

**ARKANSAS DEPARTMENT OF EDUCATION
Special Education Unit**

IN RE:

XXXXXXXXX Parents on behalf of
XXXXX, Student

PETITIONER

VS.

CASE NO. H-20-02

MONTICELLO SCHOOL DISTRICT

RESPONDENT

HEARING OFFICER’S FINAL DECISION AND ORDER

ISSUES PRESENTED:

Whether the Monticello School District (hereinafter “District” or “Respondent”) denied XXXXXXXX (hereinafter “Student”) a free, appropriate, public education (hereinafter “FAPE”) between August 12, 2017 and August 12, 2019, in violation of certain procedural and substantive requirements of the Individuals with Disabilities in Education Act of 2004, 20 U.S.C. §§ 1400-1485, as amended (hereinafter “IDEA”), by: (1) failing to conduct an assistive technology evaluation to address Student’s communication deficits; (2) failing to provide individualized education programs (hereinafter “IEPs”) that were reasonably calculated to ensure that Student made progress in light of his circumstances; (3) failing to implement Student’s 2017-2018 and 2018-2019 IEPs as written by specifically failing to provide all scheduled speech therapy services; (4) discontinuing occupational therapy (hereinafter “OT”) for Student in May 2019; and (5) failing to educate Student in the least restrictive environment.¹

¹ See Due Process Complaint and Parent’s Post-Hearing Brief.

PROCEDURAL HISTORY:

On August 12, 2019, the Arkansas Department of Education (hereinafter “Department”) received a written request from Parents, through counsel, to initiate due process hearing procedures on behalf of Student. Based on Parents’ complaint, Parents requested a due process hearing because they believed that District failed to conduct an assistive technology evaluation to address Student’s communication deficits, failed to provide IEPs that were reasonably calculated to ensure that Student made progress in light of his circumstances, failed to implement Student’s 2017-2018 and 2018-2019 IEPs and provide speech therapy services as required, discontinued occupational therapy for Student in May 2019, and failed to educate Student in the least restrictive environment.²

In response to Parents’ request for hearing, the Department assigned the case to an impartial hearing officer. Thereafter, the hearing was set to take place on September 23 and 24, 2019 assuming the Parents and District failed to reach resolution prior to that time.³ On September 16, 2019, Respondent requested a continuance of this matter, which was granted by this Hearing Officer. Thereafter, the hearing of this matter was continued to November 18 and 19, 2019. On November 18, 2019, Petitioners moved for a continuance of this matter on account of a scheduling conflict. Thereafter, the hearing of this matter was continued to December 3, 2019. Ultimately, the hearing of this matter was continued one more day, to December 4, 2019, on account of Petitioner’s counsel being ill.⁴

² See Due Process Complaint and Parent’s Post-Hearing Brief.

³ Hrg. Tr., Vol. I, pp. 7-8.

⁴ *Id.*

On December 4, 2019, the closed hearing of this matter commenced.⁵ Testimony was heard on December 4, 2019, December 16, 2019, and January 23, 2020.⁶ All testimony was heard in person at the Monticello School District's Administration Building. The hearing concluded on January 23, 2020.⁷

The following witnesses testified in this matter: Nancy Early, Cristal Langley, Parent (father), Taralee Reeves, Dr. Ivan Aldea, Glenda Hanson, Donna Rainwater, Katherine Smith, and Carol Martens.⁸ Parents had the burden of proof regarding the issues raised in this case.

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

Both parties were offered the opportunity to provide post-hearing briefs. Counsel for both parties timely submitted a brief for consideration by this Hearing Officer.

FINDINGS OF FACT:

Student is a 9-year-old male (DOB 04/01/2010) who has been diagnosed with autism spectrum disorder, PICA, and sleeping disorder. Student is enrolled in the Monticello School District and, as of the date of this decision, is in the fourth grade.

⁵ See Hrg. Tr., Vol. I.

⁶ See Hrg. Tr., Vols. I-III.

⁷ See Hrg. Tr., Vol. III.

⁸ See Hrg. Tr., Vols. I-III.

Student has sensory processing issues and, as a result thereof, has sensitivity to loud noises. He often covers his ears if a sound is bothering him.⁹ Student occasionally attempts to eat items that are not edible.¹⁰ When agitated, Student will engage in aggressive behaviors toward himself and others, including pinching, biting, and stomping his feet. Student utilizes a weighted blanket as necessary to address sensory issues.¹¹ Techniques used with Student when he is agitated also include joint compression and use of the Wilbarger Brush technique.¹² Student often drops to the floor when he does not want to work, and often has issues transitioning between activities.¹³

Student is nonverbal, with his only verbalizations at the school consisting of humming.¹⁴ During Student's second and third grade years, specifically the 2017-2018 and 2018-2019 school years, Student's special education teachers and therapists attempted to communicate with Student using a picture exchange communication system (hereinafter "PECS").¹⁵ PECS consists of a set of pictures on Velcro strips which are categorized by objects, foods, activities, or sensory items.¹⁶ Student would first point to an "I want" card and then subsequently pull off the strip for the item that he was seeking.¹⁷ During Student's fourth grade school year, Student began using the LAMP Words for Life program for communication, which utilizes an iPad.¹⁸ Student's special education teacher felt during

⁹ Hrg. Tr., Vol. I, p. 192.

¹⁰ Hrg. Tr., Vol. I, p. 194.

¹¹ Hrg. Tr., Vol. I, pp. 194-95.

¹² Hrg. Tr., Vol. I, p. 223.

¹³ Hrg. Tr., Vol. I, p. 209.

¹⁴ Hrg. Tr., Vol. I, p. 216.

¹⁵ Hrg. Tr., Vol. I, p. 199-200.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Hrg. Tr., Vol. I, p. 201.

Student's third grade year, that Student needed a device for communication purposes. She did not, however, schedule an IEP meeting to discuss this issue or contact Easter Seals to inquire about this issue when Student stopped being responsive to PECS in January 2019.¹⁹

Dr. Ivan Aldea, a child and adolescent psychiatrist at Arkansas Psychiatric Clinic, has provided psychiatric services to Student since October 2017.²⁰ He testified that Student's autism is categorically at a level 3, which is the highest level, and requires a lot of support. Student has stemming behaviors that are rigid and very repetitive.²¹ Student takes three different medications, specifically Clonidine, Guanfacine, and Cyproheptadine which are intended to assist with Student's impulse control issues.²²

Drew Central Consortium

Student, although a student of the Monticello School District, attends school at the Drew Central Consortium (hereinafter "Consortium"), which is funded through a coop and has teaching staff that are employed via contract through the coop.²³ The Consortium has children grades K-12 from both the Monticello School District, as well as a neighboring district, the Drew Central School District.²⁴ The Consortium serves only disabled children; however, students at the Consortium are allowed to participate in certain activities with non-disabled children, such as field trips.²⁵ The Consortium is a self-contained special education setting specifically designed to assist students with more severe disabilities, as well as those

¹⁹ Hrg. Tr., Vol. I, p. 211.

²⁰ Hrg. Tr., Vol. II, p. 99.

²¹ *Id.*

²² Hrg. Tr., Vol. II, p. 100.

²³ Hrg. Tr., Vol. I, pp. 57-58.

²⁴ Hrg. Tr., Vol. I, p. 68.

