

**ARKANSAS DEPARTMENT OF EDUCATION
Special Education Unit**

IN RE:

XXXXXXXX, Parents on behalf of
XXXXXXXX, Student

PETITIONERS

VS.

CASE NO. H-20-15

Atkins School District

RESPONDENT

HEARING OFFICER'S FINAL DECISION AND ORDER

ISSUES PRESENTED:

Whether the Atkins School District (hereinafter "District" or "Respondent") denied XXXXXX (hereinafter "Student") a free, appropriate, public education (hereinafter "FAPE") between December 13, 2017 and December 13, 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 referred to as "IDEA"), by failing to provide individualized educational programs (hereinafter "IEP") reasonably calculated to enable Student to make progress appropriate in light of his circumstances.

PROCEDURAL HISTORY:

On December 13, 2017, the Arkansas Department of Education (hereinafter referred to as "Department") received a request to initiate due process hearing procedures from XXXXX and XXXXX XXXXXX (hereinafter referred to as "Parents" or "Petitioners"), the parents and legal guardians of Student. Parents requested the hearing because they 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 "IDEA" or the "Act") and the regulations set forth by the Department by

not providing the Student with appropriate special education services, as noted *supra* in the statement of issues.¹ At the time that Parents filed a request for a due processing hearing, Student was a ten-year-old male enrolled in the fifth grade at District, specifically enrolled at the Atkins Middle School.²

In response to the Parents' request for hearing, the Department assigned the case to an impartial hearing officer. Thereafter, February 3, 2020 was set as the date on which a hearing would commence should the Parents and District fail to reach resolution prior to that time.³ A prehearing conference regarding this matter was conducted, via telephone, on January 30, 2020 and counsel for both parties participated. During the prehearing conference, the parties discussed unresolved issues to be addressed at the hearing, as well as the witnesses and evidence which would be necessary to address same. Thereafter, the due process hearing in this matter began as scheduled on February 3, 2020. There were joint requests for continuances made on the record so that both Parents and District would have ample time to complete their presentation of testimony on the issues in this case. All in all, testimony was heard on February 3, 2020, February 5, 2020, February 6, 2020, February 27, 2020, and April 20, 2020.⁴

The following witnesses testified in this matter: Melissa Hannah, Tim Conway, Amber White, Jackie Rooke, David Hanson, Ragen Fiddler, Penny Laymon, Lois Duvall, Parents, Susan Ward, and Audra Alumbaugh.⁵

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,

¹ See Hearing Officer File – Petitioner Complaint, p. 2.

² See Hearing Officer File – Petitioner Complaint, p. 2.

³ See Hearing Officer File – Scheduling Order.

⁴ See *generally* Transcript, Vols. I-V.

⁵ See *generally* Transcript, Vols. I-V.

J.D., Hearing Officer for the Arkansas Department of Education, conducted a closed impartial hearing. Parents were represented by Theresa 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 in lieu of closing statements, and both timely submitted briefs in accordance with the deadline set by this Hearing Officer.⁶

FINDINGS OF FACT:

Background

Student is an eleven-year-old male that attends the Atkins School District.⁷ At the conclusion of the due process hearing in this matter, Student had nearly completed his fifth-grade year at District.⁸ Parent (Mother) testified that Student began having difficulties at a young age and, by the time he was three years old, Student was receiving speech therapy services.⁹ Prior to Student beginning school, Parents noticed that Student was struggling with letter recognition, despite the fact that Parents were working with him on this skill.¹⁰ Parents also noticed that Student was struggling to articulate words.¹¹ By the middle of kindergarten, after teachers had worked with Student to no avail, it became apparent that Student needed academic intervention.¹²

In January 2015, Student was evaluated and identified for special education services under the IDEA disability category of specific learning disability (hereinafter “SLD”).¹³ This category was

⁶ See Hearing Officer File – Post-Hearing Briefs.

⁷ See Hearing Officer File – Petitioner Complaint, p. 2; Ex. Vol. I., p. 001.

⁸ Petitioner Exhibits, p. 001.

⁹ Transcript, Vol. V., p. 9.

¹⁰ *Id.* at 10.

¹¹ *Id.* at 11.

