

ARKANSAS DEPARTMENT OF EDUCATION
SPECIAL EDUCATION UNIT

XXXXXXXXX and XXX XXXXX,)	
Parents of XXXXXXX XXXXX,)	
)	
Petitioners,)	
vs.)	No. <u>H-18-30</u>
)	
VILONIA SCHOOL DISTRICT,)	
)	
Respondent.)	
)	

ORDER

NOW comes Petitioners, XXXXX and XXX XXXXX, represented by Theresa Caldwell and Clay Findley, Attorneys, and Respondent, VILONIA SCHOOL DISTRICT, represented by Jay Bequette, Attorney. This cause was submitted upon the pleadings, the testimony of witnesses, argument of Petitioner and Respondent, and other matters and things from all of which the Hearing Officer finds and Orders. The Impartial Due Process Hearing date was Wednesday, August 29, 2018, in the Vilonia School District Administration Building in Vilonia, Arkansas. Based upon the testimony and perceived validity of the witnesses and the evidence presented which was admitted into the record of this proceeding, I make the following findings of fact and conclusions of law. Both counsel stood on their previously-submitted Pre-Hearing Briefs as their opening statements.

ISSUES PRESENTED:

Were the educational placements and accompanying services offered by Vilonia School District (hereinafter referred to as District or Respondent) from May 22nd, 2016, to May 22nd, 2018, reasonably calculated to provide XXXX XXXXXX (hereinafter referred to as “Student”) with a free, appropriate public education (hereinafter referred to as FAPE)?

- Was there a failure in offering appropriate Special Education and related services?
- Was there a failure in offering an appropriate instructional program?
- Was there a failure in providing appropriate teachers using appropriate techniques and strategies?
- Was there a failure to adequately address the Student’s academic deficits?
- Was the Students IEP reasonably calculated to enable the student to make progress appropriate in light of the Students circumstances?

PROCEDURAL HISTORY:

On May 22nd, 2018, the Arkansas Department of Education (hereinafter referred to as “Department”) received a request to initiate due process hearing procedures from XXXXXXX and XXX XXXXX

(hereinafter referred to as “Parent” or “Petitioner”), the parent and legal guardian of Student. Parent requested the hearing because he believed that the District failed to comply with the Individuals with Disabilities Education Act of 2004, 20 U.S.C. §§ 1400-1485, as amended (hereinafter referred to as “FAPE” or the “Act”) and the regulations set forth by the Department by not providing the Student with appropriate special education services, as noted in the statement of issues. At the time Parent filed a request for due processing hearing, Student was a second grade, male student, enrolled in the District. For the current school year, 2018-2019 the Student has withdrawn from the District and has enrolled in a different school district within the state.

In response to the Parent’s request for hearing, the Department assigned the case to an impartial hearing officer. Thereafter, the date of June 26th, 2018 was set as the date on which a hearing would commence should the Parent and District fail reach resolution prior to that time. An Order setting preliminary time-lines and instructions for compliance with the Order was issued on May 24th, 2018. Following, the Resolution Conference was held in a timely manner without the ability to resolve the issues. A Pre-Hearing Brief was ordered to be due June 22nd, 2018, and a Pre-Hearing Conference was scheduled for June 25th, 2018. The respondent filed an Answer to the Complaint on June 1st, 2018 and on June 4th, 2018, the Hearing Officer received Resolution Tracking notice.

A Motion to Continue was Filed by the Petitioner’s Attorney on June 21st, 2018, citing a serious medical need of an immediate family member of the attorney which would require out of state travel for an extended period of time. Upon consultation with both the Petitioner’s attorney and the attorney for the Respondent a Continuance was granted, resetting the Due Process Hearing to August 29th and 30th, 2018. Five day disclosures and witness lists were exchanged by the Petitioner and Respondent on August 24th, 2018, both submitted timely. The Pre Hearing Conference was scheduled, and held, August 28th, 2018.

The Due Process Hearing was held on August 29th, 2018 as scheduled and testimony was taken and exhibits entered. After one day of testimony, the Petitioner rested their case in chief and the District chose not to call further witnesses and the Due Process Hearing was concluded on the 29th day of August, 2018.

Much of the testimony dealt with 504 issues and schedules. They were considered but they were deemed de minimis as the Hearing Officer did not have 504 jurisdiction to determine if there were violations under act 504 and all 504 claims and issues were dismissed for the purpose of exhaustion.

FINDING OF FACT:

Student is a nine year old male having attended Kindergarten through second grade in the District;
Student is a former student, having enrolled in another district for the 2018-2019 school year;

Student was tested in August 2017 and was found to have the specific learning disability of dyslexia and qualified for dyslexia therapy at school;

District implemented a 504 plan to provide a Dyslexia Interventionist to meet the students needs;

An evaluation conference was held February 28th, 2018 and a temporary IEP was developed;
Vision therapy provided by outside third party but was not designed as treatment for dyslexia;
Student missed a documented 74.5 days of instruction during kindergarten through second grade;

WITNESS XXX XXXXXs:

The witness XXX XXXXX is the Student's mother. This witness testified the Student is now 9 years old, attending third grade at Mt. Vernon-Enola, that he began attending Vilonia School District in Kindergarten (the 2015-2016 school year), at which time he was referred for Title I services to address sight words, writing sample sentences, practice with phonemic segmentation, fluency, letter recall, writing and Letter Naming fluency. The witness testified on the Student's Kindergarten report card, the Student had mastered all expectations for Kindergarten. The Student also attended Vilonia in first grade, and the witness identified the document in Petitioners' Exhibits, page 11, as the interventions dated 08-19-16 given the Student by Ashley Outlaw, the Student's first grade teacher, to be ten minutes daily on phonemic awareness, fluency and phonics.¹