²⁵ Hrg. Tr., Vol. I, pp. 96-97.

with medical issues who are in need of a nursing staff.²⁶ At the time of this hearing, there were ten students placed at the Consortium, and those students were being served by a special education classroom teacher and three aides.²⁷

Student was placed in the Consortium when he began kindergarten, and at that time was listed as a Drew Central School District student. Student was then transferred from the Drew Central School District to the Monticello School District on August 31, 2016, during Student's first grade year, on account of a bussing issue.²⁸ This change in districts did not change his placement. Since kindergarten, and through the date of this due process hearing, Student has attended school at the Consortium.²⁹ Student does not have medical issues requiring a nurse. Since Student was transferred to the Monticello School District in August 2016, there is nothing in the record to indicate that Student's placement in the Consortium has been discussed to determine continued appropriateness.³⁰ Student's special education teacher testified that the subject of placement never came up. She acknowledged that the District had a duty to consider the continuum of placement with each IEP.³¹

Student's scheduled school day consists of breakfast, speech therapy, morning group, morning recess, literacy group, small groups (1:1 work with teacher), lunch, downtime, learning groups, testing skills, snack time, clean up, afternoon recess, and dismissal.³² Only during lunch is Student with non-disabled peers, although his classroom teacher indicated

²⁶ Hrg. Tr., Vol. I, p. 176.

²⁷ Hrg. Tr., Vol. I, p. 177.

²⁸ Hrg. Tr., Vol. I, p. 88.

²⁹ Hrg. Tr., Vol. I, p. 89.

³⁰ Hrg. Tr., Vol. I, pp. 99-102.

³¹ Hrg. Tr., Vol. I, p. 190.

³² Hrg. Tr., Vol. I, pp. 180-87.

that he typically swings at lunch and is by himself.³³ Student also receives adaptive physical education services, although his special education teacher was not sure why he was receiving adaptive versus regular physical education.³⁴

Student's Evaluations

Student was evaluated for OT on October 4, 2016 by the District. Student was administered the Bruininks-Oseretsky Test of Motor Proficiency, Second Edition (BOT-2), the Beery-Buktenica Developmental Test of Visual-Motor Integration – Sixth Edition (Beery VMI), and the Short Sensory Profile.³⁵ The BOT-2 indicated that Student's age equivalency with regard to fine manual control and manual coordination was at an age range less than four years old, and Student scored less than the first percentile compared to his peers.³⁶ Student's scores fell in the descriptive category of "well below average."³⁷ On the Beery VMI, Student scored at .02 percentile and fell in the descriptive category of "very low."³⁸ Student's age equivalent on this test was less than two years and four months old.³⁹ It was noted that Student's strengths included scribbling, good range of motion, and ability to feed himself finger foods, while his weaknesses were decreased self-care skills, impaired sensory processing, decreased visual motor skills, and decreased fine motor skills.⁴⁰ It was recommended at that time that Student receive 60 minutes of OT per week, to be administered in two 30-minute sessions.

³³ Hrg. Tr., Vol. I, pp. 191-92.

³⁴ Hrg. Tr., Vol. I, p. 198.

³⁵ Ex. Vol. II, pp. 260-64.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

Student was evaluated on April 7, 2017 by the District's speech language pathologist. Student was given an oral peripheral examination, as well as administered the Functional Communication Profile – Revised. He was also clinically observed by the evaluator.⁴¹ Regarding the issue of attentiveness, it was noted that Student has “fair attention,” was occasionally distracted, had adequate alertness, showed moderate delay in response rate, was adequately aware of others, and required prompts to cooperate.⁴² Regarding Student's receptive language abilities, it was reported that Student comprehended some direct requests but overall had poor understanding of basic concepts. Student was able to respond to his name and to certain commands. Student needed verbal prompts for commands such as “hold, go, swallow turn on/off, sit, come here” and needed physical prompts for commands such as “shake, hands down, stand, touch.” Student was able to recognize some verbal requests using PECS.⁴³ Regarding expressive language, Student was determined to be completely nonverbal. It was noted that he expressed his choices through eye gazing, pointing, using gestures, and sometimes PECS.⁴⁴ Regarding pragmatic/social language, Student was able to communicate intent by requesting items, seeking attention, protesting or resisting, and affection.⁴⁵ Given these results, it was recommended that Student continue speech therapy for functional communication skills, with therapy to focus on use of a functional communication system for Student.⁴⁶

⁴¹ Ex. Vol. II, p. 266-68.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

On December 8, 2017, Student was administered a psychological evaluation by the University of Arkansas for Medical Sciences Dennis Developmental Center.⁴⁷ This evaluation was ordered by Student's treating physician on account of concern arising from Student's behavior.⁴⁸ Student was in the second grade when this evaluation took place.⁴⁹ The evaluator noted that Student lacked attention and was aggressive during the one-on-one evaluation.⁵⁰ Student hit and punched the examiner, as well as Student's father. He also kicked his father and threw test items.⁵¹

The Dennis Developmental Center administered Student the Stanford-Binet Intelligence Scale: Fifth Edition (SB-V) to determine his cognitive abilities.⁵² The results of that test indicated that Student has a nonverbal IQ score of forty-two (42).⁵³ Student was also administered the Vineland Adaptive Behavior Scales – Third Edition (VABS-3) to determine his adaptive behavior abilities.⁵⁴ That exam indicated that Student's communication, daily living skills, socialization, and motor skills are all in the low range.⁵⁵ Dennis Developmental Center recommended that this report be considered for purposes of school placement and programming. It was further recommended that Student be in an environment with supports designed to reduce behavioral difficulties and lessen the impact of difficulties in communication, social skills, and sensory processing.⁵⁶ It was also noted that

⁴⁷ Ex. Vol. II, pp. 283-92.

⁴⁸ *Id.*

⁴⁹ Ex. Vol. II, p. 283.

⁵⁰ Ex. Vol. II, p. 284.

⁵¹ *Id.*

⁵² Ex. Vol. II, p. 284.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Ex. Vol. II, p. 285.

Student should receive opportunities for socialization with same-age peers as is possible.⁵⁷ Finally, there was a recommendation that Student be given immediate rewards for appropriate behavior and immediate consequences for inappropriate behavior.⁵⁸ It was recommended that Student receive intensive intervention to address his various issues.⁵⁹

On July 2, 2019, Student was evaluated by a speech language pathologist at Kidsource Therapy based on Parents' request for an independent evaluation.⁶⁰ Student was administered the following tests: (1) Test of Language Development-Intermediate: Fourth Edition (TOLD – I:4); (2) Clinical Evaluation of Language Fundamentals – Fifth Edition (CELF-5); and (3) Functional Communication Profile – Revised (FCP-R).⁶¹ It was determined that Student presented with receptive, expressive, and pragmatic language skills that are profoundly delayed.⁶² In fact, Student was not able to complete some of the tests because he was unable to understand the directions.⁶³

Student's delays in receptive language, expressive language, and social/pragmatic skills were deemed to have "significant implications for misunderstanding directions presented to him, inability to functionally communicate to a caregiver or peer, negative teacher-student interactions, reduced peer acceptance, reduced academic skills, and reduced modulation of behavior and emotions."⁶⁴ It was recommended that Student receive therapy three times per week, for sixty minutes per session.⁶⁵ It was also recommended that

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ Ex. Vol. II, pp. 316-335.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

Student's therapy include "discrete trial training of academic and language skills, development and use of a communication system, instructional and positive practice, and an environment to facilitate appropriate play skills with brief breaks to reduce problem behaviors related to transition."⁶⁶ It was noted that Student's initial long-term goal was to increase his receptive and expressive language skills to that of a three-year-old level within twelve months.⁶⁷

The record appeared to lack an assistive technology evaluation. There was evidence that District requested a CIRCUIT referral for assistance with this issue during Student's second grade year, specifically the 2017-2018 school year.⁶⁸ The CIRCUIT referral stated that Student had been using the PECS communication system but that it had been ineffective because Student was throwing the PECS cards and being noncompliant. District, according to Nancy Early, did not complete an assistive technology evaluation because it was determined that one was not required until it was time for Student to be reevaluated in 2020.⁶⁹

Evaluations dating back to Student's preschool years are not relevant to Student's current abilities.

