

ARKANSAS DEPARTMENT OF EDUCATION
Special Education Unit

**XXXXXXXXXX,
Parents of
XXXXXXXXXX**

PETITIONER

VS.

**COMBINED CASES
NO. H-21-02 & H-21-07**

**MAYFLOWER SCHOOL
DISTRICT**

RESPONDENT

HEARING OFFICERS FINAL DECISION AND ORDER

ISSUES PRESENTED:

1. Whether the Mayflower School District (hereinafter “District” or “Respondent”) denied XXXXXXXX (hereinafter “Student”) a free appropriate public education (hereinafter “FAPE”) during the 2019- 2020 school year by having no individualized education program (herein after “IEP”) in effect at the beginning of the school year;
2. Whether the District denied Student a FAPE during the 2018-2019 and 2019-2020 school year by failing to develop and implement an appropriate IEP where the Student’s IEP failed to address her deficits in letter/word recognition, silent ready fluency and written expression as shown on her Evaluation Report;

3. Whether the District denied Student a FAPE during the 2019-2020 school year by failing to develop and implement a necessary and appropriate IEP where Student's 2/18/2020 IEP provides for Student's special education for dyslexia to be provided by a paraprofessional, rather than a highly qualified special education teacher;
4. Whether the District denied Student a FAPE by significantly impeding the parents' opportunity to participate in the decision making process where the District failed and refused to provide Parents access to the test booklet, raw scores, and scale score conversation tables used in the District's 11/13/2018 evaluation.

Procedural History:

On July 10, 2020, the Arkansas Department of Education (hereinafter referred to as the "Department") received a request to initiate a due process hearing from XXXXX and XXXXXXXXX (hereinafter referred to as "Parents" or "Petitioners"), the parents and legal guardians of Student. Parents requested the hearing because they believed 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") and the regulations set forth by the Department by not providing Student with appropriate special education services, as noted supra in the statement of issues.¹ At the time that Parents filed their request for a due process hearing, Student was a Thirteen-year-old female enrolled in the seventh grade at District, specifically enrolled in Mayflower Middle School.²

In response to the Parents' request for hearing, the Department assigned the case to an impartial hearing officer. Thereafter, a prehearing conference was scheduled for August 24, 2020, and the hearing was scheduled for August 26-28, 2020. On August 19, 2020, Petitioner

¹ See hearing officer File-Petitioner Complaint, pgs. 2-3.

² See Hearing officer File-Petitioner Complaint, pgs. 1-2.

filed a Motion to Enforce Due Process Rights and Compel District's Procedural Obligations. Included in this motion was a request for a 30-day continuance. On August 20, 2020, Hearing officer held a conference call to discuss said Motion. In attendance on the call were Theresa Caldwell, attorney for the Petitioners and Jay Bequette, Attorney for the District. At the beginning of the conference call, Ms. Caldwell stated that Mr. Kees (also attorney of record for the district) had agreed to turn over the testing protocol she was seeking in her Motion. Mr. Jay Bequette, who was on the conference call for the District, agreed the District would be providing the requested testing protocol.³ Both parties agreed that at 30 day continuance was warranted in order for the Petitioners expert to have adequate time to review the testing protocols the District agreed to provide.

On August 21, 2020, the hearing officer granted the parties Motion for a Continuance and the hearing was scheduled for September 22, 23, and 25, 2020. On August 25, 2020, Petitioner filed a second Due Process complaint against the Mayflower School District and the Arch Ford Cooperative (hereinafter "Arch Ford"), alleging that they were interfering with the Parent's right to access and have copies of Student's educational records. Except for the Addition of Arch Ford as a Respondent, Due Process Hearing request H-21-07 involves the same fact pattern, student, and school district as Due Process Hearing Request H-21-02, which was filed on July 10, 2020. On August 26, 2020, the District filed a Motion seeking a Protective Order for the testing protocols that had already been provided to the Petitioners.⁴ On September 3, 2020, the District filed a Motion to Dismiss Arch Ford.⁵ On September 10, 2020, a conference call was held to discuss the Districts Motion for a Protective Order and the District

³ See Transcript, Pre-hearing conference August 20, 2020.

⁴ See Hearing officer File, District Motion for Protective order.

⁵ See Hearing Officer File, District Motion to Dismiss Arch Ford.

Motion to Dismiss Arch Ford and to consolidate H-21-02 and H-21-07. Present on the call were Theresa Caldwell for the Parents and Cody Kees for the District. During the call counsel for the Parent, Theresa Caldwell, stated “in our response. But, I mean, and it’s not because I’m going to disclose these records or anything like that. I have no intent to do that, and I never have”.⁶ Mr. Kees stated at that time that as long as Ms. Caldwell agreed to not disclose the records, that he would withdraw his motion for a protective order.⁷ During this same conference call consolidation of Due Process Hearings H-21-02 and H-21-07 was discussed and neither of the parties objected.⁸ On September 15, 2020, the hearing officer entered an order dismissing Arch Ford from the case and consolidating H-21-02 and H-21-07.