¹² *Id.*

¹³ See Hearing Officer File – Petitioner Complaint, p. 2; Respondent Exhibits, p. 46.

selected on account of the fact that there was a significant gap between Student's intelligence and achievement scores.¹⁴

An evaluation/programming conference form dated January 30, 2015 indicated that Student was administered the following tests: (1) Photo Articulation Test – Third Edition (PAT-3); (2) Comprehensive Assessment of Spoken Language (CASL); (3) Test of Language Development – Primary: Fourth Edition (TOLD-P:4); (4) Oral and Written Language Scales (OWLS); (5) Adaptive Behavior Evaluation Scale – Revised Second Edition; (6) Kaufman Test of Educational Achievement 3; (7) Woodcock Johnson test of Achievement – III; (8) Bender-Gestalt II; and (9) Comprehensive Test of Phonological Processing.¹⁵ From these assessments, it was determined that Student had average intelligence, yet his academic skills were below average or extremely low in the areas of letter/word identification, reading comprehension, math concepts, math computation, spelling and written expression. Student's language skills were mildly delayed, as were his articulation and phonological awareness skills, memory, fine motor coordination, and manual coordination. Student was severely delayed in the areas of visual motor integration, visual perception, and fine motor control.¹⁶ It was noted that Student did not have behavior issue and that Student attended school regularly.¹⁷ Student was initially placed on an IEP that provided direct instruction in reading, math, and written expression, as well as speech language therapy (60 minutes) and occupational therapy (60 minutes) per week.¹⁸

¹⁴ Transcript, Vol. II, p. 164.

¹⁵ Respondent Exhibits, pp. 46, 15-22.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Respondent Exhibits, p. 107.

Third Grade, 2017-2018 School Year (Spring Semester)

During first and second grades, Student continued to receive special education services.¹⁹ At the start of third grade, in the fall of 2017, Student was receiving services pursuant to an IEP that was developed on January 31, 2017 and had a duration of services from January 31, 2017 through January 31, 2018.²⁰ On September 11, 2017, District held an IEP meeting at Parents' request to review Student's IEP. In the prior school year, Student received dyslexia intervention through the administration of a program called Phonics First, and Parents did not feel that Student was making progress as a result of this program. The District agreed with Parents regarding Student's lack of progress.²¹

At the September 11, 2017 IEP meeting, a new IEP was created with a duration period from date of development to September 11, 2018.²² In the section of the IEP that addressed present level of academic achievement and functional performance, it was noted that Student could understand basic features of print, spoken words, syllables, and sounds; however, Student was unable to read grade-level text with sufficient accuracy and fluency to support comprehension, unable to add and subtract within twenty, and unable to demonstrate command of the standard English conventions (capitalization, punctuation, and spelling) when writing.²³

This same section of the IEP also addressed reasons for academic, reading, writing, math, behavior, and communication development issues.²⁴ Regarding academic skill development, it was noted that Student's skill development was affected by, among other factors, short attention span,

¹⁹ First and second grades for Student, as well as the first semester of third grade, fall outside of the statute of limitations for this matter. Facts referencing events during these time periods are provided for background information only and not for the specific purpose of determining whether District violated the IDEA with regard to these events.

²⁰ Respondent Exhibits, pp. 156-167.

²¹ Respondent Exhibits, p. 195; Transcript, Vol. II, p. 190; Transcript, Vol. III, p. 19.

²² Respondent Exhibits, p. 195.

²³ *Id.*

²⁴ Respondent Exhibits, p. 196.

inability to concentrate on any one task, distraction by irrelevant stimuli, disorganization in use of books and materials, inability to follow and understand class discussion, difficulty understanding the meaning of time, and failure to comprehend requirements of completing assignments within appropriate timeframe.²⁵ Regarding reading acquisition, it was noted that Student was affected by visual discrimination difficulties, confusion of similar letters and words, letter and word reversals and inversions, difficulty following and retaining visual sequences, distracted reading, skipping and jumping over words, omission of words and phrases, slow recognition of words, and difficulty separating words into component phonemes and syllables.²⁶ Regarding writing and drawing delays, it was noted that Student was affected by inability to form letters and digits correctly, as well as difficulty in staying on or between lines, judging length and width of letters, spatial organization, and discriminating left from right.²⁷ Regarding mathematic skill development, it was noted that Student was affected by difficulty analyzing and solving math problems, associating spoken form with the correct printed material, understanding the meaning of the process sign, understanding the arrangement of numbers on a page, following and remembering sequence of steps necessary to conduct mathematical operations, and understanding concepts of space, time, distance, quantity, and linear measurement.²⁸ Regarding behavior, it was noted that Student was affected by, among other factors, hyperactivity, attention deficits, constant motion, inability to attend to a specific task, impulsivity, distractibility, inability to assimilate, store or recall visual and/or auditory stimuli.²⁹ Finally, regarding communication delays, it was noted that Student was affected by inability to comprehend works in connected speech, organize and express ideas, predict outcomes and make