Student's IEPs, Progress, and Relevant IEP Meetings

Second Grade, 2017-2018 School Year. Student's IEP for the 2017-2018 school year was developed on May 8, 2017 and indicated a duration of services from August 14,

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Ex. Vol. I, pp. 134-35.

⁶⁹ Hrg. Tr., Vol. I, p. 163.

2017 to May 24, 2018.⁷⁰ Pursuant to the IEP, Student was scheduled to attend school at the Consortium and, therein, receive all day self-contained special education services. Specifically, Student was to receive 408 minutes per week of special education instruction, 90 minutes per week of speech/language services, 60 minutes per week of OT, and 90 minutes per week of speech-language pathology services.⁷¹

The IEP contained a statement of present level of academic achievement which indicated that Student was able to follow one-step oral directions and had the ability to “sit and attend to multiple learning and therapy tasks for 15 to 20 minutes.”⁷² In addition, it was noted that Student was affectionate with his teacher, paraprofessionals, and therapists, that he would parallel play alongside peers in the classroom, and that he had begun to imitate play activities with his teacher.⁷³ It was also noted that Student enjoyed playing with other children on the playground.⁷⁴ At the time that this IEP was developed, Student required total care assistance for toileting.⁷⁵ It was noted that Student refused to participate in adaptive physical education and had “great difficulty” attending school-wide performances in the school auditorium. It was further noted that Student was a “strong sensory seeker,” seeking proprioceptive input often, and that Student noted displeasure by dropping to the floor, bucking up and down, and kicking his feet.⁷⁶

⁷⁰ Ex. Vol. II, p. 35.

⁷¹ Ex. Vol. II, p. 39.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Ex. Vol. II, p. 36.

⁷⁶ *Id.*

Student's IEP also addressed Student's progress on goals during Student' first-grade school year, noting that Student had not mastered any of his education or functional goals and objectives due to noncompliance and lack of interest in pre-academic and academic activities.⁷⁷ A summary of Student's most recent evaluations at that time were present on the IEP as well.⁷⁸ Ultimately, it was noted that Student, although at the end of his first grade year at this time, was working academically below a preschool level. Student did not know the names of colors, shapes, numerals, letters, or any words and lacked fine motor control to use a writing instrument.⁷⁹ Regarding the need for assistive technology devices and services, it was stated that Student was in need of a mode of communication that was able to utilize at home and at school.⁸⁰

Students May 8, 2017 IEP contained one adaptive behavior goal, specifically that Student, given a verbal or picture card request, would comply with teacher and staff requests 80% of the time by the end of second grade, with the goal being to maintain concentration for 20 minutes. In addition, the IEP contained a math goal, specifically that Student would assign the correct number of objects to the numerals 1-10 by the end of the second-grade year.⁸¹

Student's IEP also contained goals for speech and language, as well as for OT. Regarding speech and language, it was stated that Student should be able to demonstrate the use of a communication system when given appropriate stimuli with 90% accuracy by the

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Ex. Vol. II, p. 37.

⁸⁰ *Id.*

⁸¹ Ex. Vol. II, p. 43.

end of the school year.⁸² The objectives for this goal stated that Student would (1) “choose picture from field of at least 5 pictures, and take picture to communicative partner to obtain the desired item with 90% accuracy; (2) use a communication strip with “I want” and thereafter add a desired item, and take this to a communicative partner to obtain desired item with 90% accuracy; (3) spontaneously request items using pictures from his communication book using “I” and “want” with 90% accuracy; and (4) answer questions using his communication book pictures with 90% accuracy.⁸³ Regarding Student’s OT goal, it was stated that student would be able to achieve the following by the end of the 2017-2018 school year: (1) engage in vestibular, proprioceptive, and tactile activity with no resistance or outburst for 15 minutes during each session for 3 consecutive sessions (sensory processing); (2) place 4 pennies in a container, place 5 pegs into a pegboard, sort 5 cards by color, and string 2 beads in 15 seconds per activity (fine and visual motor control); (3) utilize a mature pencil grasp with consistent hand dominance enabling him to copy a vertical line, horizontal line, and a circle at 80% accuracy for 3 consecutive sessions (fine and visual motor control); (4) properly hold scissors to cut across paper for 3 consecutive sessions (fine and visual motor control); (5) manipulate $\frac{3}{4}$ large buttons following demonstration in 3 consecutive sessions (self-care skill); (6) accept and follow a visual schedule for OT 50% of the session (sensory processing) (7) participate in Brain Gym activities (sensory processing); and (8) match letters of his first name to model requiring Mod (A) for 50% accuracy for 2 consecutive sessions (visual motor control).⁸⁴

⁸² Ex. Vol. II, p. 45.

⁸³ *Id.*

⁸⁴ Ex. Vol. II, p. 50.

The signature page of Student's May 8, 2017 IEP indicates that three people attended the IEP meeting, specifically Parent, Student's special education teacher, and his speech language pathologist. There was no general education representative or anyone representing the local education agency.⁸⁵

Third Grade, 2018-2019 School Year. Student's IEP for the 2018-2019 school year was developed on May 7, 2018 and indicated a duration of services from August 13, 2018 to May 23, 2019.⁸⁶ Pursuant to the IEP, Student was scheduled to attend school at the Consortium and, therein, receive all day self-contained special education services. Specifically, Student's schedule of services stated that he was to receive 402 minutes per week of special education instruction, 90 minutes per week of speech/language services, 60 minutes per week of OT, 90 minutes per week of speech-language pathology services and 150 minutes per week of personal care.⁸⁷

The IEP contained a statement of present level of academic achievement which indicated that Student was a "loving child" with a "wonderful sense of humor."⁸⁸ Regarding play, the present levels portion of the IEP stated that Student enjoyed the sensory room, liked to swing and play on the see saw at recess, and tolerated the sights and sounds of kids running and playing near him during recess.⁸⁹ It was further stated that Student was able to utilize the PECS system, specifically travel to his PECS book, find icons of words that he wanted to use, pull off the icons that represented what he wanted, and present that to a

⁸⁵ Ex. Vol. II, p. 53.

⁸⁶ Ex. Vol. II, p. 54.

⁸⁷ Ex. Vol. II, p. 68.

⁸⁸ Ex. Vol. II, p. 55.

