup>195</sup> *K.E. v. Independent School District No. 15*, 57 IDELR 61 (8th Cir. 2011)

requests for what they considered meaningful and effective evidence-based interventions that were not being employed judiciously by the teachers and staff of the District.

The record shows extensive maladaptive behaviors exhibited by the Student during the two years of this due process complaint. At the same time the evidence and testimony by the District's personnel including the behavior consultant, they were able to address those behaviors with some degree of success. Contrary to the Parents' allegation, the District did have a behavior plan in place which included ongoing consultation made available to the teaching staff.

The Parent was obviously concerned as to how the District staff responded to the Student's behaviors once he was moved from kindergarten to first grade and then from first grade to second grade. The District was late in realizing that the Student's maladaptive social behaviors were in reality adaptive for him in that it aided him in not having to participate in activities that he did not want to participate in and allowed him to gain the attention that he was not able to verbally communicate. Had some of the suggestions made by the Parents in their exposure to his home-training been judiciously implemented earlier in his first grade the subsequent maladaptive social behaviors may never have occurred or may have been extinguished sooner. The District has shown that they eventually solicited outside consultation and began appropriate implementation of an effective behavior intervention plan.

The evidence and testimony does not support the Parents' allegation that the District failed to identify and appropriately place the Student for receipt of his special education needs. The evidence and testimony does, however, support their allegation that the District denied the Student FAPE with regard to comprehensively evaluating the Student and for failing to implement his program of services. The identification of this Student's unique needs of autism

were responded to appropriately according to the evidence and testimony; however, the District failed to appropriately evaluate him for his intellectual disabilities. At the same time the evidence and testimony shows that the District was to some degree belatedly hampered to some degree by the Parents' failure to provide the results of an independent evaluation sooner.

As noted above, the IDEA maintains that the term educational performance and the regulations being implemented by the IDEA is not limited to academic performance. As the District amply points out the Student not only has the difficulties in acquiring academic skills, but also has behavioral difficulties in adapting to educational demands. The regulations clearly establish that the determination about whether or not a student is a student with a disability is not limited to information about his or her academic performance. In this case the District attempted to address his maladaptive behaviors. Although difficult to anticipate, the Parents provided ample evidence in testimony that the District should have anticipated behavioral difficulties based on the Parents experience in the home and the effectiveness of the home-training they had received and implemented.

Complicating the difficulties for the District, however, was the Parents unswerving desire for their child to be able to be cured of his autism and develop at the same rate as his younger brother. A student's diagnosis of autism, is not however as the Parents may have desired, determinative of the appropriateness of his or her placement. Under the IDEA, the primary focus of an IEP team should be on the unique needs displayed by the child and not on the label given to the student's disability. More disturbing than autism was the awareness of the Student's intellectual disability that his father interpreted as "mental retardation."

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.<sup>196</sup> Too often this hearing officer has found that parents, school administrators and attorneys representing both parties, 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 academic and behavior difficulties associated with his autism and his limited intellectual abilities. Thus, students with different identified disabilities can be educated in similar programs if their disability-related needs are one and the same.

Keeping in mind, as noted above, FAPE is defined as special education and related services that are provided at public expense, under public supervision and direction, and without charge, which meet the standards set forth by the Department. Thus the question as to whether or not the Student was denied FAPE by the District for failure to follow and implement the procedural guidelines of the IDEA or whether or not the District substantively implemented an appropriate IEP requires: (1) looking at each individual issue raised by the Parents to determine whether or not the District has been in compliance with the definition of FAPE under the IDEA, and (2) whether or not any single violation, or the accumulation of violations, is severe enough to constitute a denial of FAPE.

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<sup>196</sup> 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*<sup>197</sup> 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.<sup>198</sup> 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).”<sup>199</sup>

There is no doubt in this case that the Parents were and are aware of their rights under the IDEA in that they were provided and acknowledged receipt of their rights at every IEP conference. There is no doubt that they were procedurally provided with ample opportunities to express their concerns and opinions as to what they believed the Student needed for not only his academic education, but also to address his maladaptive behaviors. They may not have agreed with the feedback provided on a daily basis, but there is ample evidence that they were provided

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<sup>197</sup> *Zumwalt v Clynes*, (96-2503/2504, U.S. Court of Appeals, Eight Circuit, July 10, 1997)

<sup>198</sup> *Board of Education v. Rowley*, (458 U.S. 176-203, 1982)

<sup>199</sup> *Light v. Parkway C-2 School District*, 41 F.3d 1223, 1227 (8th Cir. 1994), cert. denied, 515 U.S. 1132 (1995)

with ample feedback as to the Student's activities in the school. Having been denied the opportunity to observe the Student as his mother insisted is not evidence of having been deprived of FAPE.