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

judgments after appropriate dialogue, acquiring and using grammatical rules, formulating compound sentences, and write an organized paragraph.³⁰

Student's September 11, 2017 IEP had a total of three goals, one each for reading, English, and mathematics. Student's reading goal stated that Student, if given reading material on his grade level, would read grade-level text with eighty percent accuracy.³¹ The English goal for Student stated that he would demonstrate command of the conventions of standard English as appropriate for second grade with eighty percent accuracy.³² Student's mathematics goal stated that he would add and subtract within twenty with eighty percent accuracy throughout the date range of his IEP.³³ All three goals show that, after the first nine weeks of the third grade, Student progress was at twenty-five percent and that the goals were continued.³⁴

In addition to a statement of present levels and goals, Student's September 11, 2017 IEP also provided a schedule of services to include 150 minutes per week of direct instruction in reading, 150 minutes per week of direct instruction in literacy, 150 minutes per week of direct instruction in math, 60 minutes per week of speech/language therapy, 60 minutes per week of speech language intervention, and 60 minutes per week of occupational therapy.³⁵ Accommodations were also noted, with text to speech provided for math, science, and writing, as well as a notation of extended time on assignments and work in small groups.³⁶

At the September 11, 2017 IEP meeting, the IEP team further decided to conduct an updated speech evaluation for Student.³⁷ In October 2017, Student was evaluated by the speech language

³⁰ Respondent Exhibits, pp. 196-97.

³¹ Respondent Exhibits, p. 200.

³² Respondent Exhibits, p. 201.

³³ Respondent Exhibits, p. 202.

³⁴ Respondent Exhibits, pp. 200-202.

³⁵ Respondent Exhibits, p. 203.

³⁶ Respondent Exhibits, p. 206.

³⁷ Respondent Exhibits, p. 208.

therapist for District.³⁸ She noted that Student was cooperative during testing and was pleasant and able to converse with her about age-appropriate topics.³⁹ Student was administered the following assessments: (1) Test of Language Development – Intermediate: Fourth Edition (TOLD-1:4); (2) Clinical Evaluation of Language Fundamentals-4 (CELF-4); (3) Comprehensive Test of Phonological Processing – 2 (CTOPP-2); (4) Phonological Awareness Test 2; (5) Goldman Fristoe Test of Articulation-3 (GFTA-3); (6) informal assessment of pitch, intensity, and quality of Student’s voice; (7) informal assessment of rate, rhythm, and inflection of Student’s speech; (8) informal assessment of hearing and vision; and (9) classroom based assessment.⁴⁰ It was determined from these assessments that Student exhibited a moderate to severe language delay as well as a severe deficit in phonological awareness skills. These deficits were noted to adversely affect “his ability to effectively communicate his wants/needs with peers and adults as well as participate in classroom instruction.”⁴¹ Percentile ranks across the various tests and subtests for Student ranged from less than the first percentile to the seventy-seventh percentile, with over half of the percentile ranks falling below the tenth percentile.⁴² As a result of these evaluation results, Student was given eight short-term speech goals to be added to Student’s September 11, 2017 IEP.⁴³

On October 30, 2017, District held an IEP meeting, which was attended by Parents and their dyslexia advocate, for the purpose of discussing the results of Student’s speech evaluation and Barton dyslexia screener.⁴⁴ Based on the District’s recommendations, the team opted to make no changes to the speech therapy services that Student was receiving at that time.⁴⁵ Meeting notes indicated that

³⁸ Respondent Exhibits, pp. 211-21.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ Respondent Exhibits, p. 220.

⁴⁴ Respondent Exhibits, p. 224.