A pre hearing conference was conducted, via telephone, on September 21, 2020 and counsel for both parties participated.⁹ 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 the same.¹⁰ Thereafter, the due process hearing in this matter began as scheduled on September 22, 2020. In order that all parties have ample time to complete their presentation of testimony on the issues in this case the due process hearing was held on September 22, 23, 25, 2020, October 6, 7, 30, 2020.¹¹ Present for the Hearing were Theresa Caldwell, attorney for Petitioner, Jay Bequette, Attorney for the District, Christina Locke, Advocate, XXXXXXXX, Mother of Student, XXXXXXXX, Father of Student, Tammy Thorn, LEA Supervisor for the District. After providing testimony both Audie Alumbaugh, advocate for

⁶ Trial Transcript, First combined prehearing conference Pg. 8.

⁷ Id., at 12

⁸ Id., at Pg. 27.

⁹ See Second Combined Prehearing conference

¹⁰ Id.

¹¹ See generally, Trial Transcript, Vols. I-VI.

Student and John Gray, Superintendent for the District were allowed to be present during the duration of the hearing. The Hearing Officer attended by Zoom.

The following witnesses testified in this matter: Tammy Thorn, Emily Orr (Cossey), Sarah Charton, Jennifer Lee, Karisa Hundall, Brook Graves, Mollie Teas, John Gray, Melissa Hannah, Audra Alumbaugh, XXXXXXXX, Jennifer Lee, XXXXXXXX, Sarah Hahn.¹²

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, Dana McClain, J.D., Hearing Officer for the Arkansas Department of Education, conducted a closed impartial hearing.

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.¹³

Findings of Fact

Background

Student is a 14-year-old female who attends the Mayflower Middle School in the Mayflower School District. Student is diagnosed with dyslexia, dysgraphia, dyscalculia, and Attention Deficit Hyperactivity Disorder (“ADHD”).¹⁴ Parent testified that Student began having issues, around two and a half years old, she completely stopped talking. She would only use

¹² See generally Trial Transcript, Vols. I-VI.

¹³ See Hearing Officer File-post hearing briefs.

¹⁴ Petitioner Exhibits, Pg. 128.

motions and grunts.¹⁵ Parent stated that as soon as Student was three years old she began speech therapy at Arch Ford. From there she was transferred from Mayflower's pre-k to the Mayflower kindergarten.¹⁶ Around first and second grade Student started exhibiting GI issues.¹⁷ During the third grade, on February 11, 2015, the District screened Student for dyslexia using the Comprehensive Test of Phonological Processing, 2nd Edition ("CTOPP2").¹⁸ The District found Student had characteristics of dyslexia.¹⁹ The District's records indicate Student began receiving services for her dyslexia on March 7, 2016. She received small group instruction using the Barton Program three times a week for thirty minutes.²⁰

Beginning on September 16, 2016, of Student's fourth grade year she continued receiving services for her dyslexia. These services involved the Student being pulled from the classroom twice a week for forty-five minutes for instruction by a paraprofessional who was trained in the delivery of the Barton Program.²¹ Student was paired with another student for instruction.²² At the end of the fourth grade, the District reported that Student was on lesson 4, Book 3.²³

During Student's fifth grade year, the District was informed that Student suffered from migraine headaches and took medicine daily to prevent them. Parents explained that if Student stated she felt a migraine coming on then she should be allowed to take additional medication and lie down.²⁴ Student was given the STAR test on October 17, 2017. It indicated that

¹⁵ Trial Transcript, Vol. V, p. 179.

¹⁶ Id., at 180.

¹⁷ Id.

¹⁸ Id., at 181; Parent's Exhibits, p. 245; District's Exhibits, p. 1008.

¹⁹ Id.; District's Exhibits, p. 1008.

²⁰ District's Exhibits, p. 1009.

²¹ Id., at 614.

²² Id., at 741.

²³ Id.

²⁴ Parent's Exhibit, p. 330.

Student’s reading grade equivalent was 3.4 and instructional level was 3.2.²⁵ Parent testified that she notified all of Student’s teachers in fifth grade that Student did not do well in reading or comprehension.²⁶ Parent further stated that she made her initial request for help for Student the first nine weeks of fifth grade.²⁷ Parents sent an email to Student’s counselor and requested additional “assistance” for Student in the areas of reading and writing, noting Student is dyslexic.²⁸ Student’s counselor, Jennifer Lee, responded to the parents request in email stating that they might try some learning games at home such as ABC Mouse. Ms. Lee also stated that if the Parents were requesting a 504 plan Student needs to be diagnosed with a disability. And if they are asking for Student to be evaluated for SPED, Ms. Lee said she could discuss that with her teachers and begin gathering evidence for a psychological evaluation.²⁹ Student continued to receive dyslexia intervention program during her fifth-grade year. May 1-3, 2018 Student was given the Arkansas ACT Aspire Test (ACT), which is an end of year summative assessment used to assess all Arkansas public school students in grades 3-10. Below is a comparison from the ACT given to Student on April 17-20, 2017 and the ACT given to Student May 1-2, 2018.

