

**ARKANSAS DEPARTMENT OF EDUCATION  
Special Education Unit**

**IN RE:**

**XXXXXXX and XXXXXX XXXXXX,  
Parents on behalf of  
XXXXXX XXXXXX, Student**

**PETITIONERS**

**VS.**

**CASE NO. H-21-13  
CASE NO. H-21-18**

**Atkins School District**

**RESPONDENT**

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

**ISSUES PRESENTED:**

- A. Whether, as alleged in ADE H-21-13, the Atkins School District (hereinafter "District" or "Respondent") denied XXXXX XXXXXX (hereinafter "Student") a free, appropriate, public education (hereinafter "FAPE") between August 29, 2020 and October 19, 2020, in violation of certain procedural and substantive requirements of the Individuals with Disabilities in Education Act of 2004, 20 U.S.C. §§ 1400-1485, as amended (hereinafter "IDEA"), by: (1) failing to provide Parents a meaningful opportunity to participate in the decision-making process regarding Student's educational placement and program, specifically refusing to discuss and/or allow Parents to take part in determining Student's dyslexia methodology and predetermining decisions outside of IEP meetings; and (2) failing to include Student's dyslexia intervention on his IEP, therefore, resulting in an IEP that is not reasonably calculated to enable Student to make progress appropriate in light of his circumstances.

B. Whether, as alleged in ADE H-21-18, District denied Student a FAPE between October 20, 2020 and December 8, 2020, in violation of certain procedural and substantive requirements of the Individuals with Disabilities in Education Act of 2004, 20 U.S.C. §§ 1400-1485, as amended (hereinafter “IDEA”), by: (1) failing to provide Parents a meaningful opportunity to participate in the decision-making process regarding Student’s educational placement and program, specifically ignoring Parents and rejecting their requests for increased speech therapy minutes, specialized transportation, additional special education minutes, and homebound services; (2) reducing Student’s special education minutes outside of an IEP meeting and without Parent’s knowledge; and (3) failing to hold a failure conference for Student during the first and second nine weeks.<sup>1</sup>

**PROCEDURAL HISTORY:**

On October 19, 2020, the Arkansas Department of Education (hereinafter referred to as “Department”) received a request to initiate due process hearing procedures from XXXXXX and XXXXXXX XXXXXX (hereinafter referred to as “Parents” or “Petitioners”), the parents and legal guardians of Student (ADE H-21-13). Parents asserted in ADE H-21-13 that District 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 between August 29, 2020 and October 19, 2020 by failing to provide Parents a meaningful opportunity to participate in the decision-making

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<sup>1</sup> See Due Process Complaints in ADE H-21-13 and ADE H-21-18.

process regarding Student's educational placement and program, as well as failing to include Student's dyslexia intervention on his IEP, therefore, resulting in an IEP that was not reasonably calculated to enable Student to make progress appropriate in light of his circumstances. Approximately six weeks later, on December 8, 2020, Parents filed another request to initiate due process hearing procedures (ADE H-21-18). Parents asserted in ADE H-21-18 that District, between October 19, 2020, and December 8, 2020, failed to provide Parents a meaningful opportunity to participate in the decision-making process regarding Student's educational placement and program, reduced Student's special education minutes outside of an IEP meeting and without Parent's knowledge, and failed to hold a failure conference for Student during the first and second nine weeks.<sup>2</sup>

ADE H-21-13 and ADE H-21-18 are the fourth and fifth due process complaints filed by Parents against District. The first due process request filed by Parents was ADE H-20-15 and was filed 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. The second and third due process requests, respectively ADE H-21-06 and H-21-09 (hereinafter "Hearing #2") were filed on August 17, 2020 and August 28, 2020, respectively. ADE H-21-06 and ADE H-21-09 were consolidated for judicial efficiency and, as such, a single due process hearing was held to address all issues covered in both complaints. This Hearing Officer issued a Final Decision and Order on November 10, 2020 in Hearing #2, finding for Parents. The Hearing Officer, however, did not order compensatory

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<sup>2</sup> *Id.*

education for Parents on account of finding that the remedy provided in Hearing #1 was sufficient to address the violations.

In response to Parents' request for hearing in ADE H-21-13 and ADE H-21-18, the Department assigned the cases to an impartial hearing officer. ADE H-21-13 and ADE H-21-18 were consolidated for judicial efficiency and, as such, a single due process hearing was held to address all issues covered in both complaints. So that nomenclature is clear, these two hearings may be referred throughout this decision by their case numbers or, in the alternative, referred to as Hearing #3. Following lengthy continuances on account of COVID, as well as personal medical issues of Parents, testimony was heard on September 1, 2021 and September 2, 2021, 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 well as Hearing #2, ADE H-21-06 and ADE H-21-09. As such, all testimony taken in Hearings #1 and #2 was incorporated into the record for the above-referenced matters. The following witnesses testified in Hearing #3: Lindsay Riedmueller, Emma Haralson, Emily Breckling, Parents, and Susan Ward.<sup>4</sup>

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 District was represented by Jay Bequette (Little Rock, Arkansas). Both

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<sup>3</sup> See generally ADE H-21-13 and ADE H-21-18 Transcript, Vols. I-II.

<sup>4</sup> *Id.*

parties were offered the opportunity to provide post-hearing briefs in lieu of closing arguments, 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 the seventh grade. 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 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)

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

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

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

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

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

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

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.

On December 13, 2019, Parents filed ADE H-20-15, Hearing #1, 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

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

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

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

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

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

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 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

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

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

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

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

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

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

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

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 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>

On August 17, 2020 and August 28, 2020, Parents filed ADE H-21-06 and ADE H-21-09, respectively. In these matters, which were consolidated and are herein referred to as Hearing #2, Parents alleged that Student was denied FAPE between December 14, 2019 and August 28, 2020, the specific time period that Hearing #1 was pending, as well as three

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

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

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

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

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



months following the May 13, 2020 Final Decision and Order issued by this Hearing Officer in same. This Hearing Officer issued a Final Decision and Order on November 10, 2020 in Hearing #2, finding for Parents; however, the Hearing Officer did not order compensatory education for Parents on account of finding that the remedy provided in Hearing #1 was sufficient to address the violations found in Hearing #2

Parents allege in Hearing #3 (consolidated ADE H-21-13 and ADE H-21-18) that Student was denied FAPE between August 29, 2020 and December 8, 2020. During this timeframe, Student was in the sixth grade and was being provided special education and related services pursuant to an IEP dated September 8, 2020, with a duration of services through September 8, 2021.<sup>28</sup>

On August 21, 2020, District sent a Notice of Conference to Parents, setting an IEP meeting for September 8, 2020.<sup>29</sup> Pursuant to the Notice of Conference, the purpose of the meeting was to conduct an existing data review for Student, review and revise his IEP, and consider extended school year services.<sup>30</sup>

Parents were accompanied by their legal counsel and an advocate at the September 8, 2020 IEP meeting.<sup>31</sup> Parents signed the IEP that was developed for Student during this meeting.<sup>32</sup> During the meeting, Student's goals and objectives were created, with District staff and Parents participating in the discussion.<sup>33</sup> On a draft IEP that was brought to the

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<sup>28</sup> ADE H-21-13 and ADE H-21-18, Parent Exhibits, pp. 1-19.

<sup>29</sup> *Id.* at p. 50.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at p. 57.

<sup>32</sup> *Id.* at p. 19.

<sup>33</sup> *Id.* at p. 57.

September 8, 2020 meeting, a note was written in the parent/guardian input portion of the IEP.<sup>34</sup> Specifically, it was noted that Parents wanted Student to be independently evaluated by the Conway Psychological Assessment Center (hereinafter “CPