

**ARKANSAS DEPARTMENT OF EDUCATION  
Special Education Unit**

**IN RE:**

**XXXXXXXXXXXXXXXXXXXXX,  
Parents on behalf of  
XXXXXXXXXXXXXXXXXXXXX, Student**

**PETITIONERS**

**VS.**

**CASE NO. H-21-06  
CASE NO. H-21-09**

**Atkins School District**

**RESPONDENT**

**HEARING OFFICER'S FINAL DECISION AND ORDER**

**ISSUES PRESENTED:**

Whether the Atkins School District (hereinafter "District" or "Respondent") denied XXXXXXXXXXXX(hereinafter "Student") a free, appropriate, public education (hereinafter "FAPE") between December 14, 2019 and August 28, 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 referred to as "IDEA"), by: (1) failing to provide individualized educational programs (hereinafter IEPs) for the Spring 2020 semester (Student's fifth grade year), as well as for the Fall 2020 school semester (Student's sixth grade year), that were reasonably calculated to enable Student to make progress appropriate in light of his circumstances; (2) failing to provide all necessary occupational therapy minutes between December 14, 2019 and August 28, 2020, pursuant to the IEP in place at the beginning of the 2019-2020 school year; (3) failing to re-evaluate Student

between December 14, 2019 and August 28, 2020; (4) failing to hold a previously-scheduled IEP meeting on August 17, 2020 due to an unexpected conflict of District's attorney; and (5) failing to provide an appropriate program to address Student's dyslexia.

**PROCEDURAL HISTORY:**

On August 17, 2020, the Arkansas Department of Education (hereinafter referred to as "Department") received a request to initiate due process hearing procedures from XXXXX and XXXXXXXX XXXXXXXX (hereinafter referred to as "Parents" or "Petitioners"), the parents and legal guardians of Student (ADE 11-21-06). Parents asserted in ADE 11-21-06 that District had failed to comply with the Individuals with Disabilities in Education Act of 2004 (20 U.S.C. §§ 1400-1485, as amended (hereinafter referred to as "IDEA" or the "Act") and the regulations set forth by the Department by failing to provide and implement an appropriate IEP for Student between December 14, 2019 and August 17, 2020.<sup>1</sup> Eleven days later, on August 28, 2020, Parents filed another request to initiate due process hearing procedures (ADE 11-21-09). Parents asserted in ADE 11-21-09 that District had unilaterally cancelled an IEP meeting which had been scheduled for August 17, 2020, failed to have an IEP in place for Student on August 24, 2020 when school began, failed to follow due process procedures to evaluate the Student and determine appropriate goals for the 2020-2021 school year, and failed to provide an appropriate program to address Student's dyslexia, all in violation of the IDEA.<sup>2</sup>

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<sup>1</sup> See Petitioner's Complaint in H-21-06.

<sup>2</sup> See Petitioner's Complaint in H-21-09.

ADE 11-21-06 and ADE 11-21-09 were the second and third due process complaints filed by Parents against District. The first due process request filed by Parents was ADE H-20-15, which was filed approximately nine months earlier on December 14, 2019 (hereinafter “Hearing #1”). This Hearing Officer issued a Final Decision and Order on May 13, 2020 in Hearing #1, finding for Parents and awarding compensatory education. Cases ADE 11-21-06 and ADE 11-21-09 (hereinafter “Hearing #2”) were consolidated for judicial efficiency and, as such, a single due process hearing was held to address all issues covered in both complaints. At the time that Parents filed ADE H-21-06 and ADE H-21-09, Student was enrolled at the Atkins Middle School and was entering the sixth grade.

In response to the Parents’ request for hearing in ADE H-21-06 and ADE H-21-09, the Department assigned the cases to an impartial hearing officer. Thereafter, October 19, 2020 was set as the date on which a hearing would commence should the Parents and District fail to reach resolution prior to that time. All in all, testimony was heard on October 19, 2020 and October 20, 2020, with this Hearing Officer presiding via ZOOM on account of the COVID-19 pandemic.<sup>3</sup> At the hearing, Parents and District stipulated and agreed to all prior testimony given during Hearing #1, ADE H-20-15. As such, all testimony taken in Hearing #1 was incorporated into the record for the above-referenced matters. The following witnesses testified in Hearing #2: Penny Laymon, Amie Widner, Lindsay Riedmueller, Sidney Thomas, Lois Duvall, Parents, Tim Conway, and Susan Ward.<sup>4</sup>

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<sup>3</sup> See generally H-21-06 and H-21-09 Transcript, Vols. I-II.

<sup>4</sup> See generally H-21-06 and H-21-09 Transcript, Vols. I-II.