⁴⁵ *Id.*

Student was unable to pass the Barton screener and, therefore, would need another program to prepare Student for participation in the Barton program. Parents' dyslexia advocate recommended a program called Foundations in Sounds to prepare Student to eventually participate in the Barton program.⁴⁶ The day following this meeting, the Foundations in Sound kit was ordered by District.⁴⁷ Student began the Foundations in Sound program on November 20, 2017.⁴⁸

On January 24, 2018, Student's IEP team met to again review Student's IEP. This meeting, pursuant to the Notice of Conference, was Student's annual IEP conference and was called for the purpose of reviewing and revising Student's IEP and considering extended school year services.⁴⁹ Student's January 24, 2018 IEP, with a duration of services through January 24, 2019, included the same information in the present level of academic achievement section as the previous IEP, and included three total goals.⁵⁰ Regarding the goals, the first addressed Student's language skills and provided that Student would increase his language skills by demonstrating command of the conventions of standard English grammar usage when writing or speaking with eighty percent accuracy by the end of the IEP year.⁵¹ This goal included eight goal progress objectives. The second stated goal addressed reading and was identical to the reading goal on his previous IEP.⁵² The third goal, addressing math, was identical to the math goal on Student's previous IEP.⁵³ In addition to these three goals, Student's speech therapy goals were continued, without change.

Student's January 24, 2018 also provided a schedule of services to include 150 minutes per week of direct instruction in reading, 150 minutes per week of direct instruction in literacy, 150

⁴⁶ Respondent Exhibits, p. 226; Transcript, Vol. IV, pp. 161-62.

⁴⁷ Respondent Exhibits, p. 227.

⁴⁸ Respondent Exhibits, p. 4; Hearing Officer File – Respondent Response.

⁴⁹ Respondent Exhibits, p. 229.

⁵⁰ Respondent Exhibits, pp. 233-250.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

minutes per week of direct instruction in math, 60 minutes per week of speech/language intervention, 60 minutes per week of speech/language therapy, and 60 minutes per week of occupational therapy.⁵⁴ Accommodations were also noted, with text to speech provided for math, science, and writing, as well as allowing work in small groups.⁵⁵ This schedule of services and accommodations was nearly identical to that provided in Student's previous IEP. Parents noted during the IEP meeting that they felt that Student was making progress on the Foundations of Sound program.⁵⁶

On April 3, 2018, District administered the Barton program screener to Student.⁵⁷ Student was unable to pass the screener and District worked with Student to remediate deficit areas for a couple of days before screening him again on April 6, 2018. Student passed all sections of the Barton program screener on April 6, 2018.⁵⁸ Student began the Barton program on April 9, 2018 upon completion of Foundations in Sound and successful passage of the Barton screener.⁵⁹ In May 2017, another IEP meeting was held, with Parents in attendance, to discuss extended school year services. Student was determined to be eligible for extended school year services (ESY), and it was decided that the duration of services would be June 1, 2018 through August 1, 2018. During ESY, Student was provided dyslexia intervention (Barton Program) twice a week, for one hour each session.⁶⁰

During Student's third grade year, Student was issued a STAR reading test on five dates, specifically October 10, 2017, October 23, 2017, December 4, 2017, February 6, 2018, and May 3,

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Respondent Exhibits, p. 423.

⁵⁸ Respondent Exhibits, p. 423; Transcript, Vol. III, p. 189.

⁵⁹ Respondent Exhibits, p. 4.

⁶⁰ Petitioner Exhibits, p. 25.

2018. Student's grade equivalent on the first three test administrations was kindergarten level. The grade equivalent on the last two test administrations was first grade.

Fourth Grade, 2018-2019 School Year

The IEP that was developed on January 24, 2018, with duration of services from January 24, 2018 through January 24, 2019, remained in effect as Student began the fourth grade.⁶¹ On August 30, 2018, District sent an email to Susan Barton, the developer of the Barton program because Student was not progressing as expected on the Barton program. In the email, it was noted that Student, who had an expressive speech language delay, had passed Level 1 of the Barton program, but that he had been unable to pass the Level 2 posttest despite the fact that extended school year services had been provided.⁶² The purpose of this email was to seek suggestions as to how to assist Student as he progressed through the Barton program. In response, Susan Barton responded via email on August 31, 2018 and stated that District needed to stop doing the Barton program on account of the fact that Student did not meet the basic program requirements.⁶³ She explained in her email that Student had to meet the following criteria to qualify for the Barton program: (1) Student had to be at least 5 years old and in kindergarten; (2) Student had to speak and understand spoken English; (3) Student cannot be suspected to have low IQ (full scale IQ of 70 required); and (4) Student must be able to pass the 10-minute Barton screener.⁶⁴ In addition, Susan Barton wrote the following in her email:

A student with receptive and expressive language delay needs to get lots of speech therapy. Once he has had enough speech therapy so that his scores on all of his speech tests are in the average range (and he no longer has a receptive and expressive

⁶¹ Student's IEPs do not follow the typical school year, but instead are reviewed and revised in the middle of each school year. The details of Student's January 24, 2018 IEP were addressed previously in the previous section pertaining to Student's third grade year.