STUDENT 2017 ACT

2017	Eng.	Ready	National Percentile 35%
2017	MA	In need of support	National Percentile 3%
2017	Read	In need of support	National Percentile

²⁵ Id. At. 278.

²⁶ Trial Transcript, Vol. V., p. 184.

²⁷ Id.

²⁸ Parent’s Exhibit, p. 332.

²⁹ Parent Exhibit, Pg. 332.

			6%
2017	SC	In need of support	National Percentile 27%
2017	W	Close	National Percentile 56%

STUDENT 2018 ACT

2018	Eng.	Close	National Percentile 22%
2018	MA	Close	National Percentile 32%
2018	Read	In need of support	National Percentile 24%
2018	SC	In need of support	National Percentile 4%
2018	W	In need of support	Not available in exhibit

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Although Student showed small improvement in certain areas, there is a decline in others.

According to Student's ACT test scores, Student percentile in English dropped from the 35th percentile to the 22nd percentile overall.³¹

³⁰ Id. at pgs. 258-261.

Sixth Grade year 2018-2019

On September 25, 2018, Parent sent an email to the District stating she is very concerned about Student as she is struggling in school and requesting a meeting with her teachers to discuss her concerns.³² On October 12, 2018, the District referred Student for an evaluation to determine if she was eligible for special education services.³³ On November 6, 2020 Student was referred for a comprehensive evaluation by the District.³⁴

On November 13, 2018, Mollie teas, Licensed Psychological Examiner, School Psychology specialist conducted a comprehensive evaluation of Student. The Evaluation included:

Reynolds Intellectual Assessment Scale, Second Edition (RIAS 2)
Kaufman Test of Educational Achievement, Third edition (KTEA 3)
Woodcock Johnson Test of Achievement, Fourth Edition (WJ IV)
Clinical Evaluation of Language Fundamental, Fifth Edition (CELF 5
Screen)
Bender Gestalt, Second Edition (Bender)
Visual Aural Digit Span (VADS)
Behavior Assessment System for Children, Third Edition (BASC 3)

Mrs. Teas determined the following outcomes in her testing:

“According to the RIAS 2, Student test results indicate intelligence at the high end of the Below Average range. There was a significant discrepancy noted between her measured verbal and nonverbal abilities. Student’s overall intelligence is possible not a true indication of her abilities. Her higher nonverbal index was utilized to predict her academic achievement.

³¹ Id. at P. 258.

³² Id., at 321.

³³ Id., at 96.

³⁴ Id., at 97.

Academically, according to the KTEA3 Student had below average performance in basic reading, reading comprehension, math computation, Math Applications and Written Expression. Her score in Reading Fluency was Average.

On the WJ IV, Student scores were Low Average in Basic Reading, Math Problem Solving, Math Computation, and Written Expression. Her score in the area of Reading Comprehension was Average.

The CELF 5 Screen score fell below the score required for Student's age group. Student was previously dismissed from speech services. Further assessment language development may be justified.

The Bender score indicated Average visual motor skills for her age.
The VADS indicated Below Average auditory processing.
Based on information provided by Student's teacher on the BASC 3, she displays Clinically Significant concern in the areas of Depression and Somatization."³⁵

As a result of her testing Mrs. Teas found that the committee might want to look at qualifying Student under Other Health Impairment (OHI) because the medication Student was taking for Migraines might be affecting her educational performance but Mrs. Teas noted a physician's statement must be obtained prior to this determination.

Mrs. Teas goes further and determines that the results of her testing met the criteria established for the disabling condition of Specific Learning Disability (SLD) in the area of Math Problem Solving as set forth by the Arkansas Department of Education "Eligibility Criteria for Special Education and Related Services".³⁶

On November 27, 2018, the District conducted a speech-language evaluation of Student. Sarah H. Hahn, M.S., CCC-SLP, conducted the following tests:

Test of Language Development-intermediate Fourth Edition (TOLD-I:4)
Arizona Articulation Proficiency Scale-3 (AAPS-3)
Oral peripheral Examination
Hearing/Vision Screening

³⁵ Id. at 142.

³⁶ Id. at 143.

Ms. Hahn found:

“Based on formal and informal evaluation data, teacher report, and clinical observation, Student presents with language and vocabulary skills that are mildly delayed, and speech production skills that are within normal limits. Her language skills were noted to be at or above reported IQ scores, indicating language skills to be aligned with her IQ. Parameters of voice, fluency, and hearing also appear to be within normal limits, and Student’s oral mechanism appears adequate for the production of speech as well. Student is not a student in need of direct Speech/Language services at this time.”³⁷

On December 18, 2018, the IEP team presented Mrs. Teas evaluation to Parents. The IEP team consisted of Cathy Beard, special education teacher and Paige Kordsmeier, general education teacher. Mrs. Teas was not present.³⁸ Mrs. Teas testified that she wasn’t invited to the IEP meeting and rarely attends.³⁹ Mrs. Teas further testified that the Arch Ford provides two trainings per year to teachers on how to interpret evaluations results but wasn’t sure if the teachers at Student’s Evaluation conference had been trained.⁴⁰ Also at the December 18, 2018 meeting an IEP was developed for Student.⁴¹ Student was identified as a student with specific learning disability (SLD) in need of special education services. The IEP includes a statement of the child’s present levels of academic performance which includes summaries from various assessments conducted. Included is a statement that Student’s SLD affects her ability to read and process multi-step problems and to make progress in the general education curriculum.⁴² Regarding the schedule of services, the IEP indicates that student will receive co-taught services

³⁷ Id. at 149.