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 Caldwell (Little Rock, Arkansas) and the District was represented by Jay Bequette (Little Rock, Arkansas). Both parties were offered the opportunity to provide post-hearing briefs in lieu of closing statements, and both timely submitted briefs in accordance with the deadline set by this Hearing Officer.<sup>5</sup>

### **FINDINGS OF FACT:**

Student currently attends the Atkins School District and is in his sixth-grade year at District. Parent (Mother) testified that Student began having difficulties at a young age and, by the time he was three years old, Student was receiving speech therapy services.<sup>6</sup> Prior to Student beginning school, Parents noticed that Student was struggling with letter recognition, despite the fact that Parents were working with him on this skill.<sup>7</sup> Parents also noticed that Student was struggling to articulate words.<sup>8</sup> By the middle of kindergarten, after teachers had worked with Student to no avail, it became apparent that Student needed academic intervention.<sup>9</sup>

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

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<sup>5</sup> See Post-Hearing Briefs.

<sup>6</sup> H-20-15 Transcript, Vol. V., p. 9.

<sup>7</sup> *Id.* at 10.

<sup>8</sup> *Id.* at 11.

<sup>9</sup> *Id.*

category was selected on account of the fact that there was a significant gap between Student's intelligence and achievement scores.<sup>10</sup> An evaluation/programming conference form dated January 30, 2015 indicated that Student was administered the following tests as part of his initial evaluation: (1) Photo Articulation Test – Third Edition (PAT-3); (2) Comprehensive Assessment of Spoken Language (CASL); (3) Test of Language Development – Primary: Fourth Edition (TOLD-P:4); (4) Oral and Written Language Scales (OWLS); (5) Adaptive Behavior Evaluation Scale – Revised Second Edition; (6) Kaufman Test of Educational Achievement 3; (7) Woodcock Johnson Test of Achievement – III; (8) Bender-Gestalt II; and (9) Comprehensive Test of Phonological Processing.<sup>11</sup> From these assessments, it was determined that Student had average intelligence, yet his academic skills were below average or extremely low in the areas of letter/word identification, reading comprehension, math concepts, math computation, spelling and written expression. Student's language skills were mildly delayed, as were his articulation and phonological awareness skills, memory, fine motor coordination, and manual coordination. Student was severely delayed in the areas of visual motor integration, visual perception, and fine motor control.<sup>12</sup> It was noted that Student did not have a behavior issue and that Student attended school regularly.<sup>13</sup> Student was initially placed on an IEP that provided direct instruction in reading, math, and written expression, as well as speech language therapy (60 minutes) and occupational therapy (60 minutes) per week.<sup>14</sup> Student has been on an IEP since that time.

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<sup>10</sup> H-20-15 Transcript, Vol. II, p. 164.

<sup>11</sup> H-20-15 District Exhibits, pp. 46, 15-22.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> H-20-15 District Exhibits, p. 107.

On December 13, 2019, Parents filed ADE H-20-15, alleging that Student had been denied FAPE. On May 13, 2020, this Hearing Officer issued a Final Decision and Order in response to ADE H-20-15.<sup>15</sup> This Hearing Officer determined that Student had been substantively denied FAPE between December 13, 2017 and December 13, 2019, the time period beginning in the spring semester of Student's third grade school year and ending at the completion of the fall semester of his fifth grade school year.<sup>16</sup> Specifically, this Hearing Officer determined that Student had not made progress during this period with regard to his academic deficits.<sup>17</sup> Student's STAR reading scores (16/18 total tests) during this two-year statutory period indicated that Student was reading at the kindergarten or first grade level and making no progress with regard to his reading deficits.<sup>18</sup> District's administration of Phonics First, Foundations in Sound, and the Barton Program had not resulted in progress on the part of Student in the academic area of reading.<sup>19</sup> Student, a fifth-grade student at the time of the Final Decision and Order in ADE H-20-15, was four to five grade levels below in reading as compared to the school grade that he was attending.<sup>20</sup>

In addition, this Hearing Officer determined that the schedule of services on Student's IEPs, as well as the stated goals, had changed very little between December 13, 2017 and December 13, 2019 despite Student's lack of progress.<sup>21</sup> This Hearing Officer further determined that the Barton program, which was being utilized to address Student's dyslexia

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<sup>15</sup> H-20-15 Final Decision and Order.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

at the time of Final Decision and Order in ADE H-20-15, had not been appropriate for Student, noting that Susan Barton, herself, had notified the District via email that the Barton program was not likely a good fit for Student given his severe receptive and expressive speech delays.<sup>22</sup> Nonetheless, District had continued forward with the Barton Program despite the program author's notice that the program should be halted.<sup>23</sup> Ultimately, on account of all of these findings, this Hearing Officer determined that Student's IEPs between December 13, 2017 and December 13, 2019 were not reasonably calculated to enable Student to make progress appropriate in light of his circumstances in the academic areas of reading, writing, and math.<sup>24</sup>

Having found in ADE H-20-15 that District had substantively denied FAPE to Student, this Hearing Officer ordered that Student be comprehensively evaluated by August 1, 2020, to include evaluations designed to determine Student's current achievement levels, academic deficits, IQ, speech and language deficits, and occupational therapy needs.<sup>25</sup> In addition, this Hearing Officer ordered that District convene an IEP meeting with Parents by or before August 1, 2020 for the purpose of developing a new IEP for Student that was based on an academic year and contained appropriate goals and objectives, addressed specific programming and modifications for Student, and allowed for adequate progress