⁸⁹ *Id.*

teacher, therapist, or aide.⁹⁰ Regarding occupational therapy, it was noted that Student had mastered 1 of 8 total goals during the second grade school year and that he still dropped to the floor and was noncompliant at times.⁹¹ Regarding academic goals, Student had mastered 1 of 3 total objectives with special notation that the academic objective of number recognition had been discontinued because Student was not ready for that concept.⁹²

Student's 2018-2019 IEP also included a list of modifications and accommodations to include reduced assignments, video assignments, "opportunity to respond orally," short instructions, visual aids, frequent feedback, encouragement, altered format of materials, adapted materials for functional use, human reader, and extended time.⁹³

Students May 7, 2018 IEP contained two English language arts/speech therapy goal, the first of which stated that Student would demonstrate appropriate use of PECS 80% of the time by the end of the school year.⁹⁴ The objectives for this goal were nearly identical to those addressed in the 2017-2018 IEP from the previous year.⁹⁵ The second English language arts/speech therapy goal is nearly identical to the first.⁹⁶

Also included were five other goals, one for English language (not speech related), one for math, two for behavior, and one for "factor – academic."⁹⁷ Student's English language arts goal stated that Student would trace letters of the alphabet with 60% accuracy by the end of the third grade school year.⁹⁸ His math goal stated that Student would use the Touch

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ Ex. Vol. II, p. 57.

⁹⁴ Ex. Vol. II, p. 64.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Ex. Vol. II, pp. 59-63.

⁹⁸ Ex. Vol. II, p. 59.

Point method to count and show number recognition with 80% accuracy by the end of the third grade school year.⁹⁹ Regarding behavior, Student's first behavior goal stated that he would demonstrate improved social/behavioral skills by following directions to complete assignments and tasks 70% of the time by the end of the school year. This goal included three objectives which stated that Student would achieve the following: (1) demonstrate improved social/behavioral skills by using materials appropriately and not throwing materials 70% of the time; (2) independently travel to his picture schedule, manipulate the picture cards correctly, and travel to his learning station 4 of 5 days weekly; and (3) use his PECS book to request materials needed to complete tasks with 80% accuracy.¹⁰⁰ Student's second behavior goal stated that he would demonstrate improved social/behavioral skills by following rules during 1 of 1 activities by the end of each grading period.¹⁰¹ Finally, Student's "Factor – Academic" goal stated that Student would demonstrate the ability to listen in a group setting independently by achieving mastery of 1 of 1 related objectives by the end of the third grade school year.¹⁰²

The signature page of Student's May 7, 2018 IEP indicates that four people attended the IEP meeting, specifically Parent, Student's special education teacher, a general education teacher, and registered nurse. There was no representative of the local education agency, and neither Student's speech pathologist nor his occupational therapist attended the meeting.¹⁰³

⁹⁹ Ex. Vol. II, p. 60.

¹⁰⁰ Ex. Vol. II, p. 61.

¹⁰¹ Ex. Vol. II, p. 62.

¹⁰² Ex. Vol. II, p. 63.

¹⁰³ Ex. Vol. II, p. 53.

Fourth Grade, 2019-2020 School Year. On May 21, 2019, District held an IEP meeting to conduct an annual review and plan for Student's 2019-2020 IEP.¹⁰⁴ Student's special education teacher prepared and brought a draft IEP to the meeting, as well as OT reports, speech therapy reports, progress information regarding goals from Student's 2018-2019 IEP, and extended school year information.¹⁰⁵ Student's special education teacher said that she knew prior to the meeting that OT was going to be discontinued because she saw the discharge report prior to the meeting.¹⁰⁶ For that reason, she contacted Student's father and ensured that he was going to be present at the IEP meeting.¹⁰⁷

The draft IEP stated that duration of services would be August 13, 2019 through May 22, 2020. The present levels of academic achievement section of the IEP states again that Student is loving with a good sense of humor, adding that Student seems happy when he gets off the bus in the morning and that he loves to play in water puddles.¹⁰⁸ It is also stated that Student has mastered 5 out of 12 objectives in academic skills and behavior and can do many short tasks without issue.¹⁰⁹ Despite speech therapy, the IEP stated that Student had not reached his goals with regard to the PECS communication system, noting that student often threw objects during speech therapy and required sensory intervention.¹¹⁰ Student was noted to have refused to use PECS for communicating with teachers or requesting items.¹¹¹

¹⁰⁴ Hrg. Tr., Vol. I, pp. 203-04.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Ex. Vol. II, p. 72.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

The present levels section of the IEP also notes that Student will continue to be placed in the self-contained special education classroom at the Consortium.¹¹² Modifications and accommodations on the 2019-2020 IEP draft were identical to those from the previous school year.¹¹³ The schedule of services indicated that Student would receive 450 minutes per week of direct instruction in English language arts, 450 minutes per week of direct instruction in math, 220 minute per week of direct instruction in science, 150 minutes per week of personal care, and 100 minutes per week of speech therapy.¹¹⁴

Four goals were expressed on Student's 2019-2020 IEP draft. The first, an English language arts goal, stated that Student will trace his first and last name with 80% accuracy by the end of Student's fourth grade year.¹¹⁵ The second, a math goal, stated that Student will use the Touch Point method to count and show number recognition with 80% accuracy by the end of the school year.¹¹⁶ The third, a behavior goal, stated that Student will demonstrate improved social and behavioral skills by following directions to complete assignments and tasks 70% of the time by the end of the 2019-2020 school year.¹¹⁷ Finally, the fourth goal, an English language – speech therapy goal, stated that Student will demonstrate improved expressive and receptive communication skills when given appropriate stimuli 70% of the time by the end of the 2019-2020 school year.¹¹⁸

¹¹² *Id.*

¹¹³ Ex. Vol. II, p. 75.

¹¹⁴ Ex. Vol. II, p. 81.

¹¹⁵ Ex. Vol. II, p. 77.

¹¹⁶ Ex. Vol. II, p. 76.

¹¹⁷ Ex. Vol. II, p. 78.

¹¹⁸ Ex. Vol. II, p. 79.

The extended school year services addendum to the draft IEP indicates that there was no significant concern about several factors including, but not limited to, Student's rate of progress, behavioral problems, physical problems, ability to interact with nondisabled children, and vocational needs.¹¹⁹

During the annual review IEP meeting, information was presented about Student's progress on IEP goals during the previous school year, Student's third grade year, and then the OT assistant and the speech therapist presented their progress reports and made recommendations.¹²⁰ Regarding the OT recommendation, an annual review and discharge summary was provided for discussion.¹²¹ This discharge summary stated that Student had mastered 0 out of 7 OT objectives during the 2018-2019 school year and that, "due to poor motivation, lack of participation and minimal progress," Student would be dismissed from OT services. Parent became upset when he learned of the plan to discontinue OT services and, ultimately, the IEP team called the LEA supervisor and had a conference call with her and the Parent. Regarding speech, the end of year progress report provided by Smith indicated that Student been able to work on only 2 of 8 total objectives, and that Student had mastered neither of the objectives that had been addressed.¹²² The PECS system was not effective for Student, and it was noted that Student frequently bit, hit, pinched, and threw objects during therapy sessions.¹²³ At the end of the meeting, things remained undecided on

¹¹⁹ Ex. Vol. II, p. 187.

¹²⁰ Hrg. Tr., Vol. I, pp. 205, 227.

¹²¹ Ex. Vol. II, p. 311.

¹²² Ex. Vol. II, p. 313.

