

**ARKANSAS DEPARTMENT OF EDUCATION
Special Education Unit**

IN RE:

XXXXXXXXXX, Parents on behalf of
XXXXXXXXXX, Student

PETITIONER

VS.

CASE NO. H-20-35

MONTICELLO SCHOOL DISTRICT

RESPONDENT

HEARING OFFICER'S FINAL DECISION AND ORDER

ISSUES PRESENTED:

Whether the Monticello School District (hereinafter "District" or "Respondent") denied XXXXXX (hereinafter "Student") a free, appropriate, public education (hereinafter "FAPE") between August 13, 2019 and March 17, 2020, 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) violating "stay put" by failing to provide OT services between August 13, 2019 and February 24, 2020; (2) failing to implement Student's 2019-2020 IEP as written by failing to provide all scheduled speech therapy services between August 13, 2019 and March 17, 2020; (3) failing to provide an individualized education program (hereinafter "IEP") that was reasonably calculated to ensure that Student made progress in light of his circumstances, specifically an IEP that included a provision for OT services, between August 13, 2019 and March 17, 2020; and (4) failing to educate Student in the least restrictive environment between August 13, 2019 and March 17, 2020.¹

¹ See Due Process Complaint; Parent's Post-Hearing Brief.

PROCEDURAL HISTORY:

On June 17, 2020, 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. This was the second due process complaint filed by Parents against District, the first being ADE H-20-02 which was filed approximately ten months earlier on August 12, 2019 (hereinafter “Hearing #1”). This Hearing Officer issued a Final Decision and Order on February 24, 2020 in Hearing #1, finding for Parents and awarding compensatory education. Based on Parents’ complaint in the above-referenced matter, Hearing #2, Parents requested a due process hearing because they believed that District, between August 13, 2019 and March 17, 2020, (1) violated “stay put” by failing to provide OT services, (2) failed to implement Student’s 2019-2020 IEP as written by failing to provide all scheduled speech therapy services, (3) failed to provide an individualized education program (hereinafter “IEP”) that was reasonably calculated to ensure that Student made progress in light of his circumstances, and (4) failed to educate Student in the least restrictive environment. These dates, specifically August 13, 2019 through March 17, 2020, represent the time that Hearing #1 was pending, as well as an additional three weeks following the February 24, 2020 decision that was issued in that case.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 August 10 and 11, 2020, assuming the Parents and District failed to reach resolution prior to that time. On July 30, 2020, counsel for both parties requested a continuance in this matter, which was granted

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

by this Hearing Officer. Thereafter, the hearing of this matter was continued to September 1-4, 2020. Ultimately, only two days were determined necessary for the hearing of this matter; thereafter, the hearing of this matter commenced on September 3, 2020 and was concluded the following day, September 4, 2020.³ All testimony was heard in person at the Monticello School District's Administration Building. It is noted, however, that this Hearing Officer presided over the hearing via ZOOM on account of the COVID-19 pandemic. The due process hearing concluded on September 4, 2020.⁴ At the hearing, District and Parents stipulated and agreed to all prior testimony given during Hearing #1, specifically ADE H-20-02. As such, all testimony taken in Hearing #1 was incorporated into the record for the above-referenced matter.

The following witnesses testified in this matter: Natalie Gosdin (via ZOOM), Katherine Smith, Cristal Langley (via ZOOM), and Parent (father).⁵ 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).

³ See H-20-35 Hrg. Tr. Vols. I, II.

⁴ See H-20-35 Hrg. Tr., Vol. II.

⁵ See H-20-35 Hrg. Tr., Vols. I,II.

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 10-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 fifth grade. Between August 13, 2019 and March 17, 2020, the time period covered by this decision, Student was in the fourth grade.

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.⁶ Student occasionally attempts to eat items that are not edible.⁷ 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.⁸ Techniques used with Student when he is agitated also include joint compression and use of the Wilbarger Brush technique.⁹ Student often drops to the floor when he does not want to work, and often has issues transitioning between activities.¹⁰ Classroom logs kept for Student during the fall semester of 2019 repeatedly referenced that Student would come to class and sleep on a bean bag with his weighted blanket, sometimes for hours, and that Student was difficult to wake.¹¹ There was also reference to repeated instances of Student pinching school staff and

⁶ H-20-02 Hrg. Tr., Vol. I, p. 192.

⁷ H-20-02 Hrg. Tr., Vol. I, p. 194.

⁸ H-20-02 Hrg. Tr., Vol. I, pp, 194-95.

⁹ H-20-02 Hrg. Tr., Vol. I, p. 223.

¹⁰ H-20-02 Hrg. Tr., Vol. I, p. 209.

¹¹ H-20-35 Hrg. Tr., Vol. II, pp. 250-86.

himself, kicking others, and screaming.¹² On September 30, 2019, it was noted in the log that Student had chewed on the microwave latches inside the classroom microwave.¹³ On another occasion, it was noted that Student had peeled paint off of the wall and put it in his mouth, requiring staff intervention.¹⁴

Student is nonverbal, with his only verbalizations at the school consisting of humming.¹⁵ 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").¹⁶ PECS consists of a set of pictures on Velcro strips which are categorized by objects, foods, activities, or sensory items.¹⁷ Student would first point to an "I want" card and then subsequently pull off the strip for the item that he was seeking.¹⁸ During Student's fourth grade school year, which falls within the period covered by this due process hearing, Hearing #2, Student began using the LAMP Words for Life program for communication, which utilizes an iPad.¹⁹ Student's special education teacher felt during Student's third grade year that Student needed a device for communication purposes; however, prior to the February 24, 2020 Final Decision and Order in Hearing #1, ADE H-20-02, she neither scheduled an IEP meeting to discuss this issue nor contacted Easter Seals to inquire about this issue even though Student stopped being responsive to PECS in January 2019.²⁰

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ H-20-02 Hrg. Tr., Vol. I, p. 216.

¹⁶ H-20-02 Hrg. Tr., Vol. I, p. 199-200.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ H-20-02 Hrg. Tr., Vol. I, p. 201.

²⁰ H-20-02 Hrg. Tr., Vol. I, p. 211.

Dr. Ivan Aldea, a child and adolescent psychiatrist at Arkansas Psychiatric Clinic, has provided psychiatric services to Student since October 2017.²¹ 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.²² Student takes three different medications, specifically Clonidine, Guanfacine, and Cyproheptadine which are intended to assist with Student's impulse control issues.²³

Drew Central Consortium

Student, although a student of the Monticello School District, attended school between August 13, 2019 and March 17, 2020 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.²⁴ The Consortium has children grades K-12 from both the Monticello School District, as well as a neighboring district, the Drew Central School District.²⁵ 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.²⁶ The Consortium is a self-contained special education setting specifically designed to assist students with more severe disabilities, as well as those with medical issues who are in need of a nursing staff.²⁷ Between August 13, 2019 and March 17, 2020, there

²¹ H-20-02 Hrg. Tr., Vol. II, p. 99.

²² *Id.*

²³ H-20-02 Hrg. Tr., Vol. II, p. 100.

²⁴ H-20-02 Hrg. Tr., Vol. I, pp. 57-58.

²⁵ H-20-02 Hrg. Tr., Vol. I, p. 68.

²⁶ H-20-02 Hrg. Tr., Vol. I, pp. 96-97.

²⁷ H-20-02 Hrg. Tr., Vol. I, p. 176.

were ten students placed at the Consortium, and those students were being served by a special education classroom teacher and three aides.²⁸

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.²⁹ This change in districts did not change his placement. Since kindergarten, and through March 17, 2020, Student attended school at the Consortium.³⁰ 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 was discussed to determine continued appropriateness.³¹ 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.³²

Student's scheduled school day between August 13, 2019 and March 17, 2020 consisted 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.³³ Only during lunch was Student with non-disabled peers, although his classroom teacher indicated that he typically used the swings at lunch and was by himself.³⁴ Student also received adaptive physical education services, although

²⁸ H-20-02 Hrg. Tr., Vol. I, p. 177.

²⁹ H-20-02 Hrg. Tr., Vol. I, p. 88.

³⁰ H-20-02 Hrg. Tr., Vol. I, p. 89.

³¹ H-20-02 Hrg. Tr., Vol. I, pp. 99-102.

³² H-20-02 Hrg. Tr., Vol. I, p. 190.

³³ H-20-02 Hrg. Tr., Vol. I, pp. 180-87.

³⁴ H-20-02 Hrg. Tr., Vol. I, pp. 191-92.

his special education teacher was not sure why he was receiving adaptive versus regular physical education.³⁵

Student's Evaluations

Student was evaluated for OT services 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.³⁶ 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.³⁷ Student's scores fell in the descriptive category of "well below average."³⁸ On the Beery VMI, Student scored at .02 percentile and fell in the descriptive category of "very low."³⁹ Student's age equivalent on this test was less than two years and four months old.⁴⁰ 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.⁴¹ It was recommended at that time that Student receive 60 minutes of OT per week, to be administered in two 30-minute sessions.

³⁵ H-20-02 Hrg. Tr., Vol. I, p. 198.

³⁶ H-20-02 Ex. Vol. II, pp. 260-64.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *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.⁴² Regarding the issue of attentiveness, it was noted that Student had “fair attention,” was occasionally distracted, had adequate alertness, showed moderate delay in response rate, was adequately aware of others, and required prompts to cooperate.⁴³ 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.⁴⁴ 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.⁴⁵ Regarding pragmatic/social language, Student was able to communicate intent by requesting items, seeking attention, protesting or resisting, and affection.⁴⁶ 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.⁴⁷

⁴² H-20-02 Ex. Vol. II, p. 266-68.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

On December 8, 2017, Student was administered a psychological evaluation by the University of Arkansas for Medical Sciences Dennis Developmental Center.⁴⁸ This evaluation was ordered by Student's treating physician on account of concern arising from Student's behavior.⁴⁹ Student was in the second grade when this evaluation took place.⁵⁰ The evaluator noted that Student lacked attention and was aggressive during the one-on-one evaluation.⁵¹ Student hit and punched the examiner, as well as Student's father. He also kicked his father and threw test items.⁵²

The Dennis Developmental Center administered Student the Stanford-Binet Intelligence Scale: Fifth Edition (SB-V) to determine his cognitive abilities.⁵³ The results of that test indicated that Student has a nonverbal IQ score of forty-two (42).⁵⁴ Student was also administered the Vineland Adaptive Behavior Scales – Third Edition (VABS-3) to determine his adaptive behavior abilities.⁵⁵ That exam indicated that Student's communication, daily living skills, socialization, and motor skills are all in the low range.⁵⁶ 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.⁵⁷ It was also noted that

⁴⁸ H-20-02 Ex. Vol. II, pp. 283-92.

⁴⁹ *Id.*

⁵⁰ H-20-02 Ex. Vol. II, p. 283.

⁵¹ H-20-02 Ex. Vol. II, p. 284.

⁵² *Id.*

⁵³ H-20-02 Ex. Vol. II, p. 284.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ H-20-02 Ex. Vol. II, p. 285.

Student should receive opportunities for socialization with same-age peers as is possible.⁵⁸ Finally, there was a recommendation that Student be given immediate rewards for appropriate behavior and immediate consequences for inappropriate behavior.⁵⁹ It was recommended that Student receive intensive intervention to address his various issues.⁶⁰

On July 2, 2019, Student was evaluated by a speech language pathologist at Kidsource Therapy based on Parents' request for an independent evaluation.⁶¹ 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).⁶² It was determined that Student presented with receptive, expressive, and pragmatic language skills that are profoundly delayed.⁶³ In fact, Student was not able to complete some of the tests because he was unable to understand the directions.⁶⁴

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."⁶⁵ It was recommended that Student receive therapy three times per week, for sixty minutes per session.⁶⁶ It was also recommended that

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ H-20-02 Ex. Vol. II, pp. 316-335.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *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."⁶⁷ 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.⁶⁸

For the time period specified in this matter, specifically August 13, 2019 through March 17, 2020, 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.⁶⁹ 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 did not complete an assistive technology evaluation because it stated that one was not required until it was time for Student to be reevaluated in 2020.⁷⁰

On February 4, 2020, District requested a physical therapy evaluation for Student on account of some issues with Student's gait.⁷¹ The physical therapist made observations pertaining to Student's posture, range of motion, tone, strength, and gait.⁷² In addition, the evaluator administered the Bruininks-Oseretsky Test of Motor Proficiency 2 (BOT-2) to

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ H-20-02 Ex. Vol. I, pp. 134-35.

⁷⁰ H-20-02 Hrg. Tr., Vol. I, p. 163.

⁷¹ H-20-35 Ex. Vol. III, pp. 45-47.

⁷² *Id.*

Student to assess different areas of motor function.⁷³ The evaluator concluded that Student was functioning at a “fair level” of gross motor skills, and therefore did not recommend PT for gross motor skill improvements. However, he did recommend that Student be provided with services so that Student could engage in a stretching program to improve Student’s terminal knee extension.⁷⁴

Student’s IEP, Progress, and IEP Meetings – 2019-2020 School Year (Fourth Grade)

On May 21, 2019, District held an IEP meeting to conduct an annual review and plan for Student’s 2019-2020 IEP.⁷⁵ 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.⁷⁶ 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.⁷⁷ For that reason, she contacted Student’s father and ensured that he was going to be present at the IEP meeting.⁷⁸

The draft IEP presented at the May 21, 2019 IEP meeting stated that duration of services would be August 13, 2019 through May 22, 2020. The present levels of academic achievement section of the IEP stated, as in previous IEPs, that Student was loving with a good sense of humor, adding that Student seemed happy when he got off the bus in the

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ H-20-02 Hrg. Tr., Vol. I, pp. 203-04.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

morning and that he loved to play in water puddles.⁷⁹ It also stated that Student had mastered 5 out of 12 objectives in academic skills and behavior and could do many short tasks without issue.⁸⁰ Despite speech therapy, the IEP stated that Student had not reached his goals with regard to the PECS communication system as of the beginning of fourth grade, noting that student often threw objects during speech therapy and required sensory intervention.⁸¹ Student notably refused to use PECS for communicating with teachers or requesting items.⁸²

The present levels section of the IEP indicated that Student would continue to be placed in the self-contained special education classroom at the Consortium.⁸³ Modifications and accommodations on the 2019-2020 IEP draft were identical to those from the previous school year.⁸⁴ 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.⁸⁵

Four goals were expressed on Student's 2019-2020 IEP draft. The first, an English language arts goal, stated that Student would trace his first and last name with 80% accuracy by the end of Student's fourth grade year.⁸⁶ The second, a math goal, stated that Student would use the Touch Point method to count and show number recognition with 80%

⁷⁹ H-20-02 Ex. Vol. II, p. 72.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ H-20-02 Ex. Vol. II, p. 75.

⁸⁵ H-20-02 Ex. Vol. II, p. 81.

⁸⁶ H-20-02 Ex. Vol. II, p. 77.

accuracy by the end of the school year.⁸⁷ The third, a behavior goal, stated that Student would 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.⁸⁸ Finally, the fourth goal, an English language – speech therapy goal, stated that Student would demonstrate improved expressive and receptive communication skills when given appropriate stimuli 70% of the time by the end of the 2019-2020 school year.⁸⁹ Student’s goals were similar to those that Student had been given during the 2017-2018 and 2018-2019 school years.

The extended school year services addendum to the draft IEP indicated 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.⁹⁰

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.⁹¹ Regarding the OT recommendation, an annual review and discharge summary was provided for discussion.⁹² 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

⁸⁷ H-20-02 Ex. Vol. II, p. 76.

⁸⁸ H-20-02 Ex. Vol. II, p. 78.

⁸⁹ H-20-02 Ex. Vol. II, p. 79.

⁹⁰ H-20-02 Ex. Vol. II, p. 187.

⁹¹ H-20-02 Hrg. Tr., Vol. I, pp. 205, 227.

⁹² H-20-02 Ex. Vol. II, p. 311.