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<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

monitoring.<sup>26</sup> Finally, District was ordered to research and select a different dyslexia/reading program, one approved by the ADE, to address Student's reading deficits.<sup>27</sup>

Parents allege in Hearing #2 (consolidated H-21-06 and H-21-09) that Student was denied FAPE between December 14, 2019 and August 28, 2020, the specific time period during which Hearing #1 was pending, as well as the three months following the May 13, 2020 Final Decision and Order issued by this Hearing Officer in same. Between December 14, 2019 and the end of the school year in May 2020, District implemented an IEP that was developed for Student on January 22, 2019, with duration of services from January 22, 2019 through January 22, 2020.<sup>28</sup> Student's January 22, 2019 IEP was in effect through the 2019 fall semester and, according to District, remained in effect for the remainder of the school year, despite having expired, on account of the fact that the District was following IDEA regulations that required "stay put" during the pendency of a due process hearing.<sup>29</sup>

Student's January 22, 2019 IEP, with a duration of services through January 22, 2020, included the same information in the present level of academic achievement section as Student's previous IEP, except that there was an additional paragraph which indicated that Student had mastered six of seven reading objectives, as well as his math goal.<sup>30</sup> Regarding the goals, the January 22, 2019 IEP included six goals addressing language skills and math.<sup>31</sup> Student's language goals provided that he would be able to: (1) demonstrate command of

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> H-20-15 District Exhibits, pp. 270-85.

<sup>29</sup> H-21-06 and H-21-09 Transcript, Vol. II, pp. 227-28.

<sup>30</sup> H-20-15 District Exhibits, pp. 271-72.

<sup>31</sup> H-20-15 District Exhibits, pp. 270-85.



the conventions of standard English grammar when writing and speaking with eighty percent accuracy by the end of the current IEP; (2) apply phonics and word analysis skills in decoding words with eighty percent accuracy by the end of the school year; (3) read decodable text with eighty percent accuracy by the end of the fourth grade school year; (4) read grade-level text with sufficient accuracy and fluency to support comprehension by reading stories with eighty percent accuracy by the end of the current IEP; and (5) demonstrate command of the conventions of standard English capitalization and punctuation when writing by identifying errors with eighty percent accuracy by the end of the current IEP.<sup>32</sup> Student's math goal provided that, given word problems involving whole numbers, Student would be able to use four operations to solve problems with eighty percent accuracy by the end of the IEP year.<sup>33</sup> Each of Student's goals included stated objectives and notation regarding progress monitoring.<sup>34</sup>

Student's January 22, 2019 IEP also provided a schedule of services to include 225 minutes per week of direct instruction in written language, 150 minutes per week of direct instruction in literacy, 225 minutes per week of direct instruction in math, 60 minutes per week of speech/language intervention, 60 minutes per week of speech/language therapy, and 60 minutes per week of occupational therapy.<sup>35</sup> Accommodations were also noted and were identical to those provided in Student's previous IEP.<sup>36</sup> It was determined that Student

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

needed ESY for the summer of 2019, and that Student would receive 120 minutes per week to address reading deficits.<sup>37</sup>

Regarding occupational therapy minutes during the spring and summer of 2020, Student's January 22, 2019 IEP provided for 60 minutes per week of occupational therapy. Parents alleged that Student missed up to 19 sessions (up to 570 minutes) of occupational therapy during the specific period covered in Hearing #2. Pursuant to testimony and documents in the record, Student missed only two therapy sessions, one in December 2019 and another in January 2020, and one of these was subsequently made up in March 2020.<sup>38</sup> Regarding the 2020 summer months, when ESY was available, Parents declined speech and occupational therapy services.<sup>39</sup>

Throughout the spring semester of 2020, Student continued to receive instruction pursuant to the Barton program to address his dyslexia. In addition, Student was receiving instruction pursuant to the NOW program, which was funded by his Parents and began on September 23, 2019. During the 2020 spring semester, Student received Barton Program intervention as he had in the 2019 fall semester, as well as NOW program sessions for forty-five minutes per day, five days a week, via video conference.<sup>40</sup> Dr. Conway, the creator of the NOW program, testified during Hearing #2 that Student had gained nearly four grade reading levels since starting the NOW program, explaining that Student was reading excerpts from books that were rated at a fourth grade level.<sup>41</sup> Dr. Conway reported that the NOW program

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<sup>37</sup> *Id.*

<sup>38</sup> H-21-06 and H-21-09 Transcript, Vol. I, p. 196.

<sup>39</sup> *Id.*

<sup>40</sup> H-20-15 Transcript, Vol. I, pp. 137, 142.