¹²³ *Id.*

the OT issue, with District intending to discontinue OT services and Parent in search of legal and other options.¹²⁴ No IEP was agreed upon.¹²⁵

A notice of conference dated June 4, 2019 was sent to Parents, scheduling another IEP meeting for June 11, 2019. The purpose of the meeting was “to address parent’s concerns.” The District individuals invited to this meeting included Student’s speech language therapist, Smith, the OT assistant, Rainwater, Student’s special education teacher, District’s LEA, Nancy Early, and the District’s Superintendent, Sandra Lanehart.¹²⁶ Parents did not attend the meeting scheduled for June 11, 2019, and, pursuant to a separate programming conference decision form dated June 11, 2019, the remaining IEP team discussed teacher reports and report cards, Student’s current IEP, existing evaluation data, service provider information, and skill regression.¹²⁷ It was noted on the decision form that the team would meet again if Parent requested same.¹²⁸

A notice of conference dated July 2, 2019 was sent to Parents, scheduling another IEP meeting for July 16, 2019.¹²⁹ The purpose of this meeting was the same as the previous meeting, specifically to address the concerns of Parents.¹³⁰ The same district personnel were invited to this meeting as well. There is a note on District’s contact log dated July 15, 2019 indicating that Parents stated that they would not attend an IEP meeting and would “wait for a hearing.”¹³¹ A notice of action dated July 16, 2019 was completed to document the IEP

¹²⁴ Hrg. Tr., Vol. I, p. 226.

¹²⁵ Ex. Vol. II, pp. 181-82.

¹²⁶ Ex. Vol. II, p. 189.

¹²⁷ Ex. Vol. II, p. 192.

¹²⁸ *Id.*

¹²⁹ Ex. Vol. II, p. 193.

¹³⁰ *Id.*

¹³¹ Ex. Vol. II, p. 195.

meeting that took place in Parents' absence.¹³² The notice confirmed the discontinuance of OT and noted that Student's speech services would be split into shorter, but more frequent sessions.¹³³

On August 8, 2019, a notice of conference scheduling an IEP meeting for August 12, 2019 was sent to Parents.¹³⁴ A notice of action dated August 12, 2019 indicates that Parents attended the scheduled meeting.¹³⁵ The purpose of the meeting to ensure that Student's special education teacher and therapists were on the same page moving forward and were all aware of recent decisions.¹³⁶ Parents provided a speech and OT assessment from another provider, and also questioned whether the school had plans to provide a new communication device to Student for the upcoming school year.¹³⁷ The notice of action indicates that Parents refused to sign any paperwork and that a due process hearing had been filed just prior to the meeting.¹³⁸

Speech and Occupational Therapy

Occupational Therapy. Regarding OT, during the 2018-2019 school year, Student was scheduled to receive, and did receive, 90 minutes per week of occupational therapy. Student's level of functioning is approximately comparable to a two to three-year-old child, and Student often struggled with therapy as a result.¹³⁹

¹³² Ex. Vol. II, p. 199.

¹³³ *Id.*

¹³⁴ Ex. Vol. II, p. 203.

¹³⁵ Ex. Vol. II, p. 205.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Hrg. Tr., Vol. III, p. 51.

Donna Rainwater, Certified Occupational Therapist Assistant, provided direct OT therapy to patient for three years prior to the discontinuation of services in May 2019.¹⁴⁰ Between October 2018, when Student was evaluated for OT services, and May 21, 2019, when Student's services were discontinued, Rainwater worked with Student to address fine motor, visual motor, self-care skills, and sensory processing.¹⁴¹ Rainwater explained that minimal progress was made during this three-year period and that goals were adjusted so that Student could hopefully meet them throughout that time.¹⁴²

Student struggled with transitioning to OT therapy sessions during the 2017-2018 and 2018-2019 school years.¹⁴³ Student resisted going to the therapy room and refused to sit at the work desk. Student was given an opportunity to choose his preferred seat location, and to work in the classroom instead of the therapy room, to no avail.¹⁴⁴ Student refused to attempt tasks that were given to him by Rainwater and Martens.¹⁴⁵ His special education teacher attempted to assist the occupational therapist or therapy assistant with Student's transition issues by accompanying Student into the designated therapy room at the start of sessions.¹⁴⁶ She also observed Student to see if she could troubleshoot the reasons for Student's resistance.¹⁴⁷ During OT, Student would throw objects, kick staff, and run away.¹⁴⁸ Student's behavior impacted his ability to participate fully in OT, and his behavior worsened

¹⁴⁰ Hrg. Tr., Vol. III, p.33.

¹⁴¹ Hrg. Tr., Vol. III, p. 35.

¹⁴² *Id.*

¹⁴³ Hrg. Tr., Vol. I, p. 228-30.

¹⁴⁴ Hrg. Tr., Vol. III, p. 37.

¹⁴⁵ Hrg. Tr, Vol. III, p. 38.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

during the last year of therapy.¹⁴⁹ Things that Student responded to in OT included proprioceptive activities, such as playing with thera-putty, deep pressure, using his iPad, and snacks.¹⁵⁰

Student's special education teacher felt that the OT sessions were resulting in Student being more agitated in the classroom following therapy and that the therapy was doing more harm than good.¹⁵¹ Student's behavior interfered with his behavior in the classroom, in general, approximately 50% of the time.¹⁵² No behavior plan was put in place for Student during the statutory timeframe relevant to this case.

On May 21, 2019, Rainwater and Carol Martens, Rainwater's supervising occupational therapist, recommended at Student's annual IEP review that Student's direct OT services be discontinued on account of Student's lack of participation and minimal progress.¹⁵³ It was concluded that OT was no longer affecting changes in Student's level of functioning in the school setting.¹⁵⁴ Rainwater explained that, ethically, OT needed to be discontinued because it would be in violation of the code of ethics for occupational therapists to continue services when they are no longer beneficial to the client.¹⁵⁵

Rainwater and Martens made recommendations for continued classroom use, including the Wilbarger brushing protocol, weighted blanket, and other techniques for calming.¹⁵⁶ Since discontinuation of direct services, Rainwater and Martens have provided

¹⁴⁹ Hrg. Tr., Vol. III, pp. 38, 48.

¹⁵⁰ Hrg. Tr., Vol. III, p. 99.

¹⁵¹ Hrg. Tr., Vol. I, p. 229.

¹⁵² Hrg. Tr., Vol. I, p. 272-74.

¹⁵³ Hrg. Tr., Vol. III, p. 36.

¹⁵⁴ Hrg. Tr., Vol. III, p. 38.

¹⁵⁵ Hrg. Tr., Vol. III, p. 41.

¹⁵⁶ *Id.*

consultation services to District on Student's behalf. This entails discussing classroom recommendations with Student's special education teacher to help address sensory and fine motor concerns.¹⁵⁷ Rainwater explained that Student still had OT needs, but that based on the lack of progress, and her ethical requirement to not provide services if they were not beneficial, only classroom OT was being provided.¹⁵⁸ Rainwater testified that, to her knowledge, there were no discussions with Parents regarding Student's behavior during therapy or Student's lack of progress.¹⁵⁹

Dr. Aldea testified that Student would benefit from continued OT, particularly given that he is nonverbal.¹⁶⁰ In his opinion, OT would help Student continue to work on self-care skills, sensory integration, fine motor skills, gross motor skills, and communication, even if his progress was slow.¹⁶¹

Speech Therapy. Regarding speech therapy, Student was scheduled to receive 90 minutes per week of speech therapy, to be provided in 3 sessions lasting 30 minutes each.¹⁶² During the 2018-2019 school year, Student's third grade year, Student should have received 108 physical therapy sessions (36 weeks multiplied by 3 times per week).¹⁶³ Kathey Smith, Student's speech therapist at the District, testified that Student received only 59 sessions during the 2018-2019 school year, constituting half of the total number of sessions that Student was due per his IEP.¹⁶⁴ The reasons for missing sessions included conferences that

¹⁵⁷ Hrg. Tr., Vol. III, p. 39.