⁶² Petitioner Exhibits, p. 321; Respondent Exhibits, p. 338.

⁶³ Respondent Exhibits, p. 338.

⁶⁴ *Id.*

language delay), THEN you might be able to tutor him –if he meets all of our 4 requirements to be a Barton student.⁶⁵

In response to this email exchange, the District’s speech language therapist was consulted to determine if additional speech therapy was necessary. The speech language therapist testified that she felt that sixty minutes per week was sufficient and did not need amended.⁶⁶ This email exchange was also shared with the District’s LEA, who did not feel that the email indicated that termination of the program was necessary.⁶⁷ District did not notify parents that it sent an email to Barton, or that Barton responded with concerns about Student continuing the Barton program.

On October 1, 2018, District held an IEP meeting at Parents’ request.⁶⁸ The purpose of this meeting was to discuss modifications for Student.⁶⁹ Parents wanted to discuss Students’ progress on the Barton program, as well as some concerns that Student was being bullied by peers who were making fun of him when Student was required to read out loud in class. Student’s accommodations were changed so that Student was not required to read out loud in class.⁷⁰ Notes taken at this meeting reference accommodations that were changed, as well as the fact that Parents’ dyslexia advocate wanted to ensure that Student’s new fourth grade teachers understood how to implement Student’s IEP; however, these notes do not reference any discussion about concerns regarding the appropriateness of the Barton program or any notation that the program should be reconsidered or changed.⁷¹ There is also no reference in these notes that Parents were told about the Barton email exchange.⁷²

⁶⁵ *Id.*

⁶⁶ Transcript, Vol. III, pp. 200-201.

⁶⁷ Transcript, Vol. V, p. 202.

⁶⁸ Respondent Exhibits, p. 262.

⁶⁹ *Id.*

⁷⁰ Respondent Exhibits, pp. 264-65.

⁷¹ Respondent Exhibits, pp. 266-67.

⁷² *Id.*

On January 22, 2019, Student's IEP team conducted its annual review of Student's IEP. Student's January 22, 2019 IEP, with a duration of services through January 22, 2020, included the same information in the present level of academic achievement section as Student's previous IEP, except that there was an additional paragraph which indicated that Student had mastered six of seven reading objectives, as well as his math goal.⁷³ Regarding the goals, the January 22, 2019 IEP includes six goals addressing language skills and math.⁷⁴ Student's language goals provided that he would be able to: (1) demonstrate command of the conventions of standard English grammar when writing and speaking with eighty percent accuracy by the end of the current IEP; (2) apply phonics and word analysis skills in decoding words with eighty percent accuracy by the end of the school year; (3) read decodable text with eighty percent accuracy by the end of the fourth grade school year; (4) read grade-level text with sufficient accuracy and fluency to support comprehension by reading stories with eighty percent accuracy by the end of the current IEP; and (5) demonstrate command of the conventions of standard English capitalization and punctuation when writing by identifying errors with eighty percent accuracy by the end of the current IEP.⁷⁵ Student's math goal provided that, given word problems involving whole numbers, Student would be able to use four operations to solve problems with eighty percent accuracy by the end of the IEP year.⁷⁶ Each of Student's goals included stated objectives and notation regarding progress monitoring.⁷⁷

Student's January 22, 2019 also provided a schedule of services to include 225 minutes per week of direct instruction in written language, 150 minutes per week of direct instruction in literacy,

⁷³ Respondent Exhibits, pp. 271-72.

⁷⁴ Respondent Exhibits, pp. 270-85.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

225 minutes per week of direct instruction in math, 60 minutes per week of speech/language intervention, 60 minutes per week of speech/language therapy, and 60 minutes per week of occupational therapy.⁷⁸ Accommodations were also noted and were identical to those provided in Student's previous IEP.⁷⁹ It was determined that Student needed ESY for the summer of 2019, and that Student would receive 120 minutes per week to address reading deficits.⁸⁰ Following Student's annual review, Student continued to receive instruction in the Barton program.