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.<sup>200</sup>

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 use evidence-based methods to address both the education and behavior exhibited by the Student. Although the IDEA does not require educators to use evidence-based instructional techniques or methods the evidence and testimony solicited by the consultants in this case and their observations indicate that those in responsible positions with the Student demonstrated appropriate practices. According to the evidence and testimony had the District received a copy of the independent evaluation obtained by the Parents sooner would more than likely made little, if any difference in the development of the Student's second grade IEP. However, the results of the evaluations are illustrative of the District's failure to comprehensively evaluate the Student for all of his disabilities. The full implementation of the IEPs they did develop do show a failure to provide the needed related service of physical therapy and relied on the Parents to obtain the services. The outside service provider was not readily

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<sup>200</sup> *Fort Zumult School Dist. v. Clynes*, 96-2503,2504, (8<sup>th</sup> Cir. 1997)

available to the Student's education staff to provide input or make classroom suggestions.

**Summary of Findings:**

1. There is sufficient evidence and testimony to support the Parent's allegation that the District failed to provide an appropriate second grade IEP by not programming for the Student's physical therapy needs.

2. There is sufficient evidence and testimony to support the Parents' allegation that the District failed to acknowledge and then program for the Student's intellectual disability; such is not true for the alleged failure to program for his speech therapy.

3. There is sufficient evidence and testimony that supports the allegation that the District failed to provide the related service of physical therapy as programmed.

4. The allegation that the District failed to use peer reviewed or evidence based practices, is without merit in that the IDEA does not require the use of evidence-based practices or therapies. The testimony and evidence does not support the allegation that the District failed to use peer reviewed teaching practices.

5. No testimony or evidence was presented in the course of the hearing to decide whether or not the District failed to address the Student's related service of specialized transportation.

6. There is sufficient evidence and testimony to support the allegation that the District punished the Student for disability related behaviors.

7. There is no evidence or testimony to support the Parents' allegation that the District denied the Parents access to information concerning the Student's school day or that they were denied access to observe the Student. Nor was there sufficient evidence or testimony to support the allegation that the Parents were denied access to information concerning the Student's school

day.

8. The IDEA's charge to hearing officers does not address the allegation that the District failed to provide appropriate playground equipment. Therefore no decision in this regard is warranted in this due process hearing, even though the issue was allowed to be entered as the Parents concern for elopement.

9. There no evidence or testimony to support the Parents allegation that the District refused the Parents with meaningful communication in the IEP development.

10. Other than that addressed in item six (6) above there is no evidence or testimony to support the Parents allegation that the District failed to implement the Behavior Plan recommended by the Behavior Consultant.

11. As noted above the IDEA does not require the use of evidence-based practices; therefore there is no evidence or testimony presented to support the allegation that the District failed to provide necessary training for the Student's teachers and aides to implement evidence based practices.

**It is hereby decided that:**

The Parent has provide sufficient testimony and evidence to support four of the eleven allegations adjudicated at the hearing. Which in summary shows that the District has denied the Student with a free and appropriate public education with regard to failing to provide the related service of physical therapy; failing to develop and implement appropriate IEPs for the Student's first and second grades; and for punishing the Student for disability related behavior.

**Order:**

Immediately upon receipt of this order the District will:

1. No later than January 15, 2018, will arrange for a facilitated IEP conference to be conducted for the purpose of developing an appropriate IEP to be implemented in the least restrictive environment with maximum available interaction with the Student's same-aged non-disabled peers and to arrange for a comprehensive psychoeducational evaluation. The facilitator must be approved by the Parents and/or counsel for the Parents.

2. No later than January 15, 2018, to arrange for providing no less than ninety (90) minutes weekly of compensatory physical therapy for the remainder of the Student's second grade and for his following third grade year, in addition to any minutes of physical therapy recommended by the physical therapist for educational purposes.

3. The District will immediately upon receipt of this order make arrangements for a behavioral consultant to provide a minimum of three hours of training for not only the Student's current teachers and aides, but also his school administrators in the implementation of the Student's Behavior Intervention Plan. The consultant can be chosen by the District without approval by the Parents and/or counsel for the Parents in that the consultant will be working directly with District personnel.

**Finality of Order and Right to Appeal**

The decision of this Hearing Officer is final. A party aggrieved by this decision has the right to file a civil action in either Federal District Court or a State Court of competent jurisdiction, pursuant to the Individuals with Disabilities Education Act, within ninety (90) days after the date on which the Hearing Officer's Decision is filed with the Arkansas Department of

Education.

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

**It is so ordered.**



Robert B. Doyle, Ph.D.

December 21, 2017

Date