The witness testified she requested the Student receive additional testing at the third nine weeks parent/teacher conference, around March 2017. The witness testified she expressed concerns to the Student's teacher the witness felt the Student was dyslexic, but the teacher told the parent the Student was doing fine, excelling, and not to worry about it. The witness testified the teacher also testified she would get the Student tested there at school, and about a week later the teacher testified the Student had been tested, had passed and was not dyslexic.² Identifying the Petitioners' Exhibit page 10, the witness testified it was the Student's first grade report card basically showing the Student mastered all expectations in language arts, reading and math from first grade, but testified that was not consistent with what she was seeing at home.³ The witness identified Petitioners' Exhibit 12 as showing the Student was highly negative, very weak in literacy reading, the Student was a little positive in informational reading and written expression, but everything else, the Student's explicit and implicit meaning, key ideas, domains, essential competencies, extended reasoning, cognitive levels and vocabulary, were all in the negative. The witness testified the Student's total national percentile rank for English language arts was 20.⁴

The witness testified the Student is a smart child, if you can explain something to him and tell him how to do something, he can do it, he just cannot read to figure out what he needs to do.⁵ The

¹ P. 11, line 25, through page 16, line 15

² P. 16, line 23, through P. 18, line 25

³ P. 19, lines 9-20

⁴ P. 19, line 21, through P. 20, line 17

⁵ P. 20, lines 18-25

witness testified the Student hated going to school in the first grade, because he did not get it. The Student's second grade teacher at Vilonia was Shelly McCain, and the witness testified she expressed her concerns about the Student to Ms. McCain the first couple of days of school, Ms. McCain testified she would look into it and test the Student, and agreed there was something definitely going on. The witness testified Ms. McCain gave the Student the RAN test, which the Student passed, and Ms. McCain testified she thought the Student was dyslexic and it should be looked into more. The witness testified Ms. McCain noticed the Student was not at level 14 reading as labeled at the end of first grade, and the first nine weeks report card of second grade showed reading at level six, which was a first grade reading level.⁶

The witness testified she had a meeting with Susan Lloyd and Ginger West, the dyslexia coordinator, and Vandy Nash November 30th, 2017.⁷ The witness testified testing showed the Student to be dyslexic, which is something he will always have.⁸ The witness testified she specifically asked for, if the Student needed, a comprehensive evaluation to determine if there were any other issues for special ed in August 2017, and April Reed testified no, so the Student was not provided an IEP at that time. The Student was put on a 504 plan and was to receive dyslexia interventions so many days a week, but it was not what the Student received. The witness testified Ginger West told the witness it was all about how many minutes a week the Student received, and while the number of minutes was stressed to her, the Student did not get what was to be received and she had to call them out on they were not doing the minutes correctly.⁹

The witness identified petitioners' exhibit page 30 as a Fidelity Checklist, of the 504 dyslexia interventions the Student was to receive, 3 days weekly for 45 minutes for group, 2 days weekly for 60 minutes if one-on-one. The witness testified the Fidelity Checklist was to make sure the school was doing Fidelity correctly for the Student, and that was how she found out the school was not doing the Student's interventions correctly.¹⁰

The witness identified petitioners' exhibit page 33, a checklist of what she should have been getting from Blair Riggins, the dyslexia interventionist, on the Student's weekly lessons, but which she got periodically, maybe five all school year.¹¹ The witness agreed that eventually the District provided the Student with an IEP, which came about after Christmas, when the statewide testing showed the Student below average and way below on reading and math.¹² The witness identified petitioners'

⁶ P. 22, line 23, through P. 25, line 21

⁷ P. 25, lines 22-25, through P. 26, lines 1-20.

⁸ P. 26, lines 21-25, through P. 27, lines 1-5

⁹ P. 28, lines 1-25, through P. 29, lines 1-3

¹⁰ P. 29, lines 4-25, through P. 30, lines 1-25

¹¹ P. 31, lines 1-25, through P. 32, line 1.

¹² P. 32, lines 2-18

exhibit page 53 as a STAR reading test showing the Student on the far end, lower spectrum of the test, in the 1 percentile, and needing support, and on petitioners' exhibit page 55 the Student was in the 10th percentile for math.¹³ The witness testified the parents alleged and the District admitted the request for Special Education testing was Feb. 12, 2018, and the result of the evaluation was the Student needed Special Ed, an hour of literacy reading, and 30 minutes of math daily, and an IEP was developed.¹⁴

The witness testified the parents secured a comprehensive evaluation of the Student at Conway Psychological Assessment Center, referred to as CPAC in some of the paperwork, and tested the Student outside the District, as the witness felt she had been pushed aside, lied to and misled, and did not feel the school could be trusted with the Student's education. The witness identified petitioners' exhibit page 125, the CPAC evaluation, for which she paid \$1,350.00 total. The witness testified that evaluation testified they felt going to vision therapy would help the Student with the dyslexia.¹⁵

The witness testified she first heard about vision therapy from April Reed, the school psychologist, when she tested the Student for his dyslexia screener, who did the level two dyslexia testing, and she testified Richard Barnes, the doctor from Vision Care, and Ryan Barnes, the vision therapist, had come to the Vilonia School District Intermediate School and done a presentation about vision therapy helping children with dyslexia.¹⁶

The witness testified she did take the Student to Dr. Richard Barnes for testing. The witness testified the Student left school at 10:30 Wednesdays to go to vision therapy so he missed his dyslexia therapy, but the school was supposed to make up the dyslexia therapy by rearranging the Student's schedule, but did not.¹⁷

The witness testified the school was not paying for the vision therapy outside the school, and, looking at petitioners' exhibit page 146, testified that details the out-of-pocket costs for Dr. Barnes' evaluation and vision therapy and related, that round trip mileage was about 24.2 miles.¹⁸ The witness testified the Student benefitted from the vision therapy, that it has helped the Student slow

¹³ P. 32, lines 19-25, through P. 33, lines 1-16

¹⁴ P. 34, lines 7-19

¹⁵ P. 35, lines 1-25, through P. 36, lines 1-13

¹⁶ P. 36, lines 14-25, through P. 37, lines 1-22

¹⁷ P. 38, lines 1-25, through Vol, I, P. 40, line 10

¹⁸ P. 41, lines 11-25, through P. 42, line 21

down and focus on reading and has helped with anxiety a little bit.¹⁹

The witness testified at the May 16, 2018, IEP meeting she requested year round services but those were denied. The witness testified the parents then had a tutor this summer, Penny Vaught, for dyslexia therapy twice a week for 45 minutes, at \$35 per session, and the Student had 13 sessions, with mileage being 22.8 miles round trip. The cost, per petitioners' exhibit page 144, was \$455 for that therapy with Ms. Vaught.²⁰ The witness testified she felt the Student benefitted from the summer tutoring because he has not regressed over the summer and has kind of picked up with the new school.²¹