<sup>41</sup> H-21-06 and H-21-09 Transcript, Vol. II, pp. 167-70.

had not evaluated Student using a standard assessment designed for this purpose.<sup>42</sup> Standard assessments administered by District in January 2020 and July 2020 indicated that Student is reading at a 1.7 level (grade equivalent of first grade, seventh month), and that Student's reading levels remain "very low."<sup>43</sup>

Student began a new dyslexia/reading program with District, specifically Take Flight, in September 2020. Parent (Father) testified that, like the District, he was very concerned about the fact that having Student participate in two different dyslexia programs, one provided by District (Take Flight) and the other provided by Parents (NOW program), could cause conflict for one program or another.<sup>44</sup> He stated that Student's instructor in the Take Flight program had expressed concerns to Parents about this as well.<sup>45</sup> When questioned by this Hearing Officer about Parents' intentions with regard to continuing the NOW program while Student was enrolled in the Take Flight Program at District, Parent (Father) testified that his intention was to continue doing what was working, which in his opinion was the NOW program.<sup>46</sup>

Parents alleged that District did not comply with this Hearing Officer's Final Decision and Order to research and implement an ADE approved dyslexia/reading program in a timely manner. The ADE was scheduled to publish a list of approved dyslexia programs by June 1, 2020.<sup>47</sup> The ADE list of approved programs was not published, however, until August

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<sup>42</sup> *Id.*

<sup>43</sup> H-21-06 and H-21-09, District's Exhibits., p. 58.

<sup>44</sup> H-21-06 and H-21-09 Transcript, Vol. II, pp. 123-24.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 231-36.

8, 2020.<sup>48</sup> A total of six programs were released on August 8, and only one of them, specifically Take Flight, met all five criteria utilized by the ADE to determine strength of the program.<sup>49</sup> Following selection of the Take Flight program at an IEP meeting on September 8, 2020, District made arrangements for training of staff and implementation of program with Student beginning shortly thereafter.<sup>50</sup>

Parents alleged that District failed to timely evaluate Student in accordance with this Hearing Officer's Final Decision and Order dated May 13, 2020, which required reevaluation of Student by August 1, 2020. The COVID-19 pandemic resulted in the Arkansas Governor closing schools in March 2020. Due to the pandemic, District struggled to find examiners that were willing to meet Student in person and conduct necessary evaluations.<sup>51</sup> Evaluators were not permitted to start evaluating students in person until July 21, 2020. Student's comprehensive evaluation began on this same date, which was the earliest possible date that in-person evaluations were approved to begin for safety purposes.<sup>52</sup> The evaluator that met with Student on July 21, 2020 was concerned about the results of the Kaufman IQ test that she had given and recommended a second IQ test.<sup>53</sup> This IQ test was administered on July 23, 2020.<sup>54</sup> The remainder of evaluations fell between July 23, 2020 and July 30, 2020.<sup>55</sup> District did not meet with Parents by August 1, 2020 because, although the comprehensive evaluations had been completed, District was still waiting on the ADE list of approved

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 228-29.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 242.

dyslexia programs before scheduling an IEP meeting to discuss evaluation results and programming with Parents.

Ultimately, an IEP meeting was scheduled for August 17, 2020.<sup>56</sup> When the meeting was scheduled by District, District was aware that its counsel might have a conflict in federal court; therefore, District remained in communication with its counsel until the day of the meeting to ensure that the meeting could move forward.<sup>57</sup> On August 17, 2020, right before the meeting was set to begin, District's LEA learned that its counsel was unable to make it to the meeting and could not participate by telephone.<sup>58</sup> Parents and Parents' counsel appeared for the meeting before District had an opportunity to contact everyone to cancel.<sup>59</sup> District refused to go forward with the meeting without its counsel present.<sup>60</sup> This angered Parents and Parents' counsel and they all demanded to move forward with the scheduled IEP meeting despite the fact that District's counsel could not be present. The LEA for the District refused to hold the meeting. Prior to making this decision, the LEA for the District contacted the ADE to seek clarification on the issue.<sup>61</sup> The meeting was rescheduled for September 8, 2020.

On September 8, 2020, a new IEP was developed for Student and additional testing arrangements were made. At this same meeting, it was decided that the Take Flight program would be implemented for Student.<sup>62</sup>

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<sup>56</sup> *Id.* at 243.

<sup>57</sup> *Id.* at 244.

<sup>58</sup> *Id.* at 245-46.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 247.