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 had been able to work on only 2 of 8 total objectives, and that Student had mastered neither of the objectives that had been addressed.⁹³ The PECS system was not effective for Student, and it was noted that Student frequently bit, hit, pinched, and threw objects during therapy sessions.⁹⁴ At the end of the meeting, things remained undecided on the OT issue, with District intending to discontinue OT services and Parent in search of legal and other options.⁹⁵ No IEP was agreed upon.⁹⁶

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 individuals invited to this meeting included Student’s speech language therapist, the OT assistant, Student’s special education teacher, District’s LEA, and the District’s Superintendent.⁹⁷ 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.⁹⁸ It was noted on the decision form that the team would meet again if Parent requested same.⁹⁹

⁹³ H-20-02 Ex. Vol. II, p. 313.

⁹⁴ *Id.*

⁹⁵ H-20-02 Hrg. Tr., Vol. I, p. 226.

⁹⁶ H-20-02 Ex. Vol. II, pp. 181-82.

⁹⁷ H-20-02 Ex. Vol. II, p. 189.

⁹⁸ H-20-02 Ex. Vol. II, p. 192.

⁹⁹ *Id.*

A notice of conference dated July 2, 2019 was sent to Parents, scheduling another IEP meeting for July 16, 2019.¹⁰⁰ The purpose of this meeting was the same as the previous meeting, specifically to address the concerns of Parents.¹⁰¹ 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."¹⁰² A notice of action dated July 16, 2019 was completed to document the IEP meeting that took place in Parents' absence.¹⁰³ The notice confirmed the discontinuance of OT and noted that Student's speech services would be split into shorter, but more frequent sessions.¹⁰⁴

On August 8, 2019, a notice of conference scheduling an IEP meeting for August 12, 2019 was sent to Parents.¹⁰⁵ A notice of action dated August 12, 2019 indicates that Parents attended the scheduled meeting.¹⁰⁶ The purpose of the meeting was to ensure that Student's special education teacher and therapists were on the same page moving forward and were all aware of recent decisions.¹⁰⁷ 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.¹⁰⁸ The notice of action indicates that Parents

¹⁰⁰ H-20-02 Ex. Vol. II, p. 193.

¹⁰¹ *Id.*

¹⁰² H-20-02 Ex. Vol. II, p. 195.

¹⁰³ H-20-02 Ex. Vol. II, p. 199.

¹⁰⁴ *Id.*

¹⁰⁵ H-20-02 Ex. Vol. II, p. 203.

¹⁰⁶ H-20-02 Ex. Vol. II, p. 205.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

refused to sign any paperwork and that a due process hearing, Hearing #1, had been filed just prior to the meeting.¹⁰⁹

On December 10, 2019, Student's IEP team convened for the purpose of discussing physical therapy and obtaining consent for a physical therapy evaluation.¹¹⁰ Student's father, as well as his teacher, had notice that Student was walking differently than normal.¹¹¹ On February 10, 2020, another IEP meeting was held for the purpose of placing Student in physical therapy.¹¹²

Following this Hearing Officer's Final Decision and Order in Hearing #1, ADE H-20-02, dated February 24, 2020, Student's IEP team met once again. A notice of conference dated March 2, 2020 indicated that an IEP meeting would be held on March 9, 2020 for the purpose of conducting a functional behavior assessment, seeking a circuit referral, reviewing this Hearing Officer's Final Decision and Order in Hearing #1, and revising Student's IEP.¹¹³ Both parents attended the meeting, as well as the LEA Supervisor, Student fourth grade general education teacher, and a member of administration.¹¹⁴ During this meeting, revisions to the IEP were made.¹¹⁵

The revised IEP maintained the same duration of services, with a notation of the revision date of March 9, 2020. It appears that the major revision at this IEP meeting was the schedule of services. Specifically, the revised IEP indicated that Student would receive 450

¹⁰⁹ *Id.*

¹¹⁰ H-20-35 Ex. Vol. III, p. 22.

¹¹¹ H-20-35 Ex. Vol. III, p. 24.

¹¹² H-20-35 Ex. Vol. III, pp. 26-29.

¹¹³ H-20-35 Ex. Vol. III, p. 30.

¹¹⁴ H-20-35 Ex. Vol. III, p. 21.

¹¹⁵ H-20-35 Ex. Vol. III, pp. 1-6.

minutes per week of direct instruction in literacy, 450 minutes per week of direct instruction in math, 220 minutes per week of direct instruction in science, 500 minutes per week of direct instruction in functional skills, 450 minutes per week of direct instruction in life skills, 100 minutes per week of speech therapy, 750 minutes per week of paraprofessional time, and bus transportation twice per day.¹¹⁶

Occupational and Speech 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.¹¹⁷

Donna Rainwater (hereinafter "Rainwater"), Certified Occupational Therapist Assistant, provided direct OT therapy to patient for three years prior to the discontinuation of services in May 2019.¹¹⁸ 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.¹¹⁹ Rainwater explained that minimal progress was made during the three-year period that she had worked with Student and that goals were adjusted so that Student could hopefully meet them throughout that time.¹²⁰

¹¹⁶ *Id.*

¹¹⁷ H-20-02 Hrg. Tr., Vol. III, p. 51.

¹¹⁸ H-20-02 Hrg. Tr., Vol. III, p.33.

¹¹⁹ H-20-02 Hrg. Tr., Vol. III, p. 35.

¹²⁰ *Id.*

Student struggled with transitioning to OT therapy sessions during the 2017-2018 and 2018-2019 school years.¹²¹ 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.¹²² Student refused to attempt tasks that were given to him by Rainwater.¹²³ Student's 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.¹²⁴ She also observed Student to see if she could troubleshoot the reasons for Student's resistance.¹²⁵ During OT, Student would throw objects, kick staff, and run away.¹²⁶ Student's behavior impacted his ability to participate fully in OT, and his behavior worsened during the last year of therapy.¹²⁷ Things that Student responded to in OT included proprioceptive activities, such as playing with thera-putty, deep pressure, using his iPad, and snacks.¹²⁸

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.¹²⁹ Student's behavior interfered with his behavior in the classroom, in general, approximately 50% of the time.¹³⁰ No behavior plan was put in place for Student during the statutory timeframe relevant to this case, or for the prior two school years.

¹²¹ H-20-02 Hrg. Tr., Vol. I, p. 228-30.

¹²² H-20-02 Hrg. Tr., Vol. III, p. 37.

¹²³ H-20-02 Hrg. Tr., Vol. III, p. 38.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ H-20-02 Hrg. Tr., Vol. III, pp. 38, 48.

¹²⁸ H-20-02 Hrg. Tr., Vol. III, p. 99.

¹²⁹ H-20-02 Hrg. Tr., Vol. I, p. 229.

¹³⁰ H-20-02 Hrg. Tr., Vol. I, p. 272-74.

On May 21, 2019, Rainwater and Carol Martens (hereinafter “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.¹³¹ It was concluded that OT was no longer affecting changes in Student’s level of functioning in the school setting.¹³² 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.¹³³ OT services were not reinstated at any point during the 2019-2020 school year; therefore, between August 13, 2019 and March 17, 2020, Student did not receive any OT services.

Rainwater and Martens did, however, make recommendations for continued classroom use, including the Wilbarger brushing protocol, weighted blanket, and other techniques for calming.¹³⁴ Following discontinuation of direct services, and throughout the 2019-2020 school year, Rainwater and Martens provided consultation services to District on Student’s behalf. This entailed discussing classroom recommendations with Student’s special education teacher to help address sensory and fine motor concerns.¹³⁵ 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

¹³¹ H-20-02 Hrg. Tr., Vol. III, p. 36.

¹³² H-20-02 Hrg. Tr., Vol. III, p. 38.

¹³³ H-20-02 Hrg. Tr., Vol. III, p. 41.

¹³⁴ *Id.*

¹³⁵ H-20-02 Hrg. Tr., Vol. III, p. 39.

was being provided.¹³⁶ Rainwater testified that, to her knowledge, there were no discussions with Parents regarding Student's behavior during therapy or Student's lack of progress.¹³⁷

Dr. Aldea testified that Student would benefit from continued OT, particularly given that he is nonverbal.¹³⁸ 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.¹³⁹

Speech Therapy. Pursuant to Student's 2019-2020 IEP, he was scheduled to receive 100 minutes per week of speech therapy, with services scheduled for 20 minutes per day for each day of the week. Parents allege that District failed to provide Student with seventeen total sessions of speech therapy.¹⁴⁰ District records, which include speech logs and a chart summarizing speech minutes between August 13, 2019 and March 17, 2020, show that Student missed one and one half sessions of speech therapy during the week ending August 16, 2019 on account of school not being scheduled on August 12, 2020 and Student's inability to remain focused and complete one session (10 minutes not completed) on August 16, 2020.¹⁴¹ During the week ending August 30, 2019, Student missed one session of speech therapy on account of being absent from school on August 30, 2019.¹⁴² During the week ending September 6, 2019, Student missed two sessions of speech therapy on account of September 2, 2019 being a holiday and Student being absent from school on September 3,

¹³⁶ H-20-02 Hrg. Tr., Vol. III, p. 107.

¹³⁷ *Id.*

¹³⁸ H-20-02 Hrg. Tr., Vol. II, p. 101.

¹³⁹ *Id.*

¹⁴⁰ *See* Parents' Post-Hearing Brief.

¹⁴¹ H-20-35 Ex. Vol. III, pp. 53-76B.

¹⁴² *Id.*

2019.¹⁴³ During the week ending October 18, 2019, Student missed one session of speech therapy on account of Monday, October 14, 2019 being a holiday.¹⁴⁴ During the week ending November 1, 2019, Student missed one session of speech therapy on account of Student being absent from school on October 31, 2019.¹⁴⁵ During the week ending January 10, 2020, Student missed one speech therapy session on account of January 6, 2020 being a scheduled school day off.¹⁴⁶ During the week ending January 17, 2020, the first two days of the week, specifically January 13, 2020 and January 14, 2020 were days in which no school was held.¹⁴⁷ Student was absent for the remainder of that week. As such, Student received no physical therapy sessions during the week ending January 17, 2020.¹⁴⁸ During the week ending February 14, 2020, Student missed one session of speech therapy on account of there being no school scheduled on February 14, 2020.¹⁴⁹ During the week ending February 21, 2020, Student missed one session of speech therapy on account of there being no school scheduled on February 17, 2020.¹⁵⁰ Finally, during the week ending March 13, 2020, Student missed one speech therapy session on account of his being absent from school on March 10, 2020.¹⁵¹ In total, of the sessions missed, eight of those missed were on days when school was not scheduled.¹⁵² The remaining missed sessions, nine in total, were on account of Student being absent from school.¹⁵³