Discussing the Student's handwriting, the witness testified it is atrocious, that it was the worst in his second grade class.²² The witness testified when the District did its evaluation, they did not do an occupational therapy evaluation, but the new school district where the Student attends is providing the Student with occupational therapy.²³

The witness testified when the Student attended the District, in addition to the Student missing dyslexia therapy to go to vision therapy, there were some issues with the therapists not being available for therapy and missing days that were not made up.²⁴ The witness testified when Ashley Dean, a Certified Special Ed teacher, became involved with the Student's dyslexia therapy the Student benefitted by leaps and bounds.²⁵

Looking at the District's notebook pages 206 and 207, the Student's attendance reports, the witness testified she was aware the Student was absent 19.5 days and checked out early 28 times in first grade, and was absent 25 days and checked out early 13 times in second grade, and checked in after 11:00 a.m. two times in second grade. The witness testified she was aware of the data and research demonstrating young students who miss significant amounts of time from school and instructional time in the first and second grade put them behind other students, and testified that her mother, who is a librarian, talked to her about the importance of the Student being in school.²⁶

¹⁹ P. 43, lines 6-24

²⁰ P. 46, lines 3-25, through P. 48, line 4

²¹ P. 49, lines 2-9

²² P. 50, lines 20-25, through P. 51, line 16

²³ P. 51, lines 17-25

²⁴ P. 52, lines 1-25, through P. 53, line 11

²⁵ P. 54, lines 10-24

²⁶ P. 56, lines 13-25, through P. 60, line 10-25, through P. 61, line 22

The witness testified she did not know whether vision therapy is used to cure dyslexia, or if sports vision therapy is used to cure dyslexia. Looking in the smaller book, page 98, the documentation from the vision therapists beginning there through page 101, Visioncare Arkansas, the witness testified she did not see where it states anywhere “dyslexia” or it says the word “dyslexia.” On page 140, where it has recommendations totaling 13, the CPAC report did not speak to a recommendation for vision therapy.²⁷

The witness testified Peds Plus evaluated the Student for occupational therapy services, and that OT evaluation indicated the Student was severely delayed in OT, in fine motor skills. The witness did not know why the OT evaluation was not made part of the exhibit packet for this hearing, nor did she know if the OT evaluation was ever provided to the district, but testified she did not provide it.²⁸ The witness testified the Student was supposed to receive 45 minutes of dyslexia therapy 3 times weekly, and in the Due Process Complaint it alleges the District was providing five 35-minute sessions weekly.²⁹

The witness testified she knew the STAR assessments are done on the computer, and that the Student works well on computers. Looking at the District book, page 102, the IEP of May 17, 2018, the witness testified she did not agree with the last handwritten sentence, but she did sign it, because she agreed to Ashley Dean’s services.³⁰

Looking at page 117, the ESY Addendum for Extended School Year Services, the witness testified she did recall discussing extended school year services at the May 2018 conference, and signed it understanding the Student was not being considered because of factors reviewed above, and that she agreed with that decision. The witness testified she is now complaining of not receiving ESP services over the summer because she was told the Student did not qualify for those services, but after further investigation, in her opinion the Student does qualify.³¹

The witness testified she talked to Josh Hart on the phone in March 2018, as to if she would mediate with the school or hire an attorney, and Mr. Hart gave her information about advocates and how an IEP meeting could be mediated with a third party. The witness confirmed the email on page 96 in the petitioners’ book as being an email from Mr. Hart confirming their phone discussion.³² The witness testified she thought the dyslexia interventionist, Ms. Riggins, missed four or maybe five

²⁷ P. 61, lines 23-25, through P. 63, line 9

²⁸ P. 63, lines 18-25, through P. 64, line 4

²⁹ P. 64, lines 10-25, through P. 65, line 6

³⁰ P. 65, lines 7-25, through P. 67, line 12

³¹ P. 68, lines 10-25, through P. 69, line 11

³² P. 69, line 12-25, through P. 70, line 16

days at least, more than two days.³³ The witness testified she was not comparing what she called atrocious as to the Student's handwriting, to anyone, and testified she guessed it would not surprise her if some of the teachers would disagree with her, as they see handwriting all day long.³⁴ Looking at page 256 in the District book, the witness confirmed it was a document she signed and received September 1, 2017, that the Student received a dyslexia screening, which document testified pursuant to the screening, the Student exhibited characteristics of dyslexia, but the screener did not indicate the Student was being diagnosed as dyslexic.³⁵

Looking at page 4 in the District book, the witness agreed her signature was on the bottom of the page, indicating her receipt of the document, called Parent Rights, September 1, 2017. The witness testified she reviewed and read the page before signing it, and item number six indicated she, as a parent, had the right to have the Student receive an individualized evaluation, receive specialized education services. The witness testified up until this year, back in May, she never requested specialized education services or an individualized evaluation until this past spring.³⁶ Looking at page 763, the witness agreed the email at the bottom of the page that she sent to a number of personnel at the primary school August 22, 2017, also made no request for Special Ed services.