¹⁵⁸ Hrg. Tr., Vol. III, p. 107.

¹⁵⁹ *Id.*

¹⁶⁰ Hrg. Tr., Vol. II, p. 101.

¹⁶¹ *Id.*

¹⁶² Hrg. Tr., Vol. III, p. 138.

¹⁶³ Hrg. Tr., Vol. III, p. 134.

¹⁶⁴ *Id.*

caused Smith to miss sessions, as well as absences on the part of Student.¹⁶⁵ Smith testified that Student typically performed better during speech therapy when the session was shorter in length.¹⁶⁶

Student's speech therapist since summer 2019, Glenda Hanson, described Student as having a profound communication disorder, secondary to being nonverbal, explaining that Student communicated with gestures, behaviors, and sounds, but without using any spoken vocabulary.¹⁶⁷ Hanson provides services for Student outside of the school setting, and noted that Student is receiving services at school as well.¹⁶⁸ Hanson has communicated with Student's speech therapist at school, Smith, regarding therapy issues for consistency purposes.¹⁶⁹ Maintaining attention is a major issue for Hanson in her therapy sessions with Student.¹⁷⁰ Hanson incorporates behavioral modification techniques in her therapy sessions to assist student with maintaining attention on the tasks at hand.¹⁷¹ Because of Student's attention issues, it is sometimes difficult to accurately assess the true nature of Student's abilities.¹⁷² Since Student began working with Hanson in the summer of 2019, he has progressed from being able to complete 0% of his goals to approximately 30%.¹⁷³ Hanson testified that obtaining compliance is necessary for any progress to be made regarding Student's goals.¹⁷⁴

¹⁶⁵ Hrg. Tr., Vol. III, p. 135.

¹⁶⁶ Hrg. Tr., Vol. III, p. 167.

¹⁶⁷ Hrg. Tr., Vol. III, pp. 9-10.

¹⁶⁸ *Id.*

¹⁶⁹ Hrg. Tr., Vol. III, p. 131.

¹⁷⁰ Hrg. Tr., Vol. III, p. 13.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ Hrg. Tr., Vol. III, p. 14.

¹⁷⁴ *Id.*

CONCLUSIONS OF LAW AND DISCUSSION:

Pursuant to Part B of the IDEA, states are required to provide a FAPE for all children with disabilities between the ages of three and twenty-one. 20 U.S.C. § 1412(a); 34 C.F.R. §300.300(a). In 1982, in *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, the United States Supreme Court addressed the meaning of FAPE and set forth a two-part analysis that must be made by courts and hearing officers in determining whether a school district has failed to provide FAPE as required by federal law. 458 U.S. 176, 206-07 (1982); *K.E. ex rel. K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795, 804 (8th Cir. 2011). The first inquiry that a court or hearing officer must make is that of whether the State, *i.e.* local educational agency or district, has complied with the procedures set forth in the IDEA. Thereafter, it must be determined whether the student's education was reasonably calculated to provide the student educational benefit. *Id.*

Procedural Violations of FAPE

It must first be determined whether District complied with the procedures set forth in the IDEA between August 12, 2017 and August 12, 2019. Parents allege two procedural issues in this case, specifically that District failed to secure an assistive technology evaluation for Student to timely address his need for a communication device, and that District failed to comply with Student's existing IEP during the 2018-2019 school year with regard to the provision of speech therapy minutes.

Regarding Parents' allegation that District failed to secure an assistive technology evaluation for Student to timely address his need for a communication device, this Hearing Officer agrees that District committed a procedural violation of the IDEA. Student has been

in the District since he was in the first grade and his communication issues have been known since that time. Student's IEPs for the statutory period covered by this due process hearing, specifically the IEPs for Student's second, third, and fourth grade years, all address Student's severe communication deficit and nonverbal status. Student's IEP for the second-grade year, the 2017-2018 school year, references the use of PECS as a means of improving communication for Student. However, it is clear from testimony, as well as the fact that District sought a CIRCUIT referral regarding assistive technology during Student's second grade year, that Student was not adequately responding to the PECS system as the District hoped.

Despite this fact, Student's 2018-2019 third grade IEP also included the use of PECS, and testimony from Student's special education teacher showed that Student was absolutely not responding to PECS by January 2019. Other than the CIRCUIT referral request, District took no steps to address this issue. There is no evidence that any IEP meetings were called to review and revise Student's IEP regarding this issue. There is further no evidence that any evaluations were secured. In fact, evidence shows that District was waiting until it was time for Student to be reevaluated in the year 2020 to address the assistive technology issue further.

Here, Student's inability to communicate is likely the largest impediment that Student has with regard to his education. Nonetheless, District did not prioritize this issue in that they did not explore other available programs or seek a timely assistive technology evaluation to further address Student's deficits. This constitutes a clear procedural violation of the IDEA.

Regarding the allegation that District procedurally violated the IDEA by failing to provide all speech sessions required by Student's 2018-2019 IEP, this Hearing Officer agrees with Parents. The District conceded that Student should have received 90 minutes of speech therapy per week during the 2018-2019 school year, and that these minutes should have been split into thirty-minute sessions. Essentially, this required that Student receive 108 physical therapy sessions over the course of the 2018-2019 school year, which constituted 36 weeks multiplied by 3 sessions per week. District only provided 59 of those sessions, which is approximately half of the total number of sessions specified by Student's IEP.

Parents are requesting 960 minutes of compensatory speech therapy, as well as \$230.16 in mileage reimbursement as a result of Parents transporting Student to outside speech therapy services to make up for that not being provided by District.¹⁷⁵ District concedes that such compensatory education and mileage reimbursement is due Parents.¹⁷⁶

Both of these procedural violations will be further discussed below with regard to the issue of whether they constituted substantive violations of FAPE as well.

Substantive Violations of FAPE

Having analyzed the first prong of the FAPE analysis, specifically that of procedural violations, and determined that District (1) failed to appropriately evaluate Student for assistive technology needs and, (2) failed to provide speech therapy minutes to Student as required by his 2018-2019 IEP, it is now necessary to consider whether these and other actions of the District resulted in a substantive denial of a FAPE to Student. Even if a school district violated IDEA procedures, it does not automatically follow that the school district has

¹⁷⁵ See Post-Hearing Brief of Parents and District.

¹⁷⁶ *Id.*

denied the child a FAPE. *K.E. v. Indep. Sch. Dist. 15*, 647 F.3d 795, 804 (8th Cir. 2011). Rather, a school district’s educational plan for a given student will only be set aside for IDEA procedural violations “if the procedural inadequacies compromised the pupil’s right to an appropriate education, seriously hampered the parent’s opportunity to participate in the formulation process, or caused a deprivation of educational benefits.” *Id.* at 804-05.