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

Student's speech therapist since summer 2019, Glenda Hanson, described Student has having a profound communication disorder, secondary to being nonverbal, explaining that Student communicated with gestures, behaviors, and sounds, but without using any spoken vocabulary.¹⁵⁴ Hanson provides services for Student outside of the school setting, and noted that Student is receiving services at school as well.¹⁵⁵ Hanson communicated with Student's speech therapist at school, Smith, regarding therapy issues for consistency purposes.¹⁵⁶ Maintaining attention has been a major issue for Hanson in her therapy sessions with Student.¹⁵⁷ Hanson incorporates behavioral modification techniques in her therapy sessions to assist student with maintaining attention on the tasks at hand.¹⁵⁸ Because of Student's attention issues, it is sometimes difficult to accurately assess the true nature of Student's abilities.¹⁵⁹ 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%.¹⁶⁰ Hanson testified that obtaining compliance is necessary for any progress to be made regarding Student's goals.¹⁶¹

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

¹⁵⁴ H-20-02 Hrg. Tr., Vol. III, pp. 9-10.

¹⁵⁵ *Id.*

¹⁵⁶ H-20-02 Hrg. Tr., Vol. III, p. 131.

¹⁵⁷ H-20-02 Hrg. Tr., Vol. III, p. 13.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ Hrg. Tr., Vol. III, p. 14.

¹⁶¹ *Id.*

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 13, 2019 and March 17, 2020. Parents allege two procedural issues in this case, specifically that District violated "stay put" between August 13, 2019 and February 24, 2020 when it refused to provide OT services to Student, and that District failed to comply with Student's existing IEP during the 2019-2020 school year with regard to the provision of speech therapy minutes.

Regarding Parents' allegation that District violated "stay put" between August 13, 2019 and February 24, 2020, the time during the pendency of Hearing #1, this Hearing Officer agrees that District committed a procedural violation of the IDEA. Pursuant to 20 U.S.C. § 1415(j), "during the pendency of any [due process] proceedings . . . the child shall remain in the then-current educational placement of such child," unless both District and Parents agree otherwise. *Hale ex. re. Hale v. Poplar Bluffs R-1 Sch. Dist.*, 280 F.3d 831, 833 (8th Cir. 2002). The IDEA's stay put provision is "literally and rigorously enforced, consistent with

its purpose to ‘strip schools of the unilateral authority they have traditionally employed to exclude disabled students.’ *Id.* (citing *Honig v. Doe*, 484 U.S. 305, 323 (1988)). The statute does not specifically define the term “then-current educational placement”; however, the Eighth Circuit Court of Appeals interpreted this term very narrowly in *Hale*. Specifically, in that case, the District ceased providing homebound services to a student following a medical procedure and began providing the exact same services to the student in a different location. *Id.* Even though the services themselves were unchanged, the Court held that the change in location of services was sufficient to constitute a violation of the student’s stay put rights. *Id.* In making this decision, the Court focused on the fact-intensive nature of stay put issues. *Id.*

In the present case, District notified Parents of an IEP meeting scheduled for May 21, 2019, which was to be held for the purpose of conducting an annual review. At that meeting, Parents were presented with a draft IEP that did not contain occupational therapy services. During the IEP meeting, information was presented about Student’s progress on IEP goals during the previous school year, Student’s third grade year. Thereafter, the OT assistant provided a discharge summary to Parents and District and recommended discontinuation of OT services, citing poor motivation, lack of participation, and minimal progress on the part of Student. Parent (father) became very upset when he learned of the District’s plan to discontinue OT. During that meeting, the IEP team called the LEA supervisor and allowed Parents to have a conference call with her during the meeting regarding this issue. At the conclusion of the meeting, things continued to be undecided on the OT issue, with Parent (father) stating that he wanted to seek legal options. The meeting concluded with no IEP being agreed upon by the parties.

Thereafter, two other IEP meetings were scheduled by the District, specifically one on June 11, 2019 and a second on July 16, 2019. Parents did not attend these meetings but were in communication with the school and indicated to District that they would wait for a hearing. Parents did attend an IEP meeting that took place on August 12, 2019. At that meeting, Parents provided an independent speech evaluation that they had obtained from another provider. Despite Parent providing this evaluation, District chose to discontinue occupational therapy services for Student for the 2019-2020 school year. Parents filed their due process complaint in Hearing #1, ADE H-20-02, on that same day and just prior to the scheduled IEP meeting.

In reviewing these facts, it is clear that the “then-current educational placement” of Student as of August 13, 2020 was the IEP that had been in place for him during his third grade school year, specifically the 2018-2019 school year. Parents made it very clear beginning in May 2019 that they did not agree with the District’s position that OT services be discontinued. They never agreed to a new IEP and did not sign a new IEP. They sought and paid for an independent OT evaluation to provide data to District in support of their position. Finally, Parents indicated their dissent to District even further in stating at various times that they wanted to seek legal rights and wait for a hearing. The fact that they did, in fact, file a due process complaint on August 12, 2019 further solidifies that Parents were never in agreement with any IEP that resulted in discontinuation of OT services. Considering these facts, it can be concluded that the then-current educational placement of Student as of August 13, 2019, one day after Parents filed for due process in Hearing #1, and following three solid months of dissenting to District’s notification that it intended to discontinue OT

services, was the 2018-2019 IEP of Student. That was, without a doubt, the last placement that had been agreed upon by Parents and District. Perhaps had Parents not been as vocal, it could be concluded that Parents somehow consented to the change. Here, however, that is not the case. Parents notified District at every possible chance that it did not agree with the decision and was pursuing legal rights to rectify the District's unilateral change.