The witness agreed in the middle of the page, an email she sent on August 29, 2017, again to a number of Vilonia Primary School staff, also made no request for Special Ed services or an evaluation or anything like that.³⁷ Looking at the petitioners' exhibit page one, the witness agreed it was the Student's fourth nine weeks kindergarten report card, reflecting the Student was strong or satisfactory in virtually every area.³⁸ Looking at the petitioners' exhibit page ten, the Student's first grade final report card, the witness read fourth nine weeks attendance was no absences that nine weeks, and the year-to-date total absences were 8 ½ days.³⁹

The witness testified other than classroom interventions, the Student was not provided any therapy during first grade. The witness testified the Student's 13 check-outs in second grade more than likely coincided with the 13 vision therapies.⁴⁰ The witness testified, looking at her notes, that she asked the Student how dyslexia intervention was daily, so she made notes of when the Student testified there was no dyslexia therapy on a particular day, and that her notes reflected there were two

³³ P. 70, lines 22-25, through P. 71, line 20

³⁴ P. 72, lines 17-25, through P. 73, line 25

³⁵ P. 74, lines 14-25, through P. 75, line 8

³⁶ P. 75, lines 9-25, through P. 76, line 7

³⁷ P. 76, lines 2-25, through P. 77, line 3

³⁸ P. 78, lines 7-22

³⁹ P. 79, lines 4-7, and P. 80, lines 11-25, and P. 80, lines 1-2

⁴⁰ P. 81, lines 7-17

day missed that were not made up, there was a day the Student was out of school, and once the Student was at vision therapy, for a total of four days not made up.⁴¹

The witness agreed she asked the Student be tested for Special Ed Feb. 5, 2018, that the third nine weeks of first grade the witness asked the Student be tested for dyslexia at report card time, and in second grade the witness asked for the Student to be tested for dyslexia the first week of school, and the Student was tested. The witness testified Ms. McCain thought the witness should ask for Special Ed testing, but the witness testified she wanted to wait for the dyslexia testing results, and she asked Ms. Reed if she thought the Student should be tested for Special Ed, and she testified she did not feel it was needed. Then, in February when all the results were back the witness testified she requested Special Ed at that time.⁴²

WITNESS Shelly McCain:

The witness Shelly McCain teaches second grade for the Vilonia School District at the Elementary School. Ms. McCain had the Student last year at the primary school. She testified she had concerns about the Student mostly right from the beginning, as to his reading ability. She testified she checked his records to see his reading level at end of first grade, and the Student's DRA level was 14. The witness testified she administered the DRA assessment and the Student's level was a level 6. The witness testified typically the majority of her students do not regress that much over a summer, but students regress at different rates.⁴³

The witness testified on the oral fluency test, the DIBELS test, the Student was reading 6 words a minute, with level 6, 7 and 8 books, not hard books, and in second grade they really want students to be at like 42 words per minute. The witness testified she talked to Ms. Outlaw, the first grade teacher, and she really had no explanation of why the Student was at a DRA level of 6.⁴⁴

The witness testified the District has different levels of dyslexia screening, she thought the RAN test is what is done in kindergarten, first and second grades. The witness referred to page 529, the RAN test she administered, and the result was 98 with two errors, which indicated the Student was in the lower part, and that is when they talk to Ms. West, the dyslexic therapist, who oversees dyslexia therapy, or the building administrator and they go from there if there are concerns. The witness testified there is a level two screening, but she was not aware if there is a cutoff score on the RAN test. The witness testified she did not know what the next test is called, but it was her understanding that test was administered to the Student. Her understanding of the results was the Student had dyslexia characteristics, and qualified for assistance, that the Student was given dyslexia therapy and a 504 Plan was set up. When asked if it was the District's practice to not provide children with

⁴¹ P. 81, lines 18-25, P. 82, lines 1-25, and P. 83, lines 1-10

⁴² P. 83, lines 23-25, through P. 85, line 2

⁴³ P. 88, lines 16-25, through P. 89, line 25

⁴⁴ P. 98, lines 11-25, through P. 99, line 10

dyslexia characteristics an IEP, the witness testified usually they do the dyslexia therapy first and set up a 504 Plan.⁴⁵

The witness testified she had been with the Vilonia School District 32 years, and several years ago they had some training on referring students for evaluation for Special Ed services. The witness testified that while they haven't had a comprehensive one in the last few years, they usually just go through the RTI process, referring them to the building principal, to the dyslexic therapist, to the curriculum coordinator, and they go from there.⁴⁶

The witness testified she was sure first grade did a lot of the same screeners and tests as second grade, like the DIBELS, that they do the nonsense word fluency, several tests, so she was sure if the Student did not meet benchmark on those tests, the Student would have to have IRI. P. 96, line 23, through P. 97, line 5 When asked given the need for intervention, why the Student would not have been referred for evaluation for Special Ed services, the witness testified she knew they try to have the children in the least restrictive environment and watch them for a while and make sure they are not going to be successful in the classroom before they just jump right into Special Ed. The witness testified she thought a 504 Plan is less restrictive than an IEP, but agreed it is not necessarily less restrictive for the student.⁴⁷ The witness testified she had herself referred a student for evaluation for special ed services, and had referred a dyslexic student for Special Ed services.⁴⁸

The witness testified based on her 32 years of experience, the Student's handwriting was not good for a second grader.⁴⁹ The witness agreed that the Student's absences of 25 days and the number of early checkouts and late check-ins had an adverse impact on the Student's access to the interventions and instructions. The witness testified, as to why it is so important to allow a student to receive benefit from his or her education, that she thought students do not need to be just placed in special ed classes because they will be labeled for the rest of their life without the teachers doing all that they can and the school district doing whatever they can to make a child successful without having to label them.⁵⁰

The witness testified she saw more improvement in the Student with the dyslexia interventions the second semester than the first semester in second grade, that the second semester the Student was having more one-on-one with Ms. Dean, which are the targeted interventions, and the witness testified she thought that really helped the Student also, the whole package, the dyslexic therapy and the classroom going with Ms. Dean.⁵¹ The witness agreed that after the Student was given the

⁴⁵ P. 91, lines 18-25, through P. 95, line 9

⁴⁶ P. 95, lines 15-25, through P. 96, line 1

⁴⁷ P. 97, lines 6-25

⁴⁸ P. 98, lines 1-7

⁴⁹ P. 101, lines 23-25, through P. 102, line 22

⁵⁰ P. 103, lines 1-9

⁵¹ P. 103, lines 12 through 25

dyslexia screener in August of 2017, after the witness saw a need for that, it was appropriate to use

the dyslexia interventions that followed to work through the Response to Intervention, RTI, process, and testified it was helpful.⁵²

Discussing the Student's progress, the witness testified in December the Student went up to 54 sounds instead of 16 and was able to blend 17 of them together, which was a great improvement, that it is Benchmark-54 is Benchmark and 13 is Benchmark, so the Student met the Benchmark on the word fluency.⁵³ The witness testified she also saw improvement in the Student's math, that the Student had some trouble when there were more steps, but that was not really unusual, and the most problems the Student had was with word problems because his reading affected that, but she saw improvement on that after the dyslexia interventions.⁵⁴