Prior to March 22, 2017, Eighth Circuit law provided that if a student received “slight” or “de minimis” progress, then he or she was not denied educational benefit. *K.E.*, 647 F.3d at 810; *Paris Sch. Dist. v. A.H.*, 2017 WL 1234151 (W.D. Ark 2017). On March 22, 2017, however, the United States Supreme Court “rejected the ‘merely more than *de minimis*’ standard that had previously been the law of the Eighth Circuit.” *Paris Sch. Dist.*, 2017 WL at 4 (citing *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1, No. 15-827*, 2017 WL 1066260, 580 U.S. ___ (2017), 137 S.Ct. 988 (2017)).

In *Andrew F.*, the standard set forth by the Court is “markedly more demanding” as compared to the “merely *de minimis*” test outlined in *Rowley*. *Andrew F.*, 137 S. Ct. at 1000.

The Court stated the following:

It cannot be the case that the Act typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than *de minimis* progress for those who cannot. When all is said and done, a student offered an educational program providing “merely more than *de minimis*” progress from year to year can hardly be said to have been offered an education at all. For children with disabilities, receiving instruction that aims so low would be tantamount to “sitting idly . . . awaiting the time when they were old enough to “drop out.”

Andrew F., 137 S.Ct. at 1001 (citations omitted). The Court held that the IDEA requires, even demands, more. Specifically, the IDEA requires that students under the Act be provided with

an “educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Id.*

The IEP is the guiding document and primary method for providing special education services to disabled children under the IDEA. *Honig v. Doe*, 484 U.S. 305, 311 (1988). “Through the development and implementation of an IEP, the school provides a FAPE that is ‘tailored to the unique needs of a particular child.’” *Paris Sch. Dist.*, 2017 WL 1234151, at *5 (citing *Andrew F.*, 2017 WL 1066260, at *1000). An IEP is not designed to be merely a form but, instead, a substantive document that is developed only after a district has carefully considered a student’s “present levels of achievement, disability, and potential for growth.” *Id.* (citations omitted). Pursuant to *Andrew F.*, a district “must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” 2017 WL 1066260, at *1000. For most students, to comply with this standard, providing FAPE “will involve integration in the regular classroom and individualized special education calculated to achieve advancement from grade to grade.” *Id.* However, in the event that this is not possible, the education of a disabled child still needs to be “appropriately ambitious” in light of a student’s individual circumstances. *Id.*

Every IEP, pursuant to the IDEA, is required to include the following: (1) a statement of a student’s present levels of academic achievement and functional performance; (2) a description of how a student’s disability affects his or her involvement and progress in the general education curriculum; (3) annual goals that are measurable, as well as a description as to how progress toward stated goals will be measured; and (4) a description of special education and related services provided to student. 20 U.S.C. § 1414(d)(1)(A)(i)(I)-(IV).

Procedural Violations. In the present case, regarding the failure to secure an assistive technology evaluation and failure to provide speech minutes as specified in Student's 2018-2019 IEP, it is the opinion of this Hearing Officer that District's procedural violations also resulted in a substantive denial of a FAPE. Each of these procedural violations went to the issue of Student's ability to communicate with his teachers and therapists, the very issue that every evaluator and witness indicated is Student's main impediment to educational progress. Despite the fact that District was aware that PECS was not working for Student during the 2017-2018 school year, Student was not provided any other type of communication device until after the 2018-2019 school year. Had District acted swiftly when it realized that PECS was not working for Student, Student would not have lost in excess of a year of communication potential. Similarly, with regard to speech therapy minutes on Student's 2018-2019 IEP, the goals of speech therapy were to work on communication initiatives for Student. In this case, Student did not merely miss a few sessions. Instead, he was not provided with approximately 50% of the total number of sessions that were required. There is no question that this likely impacted Student's progress with regard to communication issues.

Appropriateness of IEP. Regarding the issue of whether Student's IEPs for the 2017-2018, 2018-2019, and 2019-2020 school years were appropriate, it is the opinion of this Hearing Officer that none of these IEPs were reasonably calculated to enable Student to make progress appropriate in light of his individual circumstances. While Student's IEPs include descriptive statements of Student's observed present levels of academic achievement and functional performance, those statements are ultimately lacking in information that is

supported by evaluations of Student. This is likely because it appears that there have not been sufficient evaluations to address Student's deficit areas. As noted above, there has been no assistive technology evaluation despite the fact that District is aware that one has been needed since at least the 2017-2018 school year. Student's behavior was cited as an issue in all three of the IEPs in question, yet there has been no attempt on the part of the District to secure a functional behavior assessment or conduct any other behavior assessment. Certainly, proper programming for Student is dependent on appropriate information and evaluations regarding his abilities and skills.

In addition, the goals on the 2017-2018, 2018-2019, and 2019-2020 IEPs are nearly identical from year to year, at least from a substantive standpoint. It was noted with regard to certain goals that Student was unable to begin working on the goals during the school year because he was not ready for the concepts in question. That, standing alone, is evidence that the goals are not appropriate in light of Student's individual circumstances. While it is certainly not expected that a Student be able to perform all goals at the beginning of a school year, the goals should be such that Student is able to begin working toward them. On the 2017-2018 IEP, it was noted that, during Student's first grade year, he had mastered none of the goals and objectives that had been set for him. On the 2018-2019 IEP, it was noted that, during Student's second grade year, he had mastered 1 of 8 total goals. Finally, on Student's 2019-2020 IEP, it was noted that Student had mastered 5 of 12 objectives, as opposed to goals, during his third-grade year. Student's deficits are severe, no doubt, but it cannot be said that the goals and objectives set forth for Student during the 2017-2018, 2018-2019,

and 2019-2020 school years were appropriately ambitious in light of Student's individual circumstances.

Parents alleged that Student's IEPs were also inappropriate in that they failed to provide for a board certified behavior analyst (hereinafter "BCBA") to develop, implement, and monitor a therapy program to address Student's behavior issues. This Hearing Officer agrees with Parents with regard to this issue. Testimony from Student's special education classroom teacher, speech language pathologists, and occupational therapists established that Student's behavior was a key issue with regard to his responsiveness to therapies and classroom activities. Numerous individuals testified that Student drops to the floor when he does not want to do a task, and that he engages in aggressive behaviors such as pinching, hitting, kicking, and biting himself and others. It is also clear from the record that Student has issues staying focused on tasks, which is another issue that could be positively affected by behavior intervention. The Dennis Developmental Center evaluation from December 2017 stated that Student hit and punched the evaluator when he did not want to continue with testing. Student's speech and occupational therapists have reported this same scenario on progress reports and evaluations for Students. Student's behavioral issues not only extend to classroom exercises and therapy, but also to the transition between activities. In fact, Student's special education classroom teacher testified that she felt that Student's behavior was worse after he returned to the classroom following OT therapy sessions.

Despite constant behavioral interruptions between August 12, 2017 and August 12, 2019, the statutory period covered by this due process hearing, District has only attempted to address Student's behavioral issues by having one to two behavioral goals on each of

Student's IEP. Clearly, this is not addressing the real problem as Student's behavioral issues are continuing from year to year. District has not sought a functional behavior assessment or otherwise sought consultation with a behavior specialist. No additional IEP meetings were called to address or consider this issue. Given the severity of Student's behaviors, District was on notice during the 2017-2018 and 2018-2019 school years that Student needed more substantial intervention than what it was providing.