## **CONCLUSIONS OF LAW AND DISCUSSION:**

Pursuant to Part B of the IDEA, states are required to provide a FAPE for all children with disabilities between the ages of three and twenty-one. 20 U.S.C. § 1412(a); 34 C.F.R. § 300.300(a). In 1982, in *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, the U.S. Supreme Court addressed the meaning of FAPE and set forth a two-part analysis that must be made by courts and hearing officers in determining whether a school district has failed to provide FAPE as required by federal law. 458 U.S. 176, 206-07 (1982). Pursuant to *Rowley*, the first inquiry that a court or hearing officer must make is that of whether the State, *i.e.* local educational agency or district, has complied with the procedures set forth in the IDEA. Thereafter, it must be determined whether the IEP(s) developed pursuant to IDEA procedures was reasonably calculated to enable the student to make appropriate progress in light of his specific circumstances. *Id.*

### **Procedural Violations of FAPE**

Regarding the first inquiry, that of whether the District complied with the procedures set forth in the IDEA, this Hearing Officer notes that counsel for Parents alleged two violations that qualify as procedural in nature. These alleged violations are: (1) failure of District to reevaluate Student between December 14, 2019 and August 18, 2020; and (2) failure of District to conduct a previously scheduled IEP meeting on August 17, 2020.

Regarding the first alleged procedural violation, that of whether the District procedurally violated the IDEA by failing to reevaluate Student between December 14, 2019 and August 18, 2020, it is the opinion of this Hearing Officer that there was no violation of FAPE. Pursuant to this Hearing Officer's Final Decision and Order in H-20-15, District was

required to comprehensively evaluate Student by or before August 1, 2020. The date of the Final Decision and Order in H-20-15 was May 13, 2020, which was approximately two months after the Arkansas Governor completely closed schools on account of the COVID-19 pandemic. District was not able to have any students evaluated in person at that time due to the apparent danger of exposing children and evaluators to COVID-19. As soon as in-person evaluations were approved to recommence, specifically July 21, 2020, District had Student evaluated. In fact, Student was evaluated on this very date, which represented the earliest possible date to have him evaluated in person following the closure of schools in the state. Following testing on July 21, 2020, the evaluator notified District that she had concerns with the result of the Kaufman IQ Test and, as a result, recommended administering a second IQ test. On July 23, 2020, a second IQ test was administered to Student. Thereafter, between July 23, 2020 and July 30, 2020, all other evaluations ordered by this Hearing Officer were completed, just shy of the August 1 deadline. Despite difficult circumstances, District was able to comply with the deadline imposed upon it for purposes of reevaluating Student.

Regarding the second alleged procedural violation, that of whether the District procedurally violated the IDEA by failing to conduct a previously scheduled IEP meeting on August 17, 2020, it is the opinion of this Hearing Officer that there was no procedural violation of FAPE. Here, Parents' counsel alleged that the District's decision to unilaterally cancel the August 17, 2020 IEP meeting on account of the fact that District's counsel was unexpectedly unable to attend the meeting constituted a violation of 20 U.S.C. § 1415(f)(3)(E)(ii). The regulation cited by Parents' counsel in ADE H-21-09 provides that a hearing officer may find that a child did not receive FAPE if procedural inadequacies impede

in a significant manner the ability of Student's parents to participate in the educational decisions pertaining to Student.<sup>63</sup>

In the present case, an IEP meeting was scheduled for August 17, 2020 and, at the time of scheduling, District was aware that its counsel might have a conflict regarding a federal court trial. For this reason, District remained in communication with its counsel as the meeting approached to ensure that the meeting could move forward as planned. On the day of the meeting, shortly before the meeting was set to begin, District's counsel notified the LEA for District that he was not going to be finished with his obligations in federal court in time to attend the meeting in person or via telephone. The LEA for District contacted the ADE to seek clarification on this issue and was notified that District did not have to go forward without its attorney present. Upon arrival, Parents and their counsel were upset at the fact that the meeting was being cancelled for this reason and demanded to push forward. The LEA for the District refused to hold the meeting without District's counsel present. Approximately two weeks later, on September 8, 2020, an IEP meeting was held with all parties and their attorneys present. At the September 8, 2020 IEP meeting, a new IEP was developed for Student.

Given these facts, there is no evidence that the actions of District impeded Parents' right to participate in any educational decision-making process with regard to Student. In fact, this IEP meeting was rescheduled for September 8, 2020 and Parents and their counsel attended and fully participated in the September 8, 2020 IEP meeting. Although learning about a cancelled meeting at the last minute might have been annoying and inconvenient,

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<sup>63</sup> See Petitioner's H-21-09 Due Process Complaint.



there is no evidence that the cancellation of same resulted in a denial of Parents' participation in any meetings or events. Further, it makes sense to this Hearing Officer why District would be uncomfortable in conducting a meeting with Parents and their counsel without District counsel present. At the time of this meeting, Parents had already filed and prevailed on one due process hearing request (ADE H-20-15) and had filed, or was in the process of filing, a second due process hearing request (ADE H-21-06). The relationship between Parents and District is, at present, tense on account of the ongoing litigation between the parties. Given these circumstances, this Hearing Officer cannot fault District for wanting counsel present during the August 17, 2020 IEP meeting.

Having considered Parents' allegations of procedural violations of FAPE, this Hearing Officer hereby finds that District did not deny a FAPE to Student on account of the timing of its reevaluation of Student or its refusal to pursue an IEP meeting in which District's counsel was unexpectedly unable to attend.