The witness testified the Student benefitted from her writing instructions in the classroom with the accommodations, and that since the Student was a great storyteller, she would let the Student dictate stories and she would write them for the Student, so the Student did not feel restricted with having to spell all the words and do all that.⁵⁵ The witness testified at the beginning of school in August with the screener and then getting the dyslexia interventions, she tried to pay close attention to the Student to observe improvements.⁵⁶ The witness testified she saw the Student improving all along, but agreed the Student improved more after the IEP and Ashley Dean was providing dyslexia therapy the second semester.⁵⁷ The witness testified the Student did not miss dyslexic therapy on Wednesday, the Student did not go on Wednesday, that because of going to vision therapy, the Student went to dyslexic therapy on the other days so it would not be missed.⁵⁸

WITNESS Ashley Outlaw:

The witness Ashley Outlaw testified she is employed with the Vilonia School District as a first grade teacher, that she has been employed there 13 years, that she holds a BS degree in early childhood education, and that as to dyslexia training, she has had several PD's, the latest being in 2015, and then some others since then. The witness testified her training was how to identify students who might have some of the markers of dyslexia.⁵⁹

⁵² P. 104, lines 1-11

⁵³ P. 105, line 3, through P. 106, line 12

⁵⁴ P. 107, lines 3-18

⁵⁵ P. 107, line 19, through P. 108, line 7

⁵⁶ P. 108, lines 8-16

⁵⁷ P. 108, line 23, through P. 109, line 12

⁵⁸ P. 109, line 25, through P. 110, line 7

⁵⁹ P. 111, line 16, through P. 112, line 11

Looking at the petitioners' exhibit 11, page 11, the witness testified her signature was on the IRI, the Intensive Reading Intervention, dated August 19, 2016, as to the Student's literacy after a series of screeners were given. The witness testified very year they start out with the same screeners, the DIBELS and the RAN, and each section in the DIBELS has its own Benchmark, and that on some of the sections the Student did not pass.⁶⁰ The witness agreed on the 2016-2017 school year it indicated the Student's DRA score was 3. The witness testified the Student's DRA score at the beginning and ending of kindergarten was 3. The witness testified her final DRA score for the Student was 14 on the report card.⁶¹

The witness testified, as to Ms. McCain's testimony the Student scored a DRA score of 6 at the beginning of second grade, she did not have a sit-down conversation with as to that with Ms. McCain.⁶² Discussing summer regression, the witness testified that is very common, and she felt the Student put forth a lot of effort in reading for the witness, so that would be the only way she could explain the reason the Student scored 14 on the DRA at the end of first grade but a 6 at the beginning of second grade.⁶³

The witness testified while the Student's mother expressed concerns about the Student's school performance, it was not that the Student might have dyslexia, and the witness testified she never suspected the Student might have dyslexia.⁶⁴ The witness testified she did not recall the Student's mother specifically asking for the Student to be screened for dyslexia at the third nine weeks parent/teacher conference. The witness testified all students are given the DIBELS and RAN screener at the beginning of the school year, and that she did those for the Student and concluded the Student had some need for intervention, the interventions being those on petitioners' exhibit 11.⁶⁵

Looking at petitioners' exhibit 12, the Iowa Assessment of April 2017, first grade, the witness testified it shows the Student's English language total at the 20th percentile. The witness testified she did not recall math difficulties for the Student like she did some of the literacy difficulty.⁶⁶

Looking at the petitioners' exhibit 10, the Student's report card at the end of first grade, the witness testified it showed the Student mastered all expectations in language arts, reading and math.⁶⁷ When

⁶⁰ P. 113, line 5, through P. 114, line 19

⁶¹ P. 114, line 20, through P. 115, line 18

⁶² P. 115, line 24, through P. 116, line 8

⁶³ P. 116, lines 9-21

⁶⁴ P. 116, line 22, through P. 117, line 12

⁶⁵ P. 116, line 22, through P. 118, line 3

⁶⁶ P. 118, lines 4-25

⁶⁷ P. 119, lines 1-11

asked if the report card was a true reflection of the Student's academic performance, the witness testified what they do in the classroom and the standards they reach from the state are much different than what the Iowa test assesses in April, that it is one lump score, where they assess throughout the year very small details of that lump score. The witness testified she had the most concerns about the Student's lack of enthusiasm in reading.⁶⁸

The witness testified she did have concerns about the Student's absences during first grade. ⁶⁹The witness testified first grade is probably the widest range of readers at different levels, through⁷⁰ the witness testified she never felt from the screeners she did or watching the Student over the course of the year that there was need for a referral for Special Ed.⁷¹ The witness did not recall the Student's parent ever mentioning dyslexia testing to the witness, only being told the Student was lazy, not motivated and did not like school. ⁷²

Discussing her experience as a teacher, the witness testified she taught a year and a half on Louisiana in kindergarten, she taught ten years in the Little Rock School District, also kindergarten, and moved to Vilonia and has taught for the Vilonia School District for 13 years, all in first grade.⁷³ The witness testified K-2 is when the foundation is set for reading, that if it is faulty or has holes in it, reading success diminishes, and agreed the number of absences and early check-outs the Student had in first grade had an adverse impact on the Student's ability to benefit from her class instruction.⁷⁴

The witness testified she believed the Student's phonemic awareness and phonological awareness, which is what makes a reader, had holes in it going into second grade, more than likely.⁷⁵ The witness testified she had plenty of students with reading difficulty and then that turns around, and other students with no problems at all who lose interest in reading, that it has a lot to do with personality, with what is factored in as far as home and extracurricular type activities.⁷⁶

The witness testified a student can be below grade level in reading and still access and receive an appropriate benefit from the education and instruction in her classroom, that she differentiate based on what each student needs, and the standards are written in such a way everybody receives what