³⁸ District Exhibits, pg. 98.

³⁹ Trial Transcript Vol. III, pgs. 201-202.

⁴⁰ Id. at 203.

⁴¹ Parent Exhibit, Pgs. 57-69.

⁴² Id. at 58.

in math in the regular classroom 25 minutes 5x a week. ⁴³ Student's IEP also includes several accommodations. ⁴⁴

In addition, Student's IEP includes two math goals but no spelling or reading goals.⁴⁵ At the December 18, 2018 IEP meeting Parent stated that she wasn't worried about Student's math skills but is more concerned with her ability to read and write.⁴⁶ The IEP failed to include any services to address Student's deficits in reading and spelling. The IEP did state Student is receiving dyslexia services. There was nothing indicating what type of dyslexia services Student was receiving, how many minutes and days services were provided and how progress was monitored. On February 8, 2019, Parents had an email exchange with Student's teacher Kristine Bradley. Parent's declared that Student was coming home loaded down with work and in tears because she is struggling. Parent's further asked if Student was being allowed to use her calculator as her IEP states.⁴⁷ Kristen Bradley responded that all students, including ones with IEPs went without a calculator for a few days so they would learn the steps of dividing fractions. She also stated that with an IEP you only have to use the calculators for assessments. She continued that she has noticed students in study hall including Student not using their time wisely. She offered tutoring after school to help. She also said she thought Student has extended time on work but that Student would need to turn in the work that's late or receive zeros.⁴⁸

Later on, February 8, 2019, parents emailed Student's teachers requesting an IEP meeting because of concerns that District wasn't implementing Student's IEP.⁴⁹

⁴³ Id. at 61.

⁴⁴ Id. at 68

⁴⁵ Id at 62-64.

⁴⁶ Id. at 57.

⁴⁷ Id. at 323.

⁴⁸ Id. at 324.

⁴⁹ Id. at 325.

During the meeting with the District Parents reported that Student's was being bullied by a group of students, and that this had been happening off and on since fifth grade.⁵⁰ There is nothing documented that the District took any action in response to bullying allegations. When counselor Jennifer Lee testified she admitted that she had knowledge that "students were picking back and forth", but stated she couldn't remember specifics.⁵¹ Ms. Lee also testified that she couldn't remember telling Parents that other students reported that Student intended to kill herself.⁵² On February 14, 2019, the bullying escalated into a physical altercation between Student and another student. Both girls were suspended for three days for fighting.⁵³

On February 19, 2019, Parents determined it was not in Student's best interest to remain in the District. They withdrew Student from the District and enrolled her in an online charter school, Arkansas Connections Academy ("ACA").⁵⁴ Parent testified that after Student began attending ACA, Student stopped having migraines.⁵⁵

2019-2020 Seventh Grade

The District's records indicate Parents re-enrolled Student on or before August 13, 2019.⁵⁶ On August 21, 2019, Student was tested using the STAR reading program. Her grade equivalent reading level was 3.7. However, Student had been out of the District since February of 2019. Student was tested approx. every 60 days using the STAR reading program and the

⁵⁰ Trial Transcript, Vol. V., pp. 186-187.

⁵¹ Trial Transcript, Vol II, pgs. 126 & 124.

⁵² Id. at 124.

⁵³ Trial Transcript, Vol. V., pg. 207.

⁵⁴ Id. at 211-212.

⁵⁵ Id. at 213.

⁵⁶ District Exhibits, pg. 218.

Grade equivalency fluctuated as follows:

Date of test	Grade Equivalent	Date of test	Grade Equivalent
8/25/2017	2.7	8/17/2018	3.7
10/17/2017	3.4	9/20/2018	3.3
12/14/2017	2.7	12/19/2018	4.3
1/26/2018	3.4	2/11/2019	5.2
3/12/18	2.8	8/21//2019	3.7
5/18/2018	3.5	2/20/2020	5.1

On September 2, 2019, a Notice of Conference was sent to the Parents. Under purpose of conference the District checked to review/revise the IEP and transfer conference. On September 9, 2019, the District met to develop Student’s IEP. Although the District had requested documents from Student’s last placement of ACA, they had not received any documents to review at the IEP conference.⁵⁷ Thus they met to review records, grades and Student’s previous IEP from the Mayflower School District. This would have included the STAR reading test data above up to 8/21/2019, which showed the Student had a significant deficit in reading and had consistently tested considerably under grade level since 8/25/2017. Additionally, Student hadn’t attended District since February of 2019, yet the IEP team agreed to adopt Students December 18, 2018 IEP as Students September 9, 2019 IEP. The September 9, IEP failed to address Students lack of progress in reading and spelling. On the notice of action form, under other