During Student's fourth grade year, Student was issued a STAR reading test on eleven dates, specifically August 24, 2018, August 29, 2018, September 23, 2018, October 22, 2018, November 15, 2018, December 12, 2018, January 24, 2019, March 11, 2019, April 17, 2019, May 7, 2019, and May 16, 2019. Student's grade equivalent on the first test administrations was kindergarten level. The grade equivalent on all other test administrations, with the exception of the November 15, 2018 and April 17, 2019 dates was first grade. Student's grade equivalent on the STAR reading tests administered on November 15, 2018 and April 17, 2019 was second grade.

Fifth Grade, 2019-2020 School Year (Fall Semester)

The IEP that was developed on January 22, 2019, with duration of services from January 22, 2019 through January 22, 2020, remained in effect as Student began the fifth grade. On August 20, 2019, District held an IEP meeting at Parents' request for the purpose of ensuring that Student's teachers were aware of Student's needs.⁸¹ The Notice of Action for this meeting indicated that this was accomplished, and also that Student was continuing to receive instruction pursuant to the Barton program to address his dyslexia.⁸²

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Respondent Exhibits, pp. 290-91.

⁸² *Id.*

Following this meeting, on August 28, 2019, Student was administered a STAR reading test. Student's grade equivalent on that test was 0.0, indicating that Student was still reading on a kindergarten level.⁸³ Parents were surprised at this result because they believed that Student had been making progress on the Barton program.⁸⁴ Parents contacted their dyslexia advocate and, collectively, they started researching other programs. The NOW program was one of those programs.⁸⁵

Approximately two weeks later, Parents dyslexia advocate contacted Susan Barton and inquired as to whether the school had contacted her regarding Student.⁸⁶ The dyslexia advocate testified that a statement by District's LEA regarding Susan Barton and why she might recommend that some kids not use the program prompted her to take this action. Parents' dyslexia advocate subsequently received the Barton email exchange from fall 2018 on September 10, 2019.⁸⁷

On September 23, 2019, Student began the NOW program at Parents' expense.⁸⁸ District refused to pay for this program when Parent requested same.⁸⁹ The first part of the program cost \$3800, and Parents are making monthly payments until this total is paid in full.⁹⁰ Since Student began the NOW program, he has had sessions for forty-five minutes per day, five days a week, via video conference.⁹¹ The program's creator, Dr. Tim Conway, testified that Student has made slow but steady progress while using the NOW program.⁹² District has, to date, continued to instruct Student with regard to the Barton program.

⁸³ Petitioner Exhibits, p. 254.

⁸⁴ Transcript, Vol. V, p. 42.

⁸⁵ Transcript, Vol. V, p. 43, 46.

⁸⁶ Petitioner Exhibits, p. 321.

⁸⁷ *Id.*

⁸⁸ Transcript, Vol. I, pp. 125-26.

⁸⁹ Transcript, Vol. V, pp. 51-52.

⁹⁰ Transcript, Vol. V, p. 49.

⁹¹ Transcript, Vol. I, pp. 137, 142.

⁹² Transcript, Vol. I, p. 124.

In August 2019, Student was administered the Comprehensive Test of Phonological Processing – Second Edition (CTOPP-2). Student’s composite scores for phonological awareness, phonological memory, and rapid symbolic naming were 88, 82, and 76 respectively.⁹³ These scores fall in the range for below average and poor performance.⁹⁴ In December 2019, Student was again administered the CTOPP-2. Student’s composite scores for phonological awareness, phonological memory, rapid symbolic naming were 112, 88, and 82 respectively. These scores fall in the range for below average, with the exception of the composite for phonological awareness, which falls in the above average category.⁹⁵

During the fall semester of Student’s fifth grade year, Student was issued a STAR reading test on four dates, specifically August 28, 2019, November 25, 2019, October 21, 2019, and December 2, 2019. Student’s grade equivalent increased slightly on each test with grade equivalents of kindergarten (beginning of year), kindergarten (seventh month), first grade (first month) and first grade (sixth month).

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 U.S. 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). Pursuant to *Rowley*, 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

⁹³ Petitioner Exhibits, p. 245.