⁶⁸ P. 119, lines 12-22

⁶⁹ P. 120, lines 15-17

⁷⁰ P. 122, line 16

⁷¹ P. 128, lines 5-10

⁷² P. 130, lines 7-20

⁷³ P. 131, lines 3-10

⁷⁴ P. 131, line 11, through P. 132, line 2

⁷⁵ P. 132, lines 12-19

⁷⁶ P. 134, line 6-13

they need.⁷⁷ The witness testified she did her interventions for the Student at the end of the day, so if a student was checked out early, those targeted interventions would not be received, so in the Student's case, since he was checked out 28 times early, he would have missed a significant number of those interventions.⁷⁸

The witness testified she did not take notes during every intervention, even though she probably should, but that she provides interventions every day throughout the day.⁷⁹ The witness testified nothing was random, that from the tests she gave she would know what area intervention was needed, and after the Student had reached a Benchmark, she would start on the next skill, and some could be done at the same time.⁸⁰ The witness testified there are 178-180 days of school in a school year, but there would not be 178 notes unless the Student never reached Benchmark, that she gave interventions and monitored progress.⁸¹

The witness testified handwriting is a very old school concept, that they teach more about content, that she could teach a child how to form a letter, but not how to be enthusiastic about explaining how the combination works, and that was the Student in this case. The witness testified the Student had a genre of writing the Student enjoyed, and when allowed to write about that, which was any time, the Student could write and describe what was loved very readily, but otherwise the frustration level would have cut the content and the Student would have "dumbed" it down because it was proving to be too difficult. The witness testified the Student made progress in content, and looking at penmanship the first writing selection showed the Student was not writing about anything about which the Student cared.⁸²

WITNESS Ryan Barnes:

The witness Ryan Barnes is the General Manager of Visioncare, Arkansas. The witness testified on occasion he provides sports vision training for the Student, not vision therapy. The witness testified the difference is vision therapy is for a patient with a medically diagnosed medical vision issue or problem, while sports vision training is for an athlete looking to improve their athletic ability and their ability to perform as an athlete. The witness testified the Student was provided vision therapy by the clinic.⁸³ The witness testified sports vision training is not something that can be billed to

⁷⁷ P. 134, line 16, through P. 135, line 7

⁷⁸ P. 135, line 15, through P. 136, line 5

⁷⁹ P. 139, line 4, through 4-14

⁸⁰ P. 141, lines 4-16

⁸¹ P. 141, line 23, through P. 146, line 1

⁸² P. 145, line 24, through P. 147, line 5

⁸³ P. 149, line 19, through P. 150, line 21

insurance, and vision therapy is medical treatment that insurance potentially pays for.⁸⁴ The witness testified the Student was provided vision therapy at the recommendation of the optometrist Dr. Barnes, who is not an ophthalmologist. The witness is Dr. Barnes' son, and testified the visioncare program is part of Dr. Barnes' clinic, under his direct oversight.⁸⁵

WITNESS Penny Vaught:

The witness Penny Vaught is a speech pathologist and educational therapist, holding a Masters degree in speech/language pathology. She has practiced 26 years, and has additional training as an educational therapist through the National Institute of Learning Development, with additional training in two different dyslexia treatment programs, Connections and Barton. The witness does private consulting work, her business being Abilities, Incorporated.⁸⁶ Describing what she did with the Student, the witness testified it was her understanding the Student had previously been working with the Connections program, so she continued with that program and felt it was in the Student's best interest to continue with what the Student was already familiar with. She testified she reviewed lessons to be sure the Student had mastered those, and then she picked up and moved forward.⁸⁷

The witness testified the therapy she provided was relatively short, just the summer, but she believed the Student benefitted. She testified she could tell the Student had a good grasp of the things he had previously gone over, and when they reached a point where the Student was a little bit more shaky, was not as solid, they spent a little more time with those before moving forward. The sessions were 45 minutes, and the program is broken down into 60 lessons total, each designed to teach a certain skill or set of sound/symbol connections and combinations. It uses multi-sensory input to help solidify understanding of sound/symbol connection between letters and sounds and how they go together to form words. The witness testified each lesson is a bit different, and she met one-on-one with the Student.⁸⁸

The witness also testified she works full time at a private school doing speech pathology and educational therapy, then sees private clients after school and through the summer.⁸⁹ The witness testified she charged \$35 for a 45 minute session, and \$45 for an hour.⁹⁰ The witness did not know the exact criteria for eligibility for ESY.⁹¹

⁸⁴ P. 152, lines 2-11

⁸⁵ P. 153, line 9, through P. 155, line 13

⁸⁶ P. 156, line 22, through P. 157, line 11

⁸⁷ P. 157, line 25, through P. 158, line 13

⁸⁸ P. 159, line 7, through P. 160, line 22

⁸⁹ P. 162, lines 14-18

⁹⁰ P. 163, lines 5-8

⁹¹ P. 163, line 20, through P. 164, line 2

The witness did not know what kind of dyslexia interventions the district provided to the Student during second grade, only that the Student was involved in the Connections program because the Student was familiar with it, and testified the Student had a great memory and came to her having received dyslexia interventions.⁹² The witness testified of the 60 lessons, the Student was, she believed, on lesson 18 when the Student came to her, and when she went back and reviewed, she started back at zero reviewing them to make sure, that she did not want gaps, and over the summer the Student advanced through lesson 21.⁹³

WITNESS Ashley Dean:

The witness Ashley Dean testified she is employed as a long-term sub at Cabot Public Schools. She was employed in the 2017-2018 school year at the Vilonia Public Schools as a Resource teacher.⁹⁴ The witness testified she had the Student in her classroom daily, an hour for reading and 30 minutes for math, beginning in March 2018, after the Student was given an IEP.⁹⁵ The witness testified she was on the Student's IEP team and participated in the IEP team meetings. She testified they discussed extended year services, regression in DRA scores between first and second grade, but the Student was maintaining the knowledge already had, and the Student never showed any signs of regression for her classroom.⁹⁶

The witness testified she had only been seeing the Student two months, so she did not know whether the Student would have regressed or not over the summer. The witness testified the Student's mother did ask about extended year services, but the ultimate decision of the IEP team, based on the information they had, Special Ed-wise, it was unnecessary.⁹⁷

The witness testified based on the data, she believed the committee made the correct decision that there was no need for extended school year services.⁹⁸ The witness testified when she had the Student, from March through the end of the school year, she did believe the Student made progress and received benefit from academics, from the services, because the Student's DIBELS data indicated oral reading fluency had doubled at that point, and once the Student learned a skill, the skill was maintained.⁹⁹ The witness also testified the Student benefitted from her instruction as related to

⁹² P. 164, line 3, through P. 165, line 2

⁹³ P. 165, line 7, through P. 166, line 3

⁹⁴ P. 167, line 11-20

⁹⁵ P. 167, line 21, through P. 168, line 12

⁹⁶ P. 170, line 5, through P. 171, line 10

⁹⁷ P. 173, lines 4-20

⁹⁸ P. 175, line 9, through P. 176, line 19

⁹⁹ P. 176, line 20, through P. 177, line 9

writing, and she saw improvement.¹⁰⁰ The witness agreed that, now knowing the Student has dyslexia, he would have benefitted from getting dyslexia therapy earlier than when it was started.¹⁰¹

WITNESS Josh Hart:

The witness Josh Hart is the Director of Special Education in the District since July of this year. For three years prior he was the Assistant Special Education Director, and prior to that was a school psychology specialist. To serve as the Director of Special Ed, three or four years must be spent in education in a Special Ed field. For him, that was as a school psychologist specialist where he assisted with evaluations, Due process paperwork, held referral and evaluation conferences, and assisted in determining if students met the criteria for an educational disability.¹⁰²

The witness testified he was not aware of any policy or practice of the district discouraging referrals for Special Ed evaluations, services, etc. The witness testified that he believed they actually offer typically above average Special Ed services, and they have a lot of parents moving there from surrounding areas and larger districts to Vilonia because of the services offered.¹⁰³ The witness testified this district is actually above the average across the state in terms of percentage of students receiving Special Ed services, they were sitting at about 15 percent of the student population being served in Special Ed at the end of last year, and the state average is somewhere in between 12 and 13 percent.¹⁰⁴

The witness testified during the last school year the school psychology specialist, April Reed, came to him after the referral conference, as to the Student's mother being upset, so he contacted the Student's mother by phone. The witness testified he talked to the Student's mother about 45 minutes, and informed her he had not seen any data or information relating to the Student, but understood she was concerned, and now that Special Ed was involved, they wanted to sit down with her to discuss her concerns, look at the information there, and if the District felt it was in any way wrong, they could talk about what to do to make it right. He also testified he gave the mother, via email, specific information related to Disability Rights and also the Bowen School of Law, as the mother did talk about using a lawyer, and the witness wanted to offer her some free resources to try and address any of her concerns. That was the March 1, 2018 email outlining the resources with which the witness was familiar.¹⁰⁵

¹⁰⁰ P. 177, line 21, through P. 178, line 9

¹⁰¹ P. 179, lines 17-23

¹⁰² P. 182, line 9, through P. 183, line 7

¹⁰³ P. 183, lines 8-22

¹⁰⁴ P. 183, line 23, through P. 184, line 9

¹⁰⁵ P. 184, line 10, through P. 185, line 19

After the Due Process Complaint was filed, the witness testified he went back to review services identified on the Student's IEP developed in March had been provided to the Student through the end of the school year, and found a procedural violation where they went over the 60 day timeline in relation to the temporary IEP. He testified they continued to provide the Student the services that were developed on the temporary IEP in that period between the end of the temporary IEP and the development of the initial IEP in May.¹⁰⁶

Discussing the IEP team determination that extended school year services were not required for the Student, the witness testified that based on the data, he agreed with the team decision, as extended school year is not to provide continued growth throughout that break, but it is to ensure there is not regression on mastered skills so that so much ground is not lost at the beginning of the next year you are just playing catch up.¹⁰⁷

The witness testified he was not aware of a request for special education services being made at any time prior to the initiation of the temporary IEP in March of this year, nor was he aware of what happened at the beginning of second grade year when the 504 Plan was established.¹⁰⁸ To the witness' knowledge, all the services, supports, and modifications contained in the Student's IEP developed in March were provided to the Student through the end of the school year.¹⁰⁹ The witness testified based off the Student's placement on the temporary IEP at the time, the IEP committee determined that was the appropriate least restrictive environment for the Student.¹¹⁰ The witness testified the District was not aware of any kind of anxiety disorder that would have qualified the Student for Special Ed services at any time, that he was rated in the normal or average range for anxiety, so it was not exhibited at school to a level that would raise a red flag.¹¹¹ The witness testified looking at the Student's information and speaking with the parents, he did not feel there was a Child Find issue.¹¹²

The witness testified as the Special Ed director, the one who is on the outside looking in and was not involved, he probably would have pushed to have continued dyslexia intervention for a little bit longer as an appropriate spot for the Student before moving forward with an evaluation, and testified when you take into account the loss of time due to absences in that time with those targeted interventions, you would suspect gaps to develop, but those gaps due to lack of instruction or access

¹⁰⁶ P. 185, line 20, through P. 186, line 8

¹⁰⁷ P. 187, line 15, through P. 188, line 8

¹⁰⁸ P. 188, lines 9-17

¹⁰⁹ P. 189, lines 2-9

¹¹⁰ P. 189, lines 12-13

¹¹¹ P. 189, lines 15-25

¹¹² P. 191, lines 1-24

to that instruction do not indicate, in his opinion, that you would suspect a disability.¹¹³ The witness testified Dr. Barnes presented at one of their Special Ed back-to-school conferences, and at that time really hammered home that vision therapy is not for dyslexia therapy, or is not a cure or does not assist with dyslexia.¹¹⁴

The witness testified dyslexia therapy is not a Special Ed service; rather, it is part of the dyslexia law developed by the State of Arkansas, and it is a General Education RTI part of it.¹¹⁵ The witness testified dyslexia therapy could be being educated with non-disabled peers, and the definition of specialized instruction is that it is not with non-disabled peers, and that is why a co-taught classroom is considered a General Education setting.¹¹⁶