⁵⁷ Parent Exhibit, p. 79

factors relevant, the District once again says Student is receiving dyslexia services in the general ed classroom.⁵⁸

On September 20, 2019, Parents secured an independent evaluation of Student from Pediatric Plus, “to address concerns about reading, spelling, and retention”.⁵⁹ Following the comprehensive testing, Pediatrics Plus diagnosed Student with dyslexia with impairment in reading (word reading accuracy and reading comprehension); dysgraphia with impairment in written expression(spelling accuracy); dyscalculia with impairment in mathematics (accurate calculation); and ADHD, combined presentation.⁶⁰ Pediatrics Plus recommended continued mental health therapy; special education for dyslexia; special education for spelling; and, additional drill and practice with number facts. Pediatrics Plus further recommended modifications and accommodations based on Student’s SLDs and ADHD.

On November 5, 2019, Parents requested an IEP meeting to discuss the Independent educational evaluation from Pediatric Plus. The District scheduled Student’s annual review for December 6, 2019.⁶¹ Parents arrived at the appointed time and place along with their dyslexia advocate, Audra Alumbaugh. However, the District IEP team failed to appear.⁶² Prior to the December 6, 2019 scheduled IEP meeting, while reviewing Mollie Teas Psychological evaluation, Audra Alumbaugh noticed there were two different sets of KTEA-3 scores.⁶³ Parents shared this information with the District on December 6, 2019.

The District rescheduled Student’s IEP meeting for December 9, 2019. At the December 9, 2019 IEP meeting Alumbaugh shared that Mollie Teas evaluation included two sets of KTEA-

⁵⁸ Id. p. 80.

⁵⁹ Id. p. 117.

⁶⁰ Id. p. 128.

⁶¹ Id. at 89.

⁶² Trial Transcript, Vol. V., pgs. 23-24, 219-220.

⁶³ Id. at 23-24.

3 scores and that the KTEA-3 scores in the report are consistent with the Pediatrics plus evaluation, showed SLDs in the areas for Letter/word recognition, silent reading fluency, and written expression.⁶⁴ Mrs. Teas in her testimony acknowledged the two sets of KTEA-3 scores but asserted the correct scores were used in the regression analysis. Alumbaugh, on behalf of the Parents, requested Student's test protocols "to run the scores ourselves".⁶⁵ The District refused to provide the protocols citing copyright law.⁶⁶ The District also refused to include Student's dyslexia services in her IEP.⁶⁷

Without notice to the Parents, the District changed Student's dyslexia services at the start of seventh grade from the Barton program to the Structures program.⁶⁸ Student's "progress" reports in the Structures Program are in the record.⁶⁹ However, it is not clear in the record if these were provided to the parents as a description of Student's progress in the program. Because the dyslexia program isn't included in Student's IEP there is very little known about the time Student is spending in the Structures program, if and how much progress Student is making and how the parents are being informed of said progress or problems Student may be having. The District's dyslexia teacher testified the Structures program has "no kind of built-in progress monitoring".⁷⁰

Alumbaugh testified that before the December 9, 2019 IEP meeting, the District was not providing the Structures Program with fidelity because Student was only getting 60 minutes per

⁶⁴ Id. at 26.

⁶⁵ Id. at 64.

⁶⁶ Id. at 65.

⁶⁷ Id. at 57.

⁶⁸ Trial Transcript, Vol. III, P. 105.

⁶⁹ Parent Exhibit, p. 399-400.

⁷⁰ Trial Transcript, Vol. III, p. 186, 188.

week of instruction.⁷¹ District's dyslexia teacher testified that the minimum for fidelity is 90 minutes per week.⁷²

On December 11, 2019, Parents emailed the District again requesting an IEP meeting to revise Student's IEP to recognize that the wrong KTEA-3 scores were used in the regression analysis by Mrs. Teas.⁷³ On February 18, 2020, the District held an IEP meeting at the Parents request. The Parents again requested copies of Student's KTEA-3 test protocols, and the District again refused citing copyright law.⁷⁴ After much back and forth between counsel for the Parents and counsel for the District, the District on or about August 20, 2020, provided the Parents with Student's KTEA-3 test protocols.⁷⁵ Also at the February 18, 2020, IEP meeting the team added some ELA goals.

Parents asked Melissa Hannah, who the Parents called as a dyslexia expert, to use Student's testing protocols to rescore Student's KTEA-3. Hannah produced two sets of KTEA-3 scores, neither of which consistently aligned with the two sets of scores in Mrs. Teas evaluation.⁷⁶

In the written expression part, Ms. Hannah completely rescored Student's answers resulting in standard scores of 76 and 79, as compared to a 73 in Mrs. Teas report and 83 in Mrs. Teas regression analysis.⁷⁷ Based on Ms. Hannah's scoring of Student's answers, Ms. Hannah testified that in her opinion Student has an SLD in writing expression.⁷⁸

⁷¹ Trial Transcript, Vol. V., p. 86.

⁷² Trial Transcript, Vol. III, p. 153.