Parents also allege that District's decision to discontinue OT for Student during the 2019-2020 school year resulted in the IEP for Student's fourth grade year being inappropriate. Here, the evidence established that OT services were discontinued beginning May 21, 2019 because it appeared that Student was not motivated to participate in therapy and was not making sufficient progress. Rainwater, Student's occupational therapy assistant, and Martens, Student's occupational therapist, both testified that ethically they were not permitted to provide OT services if the Student was no longer benefiting from those services.

On the surface, it appears that Student is failing to make progress and, therefore, is no longer benefiting from OT. The underlying issue, however, is the extent to which Student's behavior is playing a role in his lack of progress. Because Student's behavioral issues have not been fully addressed, it is likely that the observed lack of progress could be attributable to the behavioral issues of Student. It may well be that after Student's behaviors are addressed that he is able to more fully participate in OT. Because Student's behavioral issues have not been addressed and, thus, ruled out as an impediment to OT, it is the opinion of this Hearing Officer that discontinuing OT services at this time constitutes a substantive violation of FAPE. It is understood that perhaps Rainwater and Martens are unable to continue serving

Student if they feel that ethically they cannot do so. That does not prevent another occupational therapist with a different approach and assistance from a BCBA approved behavior plan to continue attempting to serve Student.

Finally, Parents contend that Student's IEPs for the 2017-2018, 2018-2019, and 2019-2020 school years did not take into account recommendations that Student be provided more than 90 minutes of speech therapy per week. At this point, it is not possible to determine if more speech therapy minutes would have assisted Student. Again, from a behavioral standpoint, Student is not currently able to adequately tolerate 90 minutes of speech therapy per week. Once Student's behavioral issues are addressed and Student has been fully evaluated from an assistive technology standpoint, it would be worthwhile to have Student reevaluated to determine the amount of speech therapy minutes that are recommended.

For all of these reasons, it is the opinion of this Hearing Officer that Student's IEPs for the 2017-2018, 2018-2019, and 2019-2020 school years were inappropriate in that they were not reasonably calculated to allow Student to make progress in light of his individual circumstances.

Least Restrictive Environment.

Parents allege that the District failed to educate Student in the least restrictive environment. As stated *supra*, the IDEA requires that students with disabilities be educated in the least restrictive environment pursuant to 20 U.S.C. §1412(a)(5). There is a "strong preference in favor of disabled children attending regular classes with children who are not

disabled,” resulting in a “presumption in favor of public school placement.”¹⁷⁷ However, the IDEA “significantly qualifies the mainstreaming requirement by stating that it should be implemented to the ‘maximum extent appropriate.’”¹⁷⁸ Essentially, a disabled student should not be separated from his or her peers unless the services that make segregated placement superior cannot be “feasibly provided in a non-segregated setting.”¹⁷⁹ The requirement to mainstream is not applicable when it “cannot be achieved satisfactorily.”¹⁸⁰ As such, it is permissible to remove a disabled child from a mainstream environment when he or she would not benefit from mainstreaming or when the “marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting.”¹⁸¹

Parents assert that the District’s determination to place and maintain Student in the Consortium has resulted in Student not being educated in the least restrictive environment. Student was placed in the Consortium prior to becoming a student of the Monticello School District in Student’s first grade year. Based on testimony and documents in the record, it appears that Student’s placement has not been addressed at any point since Student was moved into the District. Student’s 2017-2018, 2018-2019, and 2019-2020 IEPs all stated that Student would remain in the Consortium. There is no indication that the placement was discussed at Student’s annual IEP reviews or at any other time throughout Student’s second and third grade school years. Student’s annual review in May 2017 was not attended by a

¹⁷⁷ *CIN*, 323 F.3d at 641.

¹⁷⁸ *Pachl v. Seagren*, 453 F.3d 1064, 1067 (8th Cir. 2006); *see also* 20 U.S.C. § 1412[a](5).

¹⁷⁹ *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983).

¹⁸⁰ *Pachl*, 453 F.3d at 1068.

¹⁸¹ *Roncker*, 700 F.2d at 1063.

general education teacher, indicating to this Hearing Officer that placement in the general education curriculum was in no way considered by the IEP team.

In the Consortium, Student is with other students who are profoundly disabled. He is near non-disabled students only during his recess period, and there was testimony that Student tends to isolate himself at recess to swings and other activities that do not allow him to regularly engage with other non-disabled students. It is difficult to predict at this point whether Student would be able to function in a less restrictive setting given the information that is available in the record; however, it is the opinion of this Hearing Officer that the failure of the District to consider the possibility of a less restrictive environment for Student constitutes a substantive violation of the least restrictive environment requirement. Certainly, after a trial period, it may be determined by Student's IEP team that the Consortium is the appropriate placement for Student. At this point, however, nothing but the Consortium has been considered, which is problematic.

Conclusion

Having considered Parents' allegations of procedural and substantive due process violations, and in light of the findings and conclusions *supra*, it is the conclusion of this Hearing Officer that Student was denied FAPE between August 12, 2017 and August 12, 2019 as a result of procedural and substantive violations of the IDEA.

ORDER:

The results of the testimony and evidence warrant a finding for Parents. Specifically, Parents introduced sufficient evidence in the record to establish by a preponderance of the

evidence that District denied Student FAPE between August 12, 2017 and August 12, 2019.

District is hereby ordered to take the following actions regarding Student:

1. Provide 960 minutes of compensatory education in speech therapy provided that District will consult regularly with Student's private therapist and Parents to assess whether these additional minutes per week of speech therapy during compensatory education can be tolerated by the Student.
2. Provide extended year services during the summer of 2020 and the summer of 2021, during which time Student will receive 60 minutes of speech therapy per week. District will consult regularly with Student's private therapist and Parents to assess whether these additional minutes per week of speech therapy during extended year services can be tolerated by the Student.
3. Pay Parents the amount of \$230.16 to reimburse Parents for mileage expenses incurred as a result of traveling to and from private speech therapy sessions scheduled for Student.
4. Contact Easter Seals within fifteen (15) days of the date of this decision and make arrangements for a full assistive technology evaluation to be conducted for Student.
5. Contact a BCBA within fifteen (15) days of the date of this decision and make arrangements for (1) a full behavioral evaluation to be conducted for Student and, (2) a program to address Student's behavioral issues going forward. Should the program recommended by the BCBA include ABA therapy, District

shall provide this therapy to Student in accordance with the behavioral program.

6. Following receipt of the Easter Seals assistive technology evaluation and the BCBA evaluation and recommended program, District shall develop a new IEP to include measurable and meaningful goals for Student, as well as progress monitoring. The new IEP should address Student's deficits in communication and behavior, provide for 100 minutes of speech therapy per week, and provide for occupational therapy as provided by Student's most recent OT evaluation by Kidsource Therapy. Student's newly developed IEP shall include a provision that the IEP team meets and reevaluates Student's IEP every three (3) months for the first year to reevaluate appropriateness of placement, goals, speech therapy, and occupational therapy.
7. Change Student's placement to an appropriate classroom at Monticello Intermediate School. District and Parents will meet prior to this change in placement and agree to a transition plan for Student. Following this change in placement, Student's IEP team will meet every three (3) months for the first year to reevaluate whether the new placement is, in fact, appropriate for Student.
8. Assign a one-on-one paraprofessional to Student as deemed appropriate by District and Parents.

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.

/s/ Danna J. Young

HEARING OFFICER

02/24/2020

DATE