The witness testified Special Education is not specially designed instruction, that it could be indirect services, which is not specifically designed instruction, it is just a teacher overseeing a student, there is a continuum of services there, that a co-taught setting is considered to be zero percent of the time in a specialized setting because of being instructed with non-disabled peers.¹¹⁷ The witness testified dyslexia therapy is not provided by the classroom teacher, it is provided by a dyslexia therapist or interventionist.¹¹⁸

The witness agreed that if a parent requests a referral for Special Education, they had to evaluate that student, but that in the eyes of the IDEA, you have the opportunity to gather data before the referral conference, and as the local education agency and a referral committee, you can make a decision at that point that a referral is not necessary. The witness testified if a parent requests a Special Education evaluation, it gets at least a referral conference.¹¹⁹

The witness testified the Vilonia School District worked through an appropriate process in the eyes of the IDEA, and when you look at the absences and the impact and the information, there is a case to be made that the Student is in a gray area where, in the eyes of IDEA, a committee could easily have testified that the Student does not meet the criteria for a specific learning disability due to the exclusionary factor such as impact due to lack of instruction.¹²⁰ The witness testified the Student

¹¹³ P. 191, lines 13-25

¹¹⁴ P. 192, line 25, through P. 193, line 8

¹¹⁵ P. 195, lines 9-12

¹¹⁶ P. 195, line 22, through P. 196, line 3

¹¹⁷ P. 198, lines 11-22

¹¹⁸ P. 199, lines 5-13

¹¹⁹ P. 204, lines 13-25

¹²⁰ P. 207, lines 14-23

missed so many days from school that to judge whether or not the Student was making adequate progress, that should have been strongly considered probably a little bit more so.¹²¹

CONCLUSIONS OF LAW and DISCUSSION:

Current case law holds that “the burden of proof absent a State Statute to the contrary in an administrative hearing challenging a denial of FAPE is properly placed upon the party seeking relief, whether that is the disabled child or the school district.”¹²²

FAPE as defined for the purposes of this part are:

- a) To ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment an independent living;
- b) To ensure that the rights of children with disabilities and their parents are protected;
- c) To assist States, localities, educational service agencies and Federal agencies to provide for the education of all children with disabilities; and
- d) To assess and ensure the effectiveness of efforts to educate children with disabilities.

Pursuant to Part B of the IDEA, States are required to provide FAPE for all children with disabilities between the ages of three (3) and twenty one (21).¹²³ In 1982 In *Hendrick Hudson Dist. Bd. Of Educ. V. Rowley*, the U.S. Supreme Court addressed the meaning of FAPE and set fourth a two part analysis that must be made by Courts and Hearing Officers in determining whether or not a school district has failed to provide FAPE as required by Federal law.¹²⁴ Pursuant to *Rowley*, the first inquiry a Court or Hearing Officer must make is whether the State, i.e., the local educational agency or district, has complied with the procedures and regulations as set out in the IDEA. Therefore, it must determine whether the IEP developed pursuant to the IDEA procedures was reasonably calculated to enable a student to make progress appropriate in the light of the students circumstances.

¹²¹ P. 207, line 24, through P. 208, line 4

¹²² Schaffer v. Weast, 44 IDELR 150 (U.S.2005)

¹²³ 20 U.S.C. 1412(a); 34 C.F.R. 300.300A(a)

¹²⁴ 458 U.S. 176, 206-07 (1982)

Examining the first inquiry, that of whether the District has complied with the procedures set forth in the IDEA, this Hearing Officer hereby finds that the District did not deny FAPE to the student on account of any violation of any procedural issues.

Having analyzed the first prong of the FAPE analysis, it is now necessary to consider whether or not the District substantively denied FAPE to the Student *i.e.*, whether the District failed to provide an IEP that was reasonably calculated to enable the Student to make progress appropriate in the light of the students circumstances.¹²⁵ In the present case there was an IEP developed for the Student because the parents requested a special education evaluation because the Student needed specialized services.

Essentially, an IEP is not required to be designed to maximize the student's potential commensurate with the opportunity provided to other children, however, the student's educational program must be appropriately ambitious in the light of his circumstances and every child should have the chance to reach a fuller potential by having challenging objectives written into their IEP. Specifically, "the IDEA requires Public School Districts to educate 'a wide spectrum of handicapped children,' and the benefits obtained by children at different ends of the spectrum will 'differ dramatically.'"¹²⁶

After hearing each witness and evaluating their credibility and reviewing the evidence presented in the transcript of the Due Process Hearing, the Hearing Officer finds the following:

The Student was provided FAPE in the Vilonia School District. There has been no demonstration of any diminished educational performance by the Student caused by his dyslexia which has not been addressed adequately through his IEP with direct services provided by the district through trained staff, using proper diagnostic methods, which would could constitute a denial of FAPE.

Having determined that the District did provide FAPE to the student it is noted that there is no requirement in the IDEA that a child shall be provided with the specific educational placement or services that his or her parents prefer.¹²⁷ Additionally, nothing in the IDEA requires that a school district maximize a student's potential or provide the best possible education at the expense of the public.¹²⁸ Pursuant to *Endrew*¹²⁹, a districts obligations under the IDEA are satisfied when a child receives FAPE, i.e., personalized instruction with sufficient support services appropriately ambitious,

¹²⁵ Endrew F. V. Douglas County School District Re-1, 137 S. Ct. at 1000

¹²⁶ C.B. by and through his parents, B.B. and C.V. v. Special School District No. 1, Minneapolis MN, , 262 F. 3rd 981 (8th Cir. 2011) (quoting *Rowley*, 458 U.S. 176, at 202 (1982))

¹²⁷ *Rowley*, 458 U.S. 176, at 203 (1982)

¹²⁸ T. F. v. Special School District St. Louis Co., 449F 3rd 816, 821(8th Cir. 2006)

¹²⁹ *Supra*

with challenging objectives, to enable the Student to make progress appropriate in the light of the students circumstances.

ORDER:

After due consideration of the record, evaluation of the witnesses, review of the evidence and the foregoing Findings of Fact and Conclusions of Law, it is hereby found that no relief sought by Petitioners is Ordered.

FINALITY OF ORDER and RIGHT TO APPEAL:

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

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

It is so Ordered:

Michael McCauley

Michael McCauley
Due Process Hearing Officer
October 11, 2018