⁷³ Parent's Exhibits, p. 290.

⁷⁴ Trial Transcript, Vol. V., p. 64; Parent's Exhibit, p. 73.

⁷⁵ Parent Exhibits, p. 151.

⁷⁶ Id., at 150.

⁷⁷ Id., at 150; Trial Transcript Vol. IV., p.143.

⁷⁸ Trial Transcript, Vol. IV., p. 154.

CONCLUSION OF LAW AND DISCUSSION:

PROCEDURAL VIOLATIONS

Pursuant to Part B of the Individuals with Disabilities Education Act (IDEA), states are required to provide a Free Appropriate Public Education (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. Ed. 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, 206-207 (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 set for 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 the Parents raised six possible violations that were classified in the Complaints as procedural.⁷⁹ These six violations where District refused to provide access to student records, specifically to testing protocols; District violated Child Find by not referring the child for an evaluation when the parents requested help by email in 2017; District failed to have a qualified individual to interpret evaluation results as required under IDEA; District failed to have an IEP in place at the start of Student's seventh grade year; District failed to revise Student's IEP to address lack of progress in reading; District changed Student's Dyslexia program from Barton to Structures without notification to the Parents.

⁷⁹ See Hearing files-Complaints

Districts Refusal to provide access to Student's Education records

Parents' claim that the District refused Parents access to Students education records. Specifically, that on December 6, 2019, Parents and their advocate Ms. Alumbaugh requested copies of Student's evaluation testing protocols because as Ms. Alumbaugh testified she had noticed two different sets of numbers in the KTEA 3 test performed by Mrs. Teas, and wanted a copy of the protocols so that the Parents could have someone else run the numbers including the regression.⁸⁰ Then on December 9, 2019 and again on February 18, 2020, the Parents and Ms. Alumbaugh again sought copies of Student's testing protocols from Mrs. Teas psychological evaluation. Specifically, the protocols for the KTEA 3. Again, the District denied copies citing copyright law.

There was testimony by John Gray, Superintendent that the Parents and Ms. Alumbaugh were given an opportunity to view the test protocols at the February 18, 2020 IEP meeting, but they insisted they wanted copies. IDEA provides that a Parent must be given the opportunity to inspect and review a Student's education records.⁸¹

Based on testimony, documents, and the second complaint filed, Parents were allowed to review the KTEA-3 protocols and copies of the protocols were eventually provided to Counsel for the Parent. This was not a procedural violation of IDEA.

District violated Child Find by not referring the child for an evaluation when the parents requested help by email in 2017

This alleged violation falls outside the 2-year statute of limitation this hearing officer can look for violations. The email in question was sent in 2017 and Parents due process complaint

⁸⁰ Transcript, Vol. V., p. 43.

⁸¹ 34 C.F.R. 99.10(a).

was not filed until July 10, 2020. Since it is outside the 2 years, I am without authority to determine whether it rises to a procedural violation of IDEA.

District failed to have a qualified individual to interpret evaluation results as required under IDEA

On December 19, 2018, the IEP team presented Mrs. Teas evaluation to the parents. The IEP team consisted of Cathy Beard, special education teacher and Paige Kordsmeier, general education teacher, and Parent.⁸² Mrs. Teas testified that she wasn't invited to the IEP meeting but that Arch Ford provides two trainings a year to teachers on how to interpret evaluation results but she wasn't sure if the teachers at Student's evaluation conference had been trained.⁸³ IDEA mandates that the IEP Team must include "an individual who can interpret the instructional implications of evaluation results." 20 U.S.C. 1414(d)(1)(B)(v). There is nothing in the record to suggest that either Ms. Beard or Ms. Kordsmeier had appropriate training or knowledge to interpret and adequately explain Student's evaluation to Parent. To the contrary had either teacher been adequately trained they may/should have caught the two different sets of numbers in the KTEA-3 results. I find the District's failure to have an individual who can interpret the instruction implications of evaluation results a procedural violation of IDEA.

District failed to have an IEP in place at the start of Student's seventh grade year

IDEA requires that at the beginning of each school year, each local educational agency, State educational agency, or other State agency, as the case may be, shall have in effect, for each child with a disability in the agency's jurisdiction, an individualized education program.⁸⁴ The District's records indicate Parents re-enrolled Student on or before August 13, 2019.⁸⁵ The

⁸² District Exhibits, p. 98.

⁸³ Transcript, Vol. III, pgs. 201-203.

⁸⁴ 20 U.S.C. 1414(d)(2)(A).

⁸⁵ District Exhibits, p. 218.

District sent out a notice of conference on August 26, 2019 for a transfer conference to be held on September 9, 2019 to review and revise the existing IEP the Student had before she withdrew from the District, and that the District argues remained in effect.⁸⁶ At the IEP meeting on September 9, 2019, the IEP team decided the current IEP was appropriate, and would be continued, pending a psychoeducational evaluation the Parents were seeking from Pediatrics Plus Counseling and Diagnostics.⁸⁷ The Student's annual review was in December of 2019. Nothing in IDEA or its regulations mandates that IEPs be valid through an academic year. The IDEA only mandates that the IEP be reviewed periodically, but no less frequently than annually.⁸⁸ The Student's IEP was in place and valid from December 2018-December 2019 when an annual review was held. Based on the documents and testimony in this case I find that the District believed it had an IEP in place for Student when she began seventh grade. Further, had there not been an IEP, the District immediately scheduled a meeting to discuss and revise the IEP. It is unfathomable to this hearing officer that IDEA could stand for the principle that if Parent enrolled their child with a disability close to or on the first day of school that the District would have to have an IEP in place that day. In this case the District acted immediately upon the Student re-enrolling. I find no procedural violation of IDEA.

District failed to revise Student's IEP to address lack of progress in reading

Whether the District failed to revise the Student's IEP to address lack of progress in reading is an allegation of a substantive violation not a procedural violation and as such will be discussed below.

⁸⁶ Id. at 138.

⁸⁷ Id. at 185-203.

⁸⁸ 20 U.S.C. 1212(d)(4)(A)(i)

District changed Student's Dyslexia program from Barton to Structures without notification to the Parents

Because the Dyslexia program is not part of the Student's IEP, IDEA doesn't address what happens to programs outside its purview. There is no law or regulations this hearing officer has authority over that would mandate the District notify Parents of changes to programming outside of special education services and programming contained within the IEP. Certainly, it should always be the desire of a district to keep parents informed of services being provided to their children, but under these facts there is no procedural violation of IDEA. Had the Dyslexia program been a part of the IEP the outcome may have been different.

SUBSTANTIVE VIOLATIONS

Having analyzed the first prong of the FAPE analysis, specifically that of procedural violations, and determined the Districts failure to have an individual present at an IEP meeting/evaluation conference who can interpret the instruction implications of evaluation results is a procedural violation pursuant to IDEA, it is now necessary to consider whether the District's actions resulted in a substantive denial of 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 pupils right to an appropriate education, seriously hampered the parent's opportunity to participate in the formulation process, or caused a deprivation of educational benefit." *Id.* At 804-805.

On December 19, 2018, the Parents attended an evaluation/IEP conference. It was at this conference that the Parents were presented Mrs. Teas evaluation results. Mrs. Teas testified that

she wasn't invited to the evaluation conference/IEP meeting and she wasn't sure if either of the teachers present had been trained on how to interpret evaluation results.⁸⁹ There was no evidence presented, through testimony or documents, that convinced this Hearing Officer that either Cathy Beard, special education teacher, or Paige Kordsmeier, general education teacher were qualified to interpret Mrs. Teas evaluation results and interpret the instructional implications of those results for the Parent. IDEA recognizes that it doesn't have to be the evaluator who attends the IEP meeting to explain the evaluation results but it stresses that it must be someone qualified to interpret, answer Parents questions, and discuss the instructional implications of the results. Without someone who could fully interpret and explain Student's evaluation results there is no way the Parents could fully participate in the development of services for Student. One of IDEA's foundational principles is the right of parents to participate in educational decision making regarding their child with a disability. The District's failure to have a qualified person to interpret Student's evaluation seriously hampered the Parent's opportunity to participate in the formulation process and as such I find is a substantive violation of IDEA and a denial of FAPE.

Now we must look at whether the District failed to provide IEPs that were reasonably calculated to enable Student to make appropriate progress in light of her 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 the 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

⁸⁹ Transcript, Vol. III, pgs. 201-203.

Endrew F. ex rel. Joseph F. v. Douglas City. Sch. Dist. RE-1, No. 15-827, 2017 WL 1066260, 580 U.S. __ (2017), 137 S.Ct. 988 (2017)).

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 state 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. The Court held that the IDEA requires, even demands, more. Specifically, the IDEA requires that students under the Act be provided with an “education 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 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. 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 is not possible, the education of a disabled child still needs to be “appropriately ambitious” in light of a student’s individual circumstance. Id.

Every IEP, pursuant to IDEA must include: (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 her 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 states 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 has provided FAPE. *C.B., by and through his parents. B.B. and C.B. vs. 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 *Endrew F.*, when the *Rowley* standard was interpreted to require that a student’s curriculum provide only “some educational benefit.” Certainly, in light of the U.S. Supreme Court decision in *Endrew F.*, it is most certain 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 screened for dyslexia during the third grade. The District found Student had characteristics of dyslexia. Student began receiving services for her dyslexia on March 7, 2016. She received small group instruction using the Barton Program. Student

continued to receive Dyslexia services in the fourth grade (2016-2017), fifth grade (2017-2018) and sixth grade (2018-2019). Student was given the STAR test on August 25, 2017, which indicated her grade equivalent was 2.7. Student was given the STAR test at least 12 times between August 25, 2017 and February 20, 2020. All but three of those tests scored the Student in the third-grade equivalent or below. The Student's STAR scores fluctuated considerably indicating that even if Student was gaining knowledge, she was not retaining it for long. Student was also given the Arkansas ACT Aspire Test (ACT) twice during this same time period. Once in April of 2017 and once in May of 2018. Student scored Ready in only English in 2017, but that had dropped to close when Student took the ACT in 2018. And although her reading score went from 6% national percentile in 2017 to 24% national percentile in 2018, her English score dropped from 35th percentile to 22nd percentile nationally. This should have put the District on notice that the program Student was receiving for dyslexia was failing Student and as she moved up in grades, her skills continued to lag further behind.