⁹⁴ *Id.*

⁹⁵ Petitioner Exhibit, p. 246.

set forth in the IDEA. Thereafter, it must be determined whether the IEP(s) developed pursuant to IDEA procedures was reasonably calculated to enable the student to make appropriate progress in light of his specific circumstances. *Id.*

Regarding the first inquiry, that of whether the District complied with the procedures set forth in the IDEA, this Hearing Officer notes that counsel for Parents raised three violations that were classified in the Complaint as procedural. These three violations were failure of District to review Student's IEPs to address lack of progress, failure of District to identify Student's dyslexia program on his IEPs, and failure of District to include goals and objectives directly related to Student's dyslexia program in his IEPs.⁹⁶ These issues, ultimately, are allegations of substantive violations of the IDEA and will be addressed below. As such, this Hearing Officer hereby finds that the District did not deny a FAPE to Student on account of violation of any procedural issues.

Having considered the first prong of the FAPE analysis, it is now necessary to analyze whether the District substantively denied FAPE to Student, *i.e.* whether the District failed to provide IEPs that were reasonably calculated to enable Student to make appropriate progress in light of his individual circumstances. 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 *Endrew 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)).

⁹⁶ See Hearing Officer File – Complaint, p. 8.

In *Endrew F.*, the standard set forth by the Court is “markedly more demanding” as compared to the “merely *de minimis*” test outlined in *Rowley*. *Endrew 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.”

Endrew 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 *Endrew 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 *Endrew 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).

In a case directly on point, the Eighth Circuit Court of Appeals found that where the student in question had intellectual ability in the average range and, in addition, was socialized, well behaved and willing to work, slight progress was not sufficient to establish that the school district had provided FAPE. *C.B., by and through his parents, B.B. and C.B. v. Special Sch. Dist. No. 1, Minneapolis, MN*, 636 F.3d 981 (8th Cir. 2011). Similar to this case, the student in *C.B.* was in the sixth grade and, despite knowledge of the widening gap between student’s grade and his reading grade level, the school district failed to take appropriate steps to adequately address student’s deficits. *C.B.* was decided prior to *Andrew F.*, when the *Rowley* standard was interpreted to require that a student’s curriculum provide only “some educational benefit.” Certainly, in light of *Andrew F.*, it is likely that the Court’s position in *C.B.* would remain the same and would be applicable to the current case.

In the present case, Student was identified in Kindergarten as being eligible for special education services under the IDEA on account of a specific learning disability in the areas of reading, writing, and math. Focusing only on the statutory timeframe in the case, it is clear that Student did not make progress with regard to his academic deficits between third grade (spring semester) and fifth grade (end of fall semester). A review of Student’s STAR reading scores are telling. In third grade,

Student's scores were at a grade equivalent representative of kindergarten or first grade level. In second grade, although there were two tests where Student appeared to be reading at the second-grade level, the remaining nine test scores were at a grade equivalent of kindergarten or first grade. Finally, in fifth grade (first semester), Student's scores, again, were in the kindergarten or first grade level. Various district witnesses explained that the STAR reading scores could be somewhat inconsistent given that Student did not take as much time on some tests as others. However, between December 13, 2017 and December 13, 2019, Student was administered eighteen STAR reading tests, and all but two of those tests showed Student at a grade equivalent of kindergarten or first grade. It is unlikely that all of these tests were inconsistent. Basically, Student fell further and further behind as the school years passed. Student is currently four to five grade levels below in reading as compared to the school grade that he is attending.

A review of Student's IEPs show that there was very little change to Student's schedule of services or goals from year to year until the January 22, 2019 IEP. Even then, the new goals did not differ much in substance as compare to prior IEPs. Parents alleged that Student's IEPs were not appropriate largely because of the Barton program, which has been administered to Student since April 9, 2018. As addressed previously, it is clear from Student's consistently low and unchanging STAR reading scores that the Barton program has not been successful for him. Student struggled to pass the Barton screener. Even though he eventually did pass the screener and began the program, it is clear from the August 2018 email exchange between District and Susan Barton that District had concerns, even three months into the Barton program, that Student was not responding well. Parents argue that the email from Susan Barton should have caused District to stop the Barton program in August 2018 because Student did not meet the four basic requirements to participate in the program. This Hearing Officer disagrees with this allegation in the sense that it appears that Student did meet

the four basic criteria set out by Barton. Student was over age five and was at least in kindergarten, he spoke English as his native language, he was of average intelligence, and he had passed the Barton screener. District focused on these four elements, however, and ignored a critical portion of the Barton email exchange. Specifically, Susan Barton addressed the issue of kids with receptive and expressive language delays and stated that they needed to have additional speech language therapy until that delay was corrected. Only then would Student be able to proceed with the Barton program. Evidence in the record indicates that this email was shared with District's speech and language therapist, and that it was determined that Student did not need any additional speech therapy. As a result, the District continued forward with Barton without addressing this issue. Even more concerning is the fact that there is no evidence in the record that District shared the existence of the Barton email exchange with Parents. Based on the Barton email exchange, District should have stopped using the Barton program in August 2018 and either provided additional speech therapy to Student or, alternatively, considered other programs.