### **Substantive Violations of FAPE**

Having considered the first prong of the FAPE analysis, it is now necessary to analyze whether the District substantively denied FAPE to Student, *i.e.* whether the District failed to provide IEPs that were reasonably calculated to enable Student to make appropriate progress in light of his individual circumstances. Prior to March 22, 2017, Eighth Circuit law provided that if a student received "slight" or "de minimis" progress, then he or she was not denied educational benefit. *K.E.*, 647 F.3d at 810; *Paris Sch. Dist. v. A.H.*, 2017 WL 1234151 (W.D. Ark 2017). On March 22, 2017, however, the United States Supreme Court "rejected the 'merely more than *de minimis*' standard that had previously been the law of the Eighth

Circuit.” *Paris Sch. Dist.*, 2017 WL at 4 (citing *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).

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

**IEPs for Spring 2020 and Fall 2020.**

Here, Parents allege that Student was denied FAPE during the 2020 spring semester because District did not create a new IEP for Student in January 2020 when his prior IEP expired. In addition, Parents allege that District failed to provide an IEP for Student, in accordance with this Hearing Officer's Final Decision and Order in ADE H-20-15, which resulted in Student beginning the sixth grade with the same IEP that was in place when Student began the fifth grade a year prior. Each of these allegations will be addressed below.

Regarding Parents' allegation that Student was denied FAPE between December 14, 2019 and end of the 2019-2020 school year on account of the fact that the IEP being implement was not appropriate, this Hearing Officer agrees.

As outlined in this Hearing Officer's May 13, 2020 Final Decision and Order in ADE H-20-15, Student was identified in kindergarten as being eligible for special education services under the IDEA on account of a specific learning disability in the areas of reading, writing, and math. As of December 13, 2019, it was determined that Student had made no progress with regard to his academic deficits since his eligibility determination in 2015. A review of Student's STAR reading scores were telling. In third grade, Student's scores were at a grade equivalent representative of the kindergarten or first grade level. Two years later, in the fall of 2019, when Student was in the first semester of fifth grade, his STAR reading scores had, in effect, not changed. In fact, between December 13, 2017 and December 13, 2019, Student was administered the STAR reading assessment eighteen times, and only two of those scores were above the kindergarten or first grade level. Basically, as this Hearing Officer determined in ADE H-20-15, Student fell further and further behind as the school

years passed and is currently four to five grade levels below in reading as compared to the school grade that he is attending. In addition, this Hearing Officer determined that, as of December 13, 2019, Student's IEPs since third grade had changed very little in terms of the schedule of services or goals from year to year. As of December 13, 2019, Student had been receiving instruction via the Barton program for more than a year to address Student's dyslexia, but to no avail. For all of these reasons, this Hearing Officer determined that Student had been substantively denied FAPE between December 13, 2017 and December 13, 2019.

In the present case, specifically Hearing #2, the issue to be determined is whether Student was similarly denied FAPE between December 14, 2019 and August 28, 2020, which includes the time period that ADE H-20-15 was pending plus an additional three months. It is the opinion of this Hearing Officer that Student was, in fact, denied FAPE between December 14, 2019 and the end of the 2019-2020 school year. All of the programming that this Hearing Officer found inappropriate for Student in ADE H-20-15 was in effect during the time period raised in Hearing #2, specifically December 14, 2019 through then end of the 2019-2020 school year. It can hardly be said that Student was denied FAPE up through December 13, 2019, but then received FAPE despite the same exact programming for the six months after December 13, 2019.

It is noted that District alleges that it had no choice but to maintain Student's placement pursuant to the "stay put" provision in the IDEA. The IDEA addresses "stay put" in 20 U.S.C. § 1415(j). This provision provides that "[d]uring the pendency of any proceedings . . . unless the state or local education agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child . . . until all

such proceedings have been completed.” *Id.* As this provision makes clear, without Parents’ consent to change programming during the pendency of Student’s IDEA due process hearing, District was required to maintain Student’s placement as of the date ADE H-20-15 was filed. Here, however, there is no evidence in the record that Parents were refusing to grant consent to change Student’s IEP while ADE H-20-15 was pending. In addition, it is noted that District’s decision to abide by “stay put” requirements even where a parent is willing to consent to change a student’s educational placement and/or services does not insulate a district from being responsible for compensatory education in the event that it is determined that Student was denied FAPE during the same period. Although caselaw on this point is scarce, such that there is no caselaw on point in the Eighth Circuit, the First Circuit Court of Appeals addressed this very issue in the year 2003. *Maine Sch. Admin. Dist. 35 v. Mr. R.*, 321 F.3d 9 (1st. Cir. 2003). In the referenced case, the Court stated that “[c]onferring blanket immunity from compensatory education claims during the course of a stay put placement would reward school districts for misfeasance or nonfeasance in providing appropriate educational services.” *Id.* at 19. The Court further stated the following:

[C]laiming to be caught between a rock and hard place is no excuse for dereliction of duty. The IDEA charges school districts with making reasonable efforts both to work with parents and to satisfy the needs of special education students. That entails the responsibilities to find a path that runs between the rock and the hard place. Knee-jerk compliance with a stay-put provision does not negate that responsibility.

*Id.* at 19-20. Given the plain language of the IDEA’s “stay put” provision, as well as this case law, it is the conclusion of this Hearing Officer that District’s assertion of “stay put” as a defense to justify its decision to keep Student’s January 21, 2019 IEP in place between

December 14, 2019 and the end of the 2019-2020 school year, given that Parents were not refusing to consent to a change in services, must fail.

In sum, it is the opinion of this Hearing Officer that Student was substantively denied FAPE between December 14, 2019 and the end of the 2019-2020 school year on account of the fact that the same programming that this Hearing Officer found inappropriate for Student pursuant to ADE H-20-15 was in effect during the period in question.

Moving on now to Parents' allegation that Student was denied FAPE when District failed to work with Parents to create a new IEP by or before August 1, 2020, in accordance with this Hearing Officer's May 13, 2020 Final Decision and Order in ADE H-20-15, this Hearing Officer disagrees. District's ability to evaluate Student in the timeframe set by this Hearing Officer in ADE H-20-15 was affected by the COVID-19 pandemic that caused the Arkansas Governor to close schools in the middle of March 2020. The evidence is clear that District had Student evaluated at the first available date that evaluators were able to see Students in person, specifically July 21, 2020. Within a 9-day period thereafter, District completed all evaluations required by this Hearing Officer in the May 13, 2020 Final Decision and Order issued in ADE H-20-15. Unfortunately, however, the ADE had not yet published its list of approved dyslexia programs and, in fact, did not publish this list until August 8, 2020. This caused District to be in a position in which they did not have all available information to work with Parents and Student's IEP team to create an IEP for Student by August 1, 2020. However, within a month of receiving the ADE list of dyslexia programs on August 8, 2020, Student's IEP team had met, reviewed evaluation data, reviewed possible approved dyslexia programs, and created a new IEP which included the Take Flight dyslexia program. This

Hearing Officer does not find this delay in securing and implementing Student's 2020-2021 IEP to be so significant that it constituted a substantive violation of FAPE. Certainly, there were factors outside of the control of District and, given those factors, District did the best that it could to comply with the deadlines set in the May 13, 2020 Final Decision and Order in ADE H-20-15.

In sum, it is the opinion of this Hearing Officer that Student was denied FAPE between December 14, 2019 and the end of the 2019-2020 school year on account of the fact that the same programming that was determined to be a substantive violation of FAPE in ADE H-20-15 was in effect during that time period and "stay put" does not insulate District from being responsible for compensatory education in such cases. It is the opinion of this Hearing Officer, however, that the one-month delay in getting Student's IEP for his sixth-grade year, specifically the 2020-2021 school year, did not constitute a substantive violation of FAPE on account of the fact that the delay was outside of District's control.

**Occupational Therapy Minutes.**

Parents alleged that District failed to provide FAPE to Student between December 14, 2019 and August 18, 2020 when it failed to provide all required occupational therapy minutes as set forth in the January 22, 2019 IEP that Student operated under during this same time period. Pursuant to the January 22, 2019 IEP for Student, he was entitled to 60 minutes per week of occupational therapy. Parents alleged in Hearing #2, with more specificity in Parents Post-Hearing Brief, that Student did not receive all occupational therapy services that he was due.



Here, as with other claims raised in Hearing #2, the burden of proof with regard to proving allegations made in the complaint lies with Parents. There is insufficient evidence in this case to support Parents' allegations that Student was denied occupational therapy sessions. In fact, pursuant to testimony in the record, Student appears to have missed only two therapy sessions, one of which was in December 2019 and the other in January 2020. In addition, one of these was subsequently made up in March 2020. Also, Parents choose to stop occupational therapy services that were offered to Student for the 2020 summer session. There is not sufficient evidence, given these facts, that Student was denied occupational therapy minutes in violation of the January 22, 2019 IEP that he was operating under during the 2020 spring semester and summer session. As such, there is insufficient evidence that Student was denied FAPE on this basis.

**Dyslexia/Reading Program for Student.**

Parents allege that Student was denied FAPE when District failed to timely research and adopt a new dyslexia/reading program for Student in accordance with this Hearing Officer's May 13, 2020 Final Decision and Order in ADE H-20-15. In addition, Parents assert that District should be required to pay for the NOW program, asserting that it is the only dyslexia program that has had a positive impact on Student's reading level. With regard to both of these allegations, this Hearing Officer disagrees.

With regard to the allegation that District, in accordance with the May 13, 2020 Final Order and Decision in ADE H-20-15, failed to timely research and find a replacement for the Barton program that Student had been receiving, Parents failed to present sufficient evidence. Throughout the spring semester of 2020, Student continued to receive instruction

pursuant to the Barton program to address his dyslexia. This was in part due to the fact that District did not change Student's placement or programming while ADE H-20-15 was pending pursuant to "stay put" requirements in the IDEA. As such, between December 14, 2019 and May 13, 2020, Student received the Barton program, which was the same program that he had been receiving in the 2020 fall semester, prior to the filing of ADE H-20-15. In addition, Student was receiving instruction pursuant to the NOW program, which was funded by his Parents and began on September 23, 2019. In sum, between December 14, 2019 and the end of the 2019-2020 school year, Student received Barton Program intervention as he had in the 2019 fall semester, as well as NOW program sessions for forty-five minutes per day, five days a week, via video conference.

Following this Hearing Officer's May 13, 2020 Final Decision and Order, District was waiting for the ADE to release a list of approved dyslexia programs before making any moves to change Student's programming. District believed that it was complying with this Hearing Officer's Order which specified that it must choose a dyslexia program for Student that had been approved by the ADE. The ADE was scheduled to publish a list of approved dyslexia programs by June 1, 2020. Unfortunately, the ADE was unable to publish the approved list of programs until August 8, 2020, which was eight days following this Hearing's Officer's deadline for meeting with Parents and creating a new IEP for Student. District intended to meet with Parents during an IEP meeting that was scheduled for August 17, 2020; however, due to a conflict of District's counsel, that meeting was moved to September 8, 2020. At the September 8, 2020 IEP meeting, it was decided that Student would begin using the Take Flight program, which was the only program on the ADE list of approved programs that

covered all criteria utilized by the ADE to determine strength of the program. Following selection of the Take Flight program at the September 8, 2020 IEP meeting, District made arrangements for training of staff and implementation of program with Student beginning shortly thereafter.

The District's delay, in light of the fact that the COVID-19 pandemic delayed the start of school until the third week of August and the ADE list of approved dyslexia programs was published later than expected, is reasonable. There is no indication here that District was intentionally attempting to delay the selection of a new program for Student. In fact, it appears just the opposite. District was trying to the best of its ability to comply with the May 13, 2020 Final Decision and Order of this Hearing Officer. All in all, Student lost approximately one month of reading instruction on a new program, specifically the month between the start of school in late August and the start of the Take Flight program in late September. This delay, given the short time period involved and the fact that delay was outside of the control of District, does not constitute a separate violation of FAPE.

With regard to the allegation that the NOW program is the best dyslexia program for Student and should be implemented by District, this Hearing Officer disagrees. First, Dr. Conway, the creator of the NOW program, testified during Hearing #2 that Student had gained nearly four grade reading levels since starting the NOW program in September 2019, explaining that Student was reading excerpts from books that were rated at a fourth-grade level. When questioned about standardized assessments, however, Dr. Conway reported that the NOW program had not evaluated Student's reading level using a standardized assessment. The District, however, did administer Student such assessments in January 2020

and July 2020, and the results indicated that Student at that time was reading at a 1.7 grade level, meaning that he was reading equivalent to a first-grade student in the seventh month of the year. The most recent assessment which was given in July 2020 indicated that Student was reading at a “very low” level. The discrepancy between Dr. Conway’s assessment and the results of the standardized assessments is troubling and indicative that Student is not progressing at the same rate that Dr. Conway thinks that he is.

Second, there was testimony by Parent (father) that Student’s instructor on the new District program, Take Flight, had expressed concern that having Student participate in two dyslexia programs would create conflicts and prevent progress. Parent (father), himself, indicated that he was concerned about this issue. When questioned by this Hearing Officer, however, Parent (father) indicated that he had no intention of stopping the NOW program despite these concerns. Parents are convinced that the NOW program is the best program for Student and, despite concerns of Student’s Take Flight instructor, are not willing to make any changes. This indicates to this Hearing Officer that Parents are not willing to give the new program selected by the District, specifically Take Flight, a true chance to work. This Hearing Officer is unable to determine based on the evidence in the record that the District’s selected program is ineffective at this time. At the time of Hearing, Student had been on the Take Flight program for less than one month. In addition, any delays in progress on the Take Flight program, should there be any, could be due in part to the fact that Parents are acting in opposition of Student’s Take Flight instructor by insisting that Student participate in a separate dyslexia program that could be interfering in his learning process. For these reasons, this Hearing Officer does not find that the NOW program is the best program for

Student at this time and is of the opinion that the Take Flight program be given every chance to be successful before other alternatives are considered.

**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 14, 2019 and the end of the 2019-2020 school year, specifically Student's fifth grade year, by failing to produce an IEP for Student that was reasonably calculated to enable him to make progress appropriate in light of his circumstances. It is the opinion of this Hearing Officer, however, that no compensatory education is due in this case. The remedies ordered in ADE H-20-15, as set forth in this Hearing Officer's May 13, 2020 Final Decision and Order, sufficiently compensate from an educational perspective District's denial of FAPE as addressed in this decision.

**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

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**HEARING OFFICER**

11/10/2020

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**DATE**