On October 12, 2018, at the Parents request the District referred Student for an evaluation to determine if she was eligible for special education services. The evaluation determined that Student met the criteria for SLD in the area of Math Problem Solving and on December 18, 2018, the District met to develop an IEP for Student. Even with all of the data, the STAR testing, the ACT testing and the Mollie Teas evaluation, the 2018-2019 IEP failed to address Student's reading deficits. The IEP contained 2 math goals and no reading goals. The dyslexia program Student was receiving in general ed was not included in the IEP, but testimony indicated that the District expected that program to address Student's reading deficits. The Student was not enrolled in the District from February of 2019 until August 2019. In August Parent re-enrolled

Student and the District met shortly after to continue the 2018-2019 that the district believed was still valid because annual review wasn't to take place until December of 2019.

In September of 2019, Parents secured an Independent evaluation from Pediatric Plus. That evaluation diagnosed Student with dyslexia with impairment in reading; dysgraphia with impairment in written expression; dyscalculia with impairment in mathematics and ADHD combined type. At the December 2019 annual review of Student's IEP, the Pediatric Plus evaluation was discussed. Student's IEP added additional goals in English Language Arts (ELA) and added ELA, co-taught 25 minutes, 5 x a week. The new goals added look remarkably similar to the dyslexia program Student is receiving but again the Dyslexia program is mentioned but not included in the IEP. (beginning of 7th grade District changed Student's dyslexia program from Barton to Structures). There was little evidence offered that showed progress made by Student regarding the new ELA goals. There was testimony by Ms. Graves, Student's dyslexia teacher that she was implementing the English goals in Student's IEP. That information is not contained in the Student's 2019-2020 IEP. The District is correct there is no requirement that dyslexia services be included in the IEP. However, in the present case they are so intertwined that it appears to do a dis-service to the IEP team, Student and Parents. IDEA does require that the IEP address all areas of disability, and if you are going to use any program to address a Student's disabling condition and you want to be able to use that program to show student has progressed there needs to be goals and objectives and progress monitoring in the IEP. There doesn't seem to be any progress monitoring implemented. And although not a violation of IDEA per se, when an IEP is split in an academic year it makes it exceedingly difficult to conduct accurate and seamless progress monitoring. The ELA goals are being implemented by the dyslexia teacher, who testified she is not a part of the IEP team. And in the meantime, Student

appears to be falling further behind. Student has been receiving dyslexia services since 2016, and has had an IEP since 2018, and yet her progress in reading appears to be minimal. Student is of average intelligence, and but for Migraines, there was no evidence that she is unable to learn. What is clear is that there has been a violation of FAPE on account of Student's lack of progress.

Based on the evidence presented, and the testimony of the witnesses, this hearing officer finds that the District failed to provide Student with IEPs that were reasonably calculated to enable Student to make progress appropriate in light of her circumstances between December 18, 2018 and August 25, 2020.⁹⁰

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 18, 2018-August 25, 2020 by failing to produce IEPs for Student that were reasonably calculated to enable her to make progress appropriate in light of her circumstances. In addition, the District failed to provide Student FAPE by failing to provide a qualified person to interpret Mollie Teas evaluation at the December 18, 2018 IEP/evaluation meeting.

Therefore, this Hearing Officer hereby orders the following:

1. District shall conduct comprehensive evaluations by evaluators agreeable to Parents within sixty (60) days to address all areas of suspected disability, including Student's potential need for language therapy.
2. District shall meet with the Parents no later than February 1, 2021, for the purpose of developing a new IEP for Student. The District shall have an individual present who can interpret the evaluations and the instructional implications of the

⁹⁰ Filing date of the second due process complaint filed by Petitioners.

evaluation results for Parents. 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 meet with the 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 the Student's IEP.
4. District shall provide compensatory education that consists of selecting an intensive Dyslexia/reading program that is based on recommendations in light of the Student's evaluations. The program selected must be on the approved list by the ADE. The program must be in addition to services provided Student under her IEP and must be provided with fidelity and contain progress monitoring. The compensatory education shall be the length of time it takes to for Student to complete the program. The District shall update Parents on Students progress in the Program at an IEP meeting held at the end of every 9 week period. The District has until March 1, 2021 to initiate the Dyslexia/reading program.

Parents also allege that the District's conduct constitutes disability discrimination in Violation of §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794(a), and Title II of the Americans' with Disabilities Act, 42 U.S.C. §12131-12165. This Hearing Officer has no jurisdiction over disability discrimination claims. See ADE Spec. Ed. Rules §10.01.22.1.

Accordingly, to the extent Parents' due process complaints raise disability discrimination claims, those claims are dismissed.

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.

1s/Dana McClain
HEARING OFFICER

11/25/2020
DATE