District focused on the fact that Parents utilized a dyslexia advocate that was an expert in the field, and that this advocate was pushing for the Barton program. This defense has no merit given the facts of this case. First, it appears that the dyslexia advocate was also not aware of the Barton email exchange, so it is unclear what she would have recommended had that information been shared with Parents. Second, the school ultimately cannot displace their responsibility with regard to Student on Parents or their advocate. Even if the dyslexia advocate wanted nothing but the Barton program to be used with Student, the school had a duty to take action and make appropriate changes when it became clear that this program was not appropriate or effective.

Similar to the above-referenced Eighth Circuit precedent, specifically *C.B.*, Student in the present case possesses average intelligence, but his achievement is highly discrepant when compared to his intellectual ability. The record indicates that Student is pleasant, has regular attendance, and is willing to participate in class activities. This does not appear to be a child that is unable to learn due to intellectual deficiencies. Instead, it appears that Student, between December 13, 2017 and December 13, 2019, was struggling to learn on account of the fact that his special education programming pertaining to reading, writing, and math was not reasonably calculated to enable him make progress appropriate in light of his circumstances.

Parents are asking this Hearing Officer to order District to allow Student to continue in the NOW program at District's expense. Student has been on the NOW program since the beginning of fifth grade. This program has been administered to Student five days a week for forty-five minutes each day since early fall 2019, in addition to the Barton program that the school was administering as part of Student's IEP. Because the NOW program and the Barton program have been administered concurrently, it is impossible to determine whether the NOW program, standing alone, has benefited Student. Dr. Tim Conway, who created and operates the NOW program, testified that Student's progress has been slow but steady. Student's reading level at the end of the first semester of fifth grade is not much different than the reading levels noted in prior grades. Essentially, Student was still at the first-grade reading level at the end of the fall semester 2019. Parents, however, have not met their burden in establishing that the NOW program has been effective for Student. It should also be noted that caselaw makes clear that it is not the place of a court or hearing officer to assume the expertise of an education professional and suggest one teaching method over another. *Zumwalt*, 119 F.3d 614. What is clear is that there has been a violation of FAPE on account of Student's lack of progress.

This Hearing Officer has no doubt, based on the testimony of the District's witnesses, that the District genuinely wanted to assist Student in making progress on his academic goals during the two-year statutory period considered in this case. Nonetheless, based on the evidence in the record, this Hearing Officer finds that Parents proved by a preponderance of the evidence that the District failed to provide Student with IEPs that were reasonably calculated to enable Student to make progress appropriate in light of his circumstances between December 13, 2017 and December 13, 2019.

ORDER:

The results of the testimony and evidence warrant a finding for the Parents. Specifically, Parents have introduced sufficient evidence in the record to establish by a preponderance of the evidence that District denied Student a FAPE between December 13, 2017 through December 13, 2019 by failing to produce IEPs for Student that were reasonably calculated to enable him to make progress appropriate in light of his circumstances.

Therefore, this Hearing Officer hereby orders the following:

1. District shall ensure that Student is comprehensively evaluated to determine, at a minimum, current achievement levels and academic deficits, IQ, speech and language deficits, and occupational therapy needs. This evaluation must be completed by August 1, 2020.
2. District shall meet with Parents no later than August 1, 2020 for the purpose of developing a new IEP for Student. The new IEP needs to be based on an academic year, as opposed to being split in the middle of a year, so that progress monitoring is seamless going forward. The IEP must contain appropriate and thorough goals, with objectives, and address the specific programming and modifications that District will

use to address Student's deficits. The IEP must also have progress monitoring and tracking incorporated.

3. District shall research and select a different dyslexia/reading program that is based on recommendations in light of Student's evaluations. The program selected by District must be approved by the ADE.
4. District shall meet with parents at the end of every 9-week period of the school year for the purpose of determining Student's progress and making adjustments as necessary to Student's IEP.

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

5/13/2020

DATE