Having concluded that Student's then-current educational placement as of August 13, 2019 was his 2018-2019 IEP, which included OT services, it is necessary to compare the services received by Student during the 2019-2020 school year to those specified in his prior IEP. Here, District chose not to provide OT services for the 2019-2020 school year, altering the schedule of services that Student had been provided the prior school year. Certainly, if a simple change of location of services can constitute a violation of stay put, it can be concluded that the complete elimination of a service, in this case OT, would qualify as a violation. Therefore, it is the conclusion of this Hearing Officer that the District violated "stay put" when it moved forward with an IEP for Student's 2019-2020 school year that was not agreed upon by Parents and was lacking OT services.

Regarding the allegation that District procedurally violated the IDEA by failing to provide all speech sessions required by Student's 2019-2020 IEP, this Hearing Officer does not agree with Parents. Regarding failure-to-implement claims, the Eighth Circuit Court of Appeals is one of many circuit courts that has adopted a standard set forth in a Fifth Circuit Court of Appeals case, specifically *Houston Independent Sch. Dist. v. Bobby R.*, 200 F.3d 341, 348 (5th Cir. 2000)(referenced in *Neosho R-V Sch. Dist. V. Clark*, 315 F.3d 1022, 1027 n.3 (8th Cir. 2003)). Essentially, a party challenging the implementation of an IEP must show

evidence of more than a mere *de minimis* failure to implement the elements of the written plan. *Id.* Unless it can be established that District failed to implement substantial or significant provisions of an IEP, then petitioner will not prevail on claims of this nature. *Id.* The essential question for a hearing officer is whether the failures alleged were material. *Id.*

In the present case, Student missed a total of 17 speech therapy sessions. Eight of these sessions were missed on account of holidays or other scheduled days off from school, and the remaining nine missed sessions were missed on account of Student being absent from school. It is the opinion of this Hearing Officer that these missed sessions did not constitute a material failure on the part of the District. Student received consistent speech therapy in accordance with his IEP, and the failure of the District to follow his IEP to the letter in this case was excusable under the circumstances. While there was a technical violation of Student's IEP plan between August 13, 2019 and March 17, 2020, it was not material and therefore constituted a mere *de minimis* failure on the part of the District. It is noted that this case is nearly identical to a case out of the United States District Court for the District of Columbia, specifically *Catalan v. District of Columbia*, 478 F.Supp.2d 73 (D.D.C. 2007). Although not an Eighth Circuit case, *Catalan* is instructive in that it also cites *Houston Independent Sch. Dist. v. Bobby R.* and applies the failure-to-implement standard to facts nearly identical to the current case. As such, it is the conclusion of this Hearing Officer that the failure of the District to make up missed speech therapy sessions on account of school being closed or the Student missing school between August 13, 2019 and March 17, 2020 was a *de minimis* failure at best and, therefore, not a procedural violation of the IDEA in this case.

The question of whether the procedural violation pertaining to the issue of OT and “stay put” also constituted a substantive violation of FAPE will be discussed further in the following section.

Substantive Violations of FAPE

Having analyzed the first prong of the FAPE analysis, specifically that of procedural violations, and determined that District violated “stay put” between August 13, 2019 and February 24, 2020 when it failed to provide OT services to Student, it is now necessary to consider whether this procedural violation, as well as 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 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 violation of “stay put” between August 13, 2019 and February 24, 2020, it is the opinion of this Hearing Officer that District’s procedural violation also resulted in a substantive denial of a FAPE. The specific argument asserted by Parents regarding stay put is that Student was prevented from receiving OT minutes between August 13, 2019 and the date of the decision in Hearing #1, specifically February 24, 2020, as a result of District discontinuing OT prior to the 2019-2020 school year, despite Parents’ objections and in light of Parents’ filing a due process complaint in Hearing #1 on August 12, 2019. The following section outlines the importance of OT and why discontinuing same prior to the 2019-2020 school year resulted in an inappropriate IEP for Student. Given that Student’s IEP was deemed inappropriate in part based on the lack of OT, it cannot be said that this procedural violation was not substantive in nature.

Appropriateness of IEP. Regarding the issue of whether Student’s IEP for the 2019-2020 school year was appropriate, it is the opinion of this Hearing Officer that Student’s

fourth grade IEP was not reasonably calculated to enable Student to make progress appropriate in light of his individual circumstances. As stated in the Final Decision and Order in Hearing #1, ADE H-20-02, although Student's 2019-2020 IEP includes 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. As noted previously, this is likely due to the lack of sufficient evaluations prior to the 2019-2020 school year to address Student's deficit areas. Prior to the start of school in August 2019, and throughout the time period covered in this hearing (with August 13, 2019 to February 24, 2020 constituting the time that Hearing #1 was pending), there was no assistive technology evaluation despite the fact that District was aware that one had been needed since at least the 2017-2018 school year. Student's behavior was cited as an issue in not only his 2019-2020 IEP, but in the IEPs on record for Student for the 2017-2018 and 2018-2019 school years. Despite these notations and knowledge of this issue by District, there was no attempt on the part of the District to secure a functional behavior assessment or conduct any other behavior assessment prior to the 2019-2020 school year or between August 13, 2019 and March 17, 2020. Certainly, proper programming for Student is dependent on appropriate information and evaluations regarding his abilities and skills.

In addition, the goals on Student's 2019-2020 IEPs are nearly identical to those present on his prior two IEPs for second and third grades, specifically the 2017-2018 and 2018-2019 school years, 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. Student's deficits are severe, no doubt, but it cannot be said that the goals and objectives set forth for Student on his 2019-2020 IEP were appropriately ambitious in light of Student's individual circumstances, particularly given the similarity of these goals to prior IEPs and the fact that Student had been unable to achieve any of these goals during the past two school years, as well as during the 2019-2020 school year.

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. 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 13, 2019 the date of the Final Decision and Order issued in Hearing #1, specifically February 24, 2020, District only attempted to address Student's behavioral issues by having one behavioral goal on Student's 2019-2020 IEP. As stated in the February 24, 2020 Final Decision and Order, this is insufficient to address an issue that has been present for numerous school years, specifically for at least the two school years prior to Student's fourth grade year. Prior to or during the 2019-2020 school year, District did not seek a functional behavior assessment or otherwise seek consultation with a behavior specialist. No additional IEP meetings were called to address or consider this issue. Given the severity of Student's behaviors, as noted by District and various therapists, District was on notice between August 13, 2019 and March 17, 2020 that Student needed more substantial behavioral 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, as also set forth in the Final Decision and Order in Hearing #1, ADE H-20-02, 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 was failing to make progress and, therefore, no longer benefiting from OT. The underlying issue, however, is the extent to which Student's behavior played a role in his lack of progress. Because Student's behavioral issues were not 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.

It is noted that District argued that Student made progress between August 13, 2019 and March 17, 2020. District's argument, however, falls short. First, District offered little evidence in support of this assertion, other than testimony that Student was making some progress on the LAMPs program. Second, while there is no doubt that progress is an indicator for consideration, it is not the only factor for consideration in determining the appropriateness of Student's IEP. Pursuant to *Endrew*, as set forth above, it is required that an IEP be designed such that Student can make progress in light of his individual circumstances. In fact, the Court in *Endrew* specifically stated that "[w]hen 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.” *Andrew F.*, 137 S.Ct. at 1001. Here, the progress cited by the District is not sufficient to overcome the deficits proven by Parents.

For all of these reasons, it is the opinion of this Hearing Officer that Student’s IEP for the 2019-2020 school year was inappropriate in that it was not reasonably calculated to allow Student to make progress in light of his individual circumstances between August 13, 2019 and March 17, 2020.

Least Restrictive Environment.

Parents allege that the District failed to education Student in the least restrictive environment between August 13, 2019 and March 17, 2020. 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.”¹⁶² However, the IDEA “significantly qualifies the mainstreaming requirement by stating that it should be implemented to the ‘maximum extent appropriate.’”¹⁶³ 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.”¹⁶⁴ The requirement to mainstream is not applicable when it “cannot be achieved satisfactorily.”¹⁶⁵ As such, it is permissible to remove a disabled child from a mainstream environment when he or she would not benefit from mainstreaming

¹⁶² *CJN*, 323 F.3d at 641.

¹⁶³ *Pachl v. Seagren*, 453 F.3d 1064, 1067 (8th Cir. 2006); *see also* 20 U.S.C. § 1412[a](5).

¹⁶⁴ *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983).

¹⁶⁵ *Pachl*, 453 F.3d at 1068.

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.”¹⁶⁶

Parents asserted in Hearing #1, and again here, that the District’s determination to place and maintain Student in the Consortium during the 2019-2020 school year, specifically between August 13, 2019 and March 17, 2020, 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 was not addressed at any point, prior to the February 24, 2020 Final Decision and Order, since Student was moved into the District. There is no indication that the placement was discussed at Student’s annual IEP review in preparation for the 2019-2020 school year.

In the Consortium, Student was with other students who were profoundly disabled. He was near non-disabled students only during his recess period, and there was testimony that Student tended to isolate himself at recess to swings and other activities that did not allow him to regularly engage with other non-disabled students. As stated in the Final Decision and Order following Hearing #1, 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 between

¹⁶⁶ *Roncker*, 700 F.2d at 1063.

August 13, 2019 and February 24, 2020, the date of the Final Decision and Order in Hearing #1, constituted a substantive violation of the least restrictive environment requirement.

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 13, 2019 and February 24, 2020 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 13, 2019 and March 17, 2020. It is noted that, with the exception of the following, the violations stated herein were addressed in the Final Decision and Order dated February 24, 2020. The District is hereby ordered to take the following actions regarding Student:

1. Provide 660 total minutes of compensatory education in the form of OT services, which is the equivalent of 60 additional minutes per week for 11 weeks,¹⁶⁷ above and beyond that already ordered for Student pursuant to the February 24, 2020 Final Decision and Order in Hearing #1 (ADE H-20-02). District will consult regularly with Student's therapist and Parents to assess whether these additional minutes per week of occupational therapy during

¹⁶⁷ Parents and District focused on eleven weeks when looking at speech therapy sessions and minutes. Considering that both parties agreed that those eleven weeks constituted the weeks that services should be provided to Student, that same number of weeks was used here in determining compensatory education for OT services. These compensatory education minutes account for OT missed between August 13, 2019 and March 17, 2020.

compensatory education can be tolerated by the Student. If not, District and Parent, in consultation with Student's therapist, can determine an alternative arrangement to ensure that Student receives all 660 minutes hereby ordered.

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

09/24/2020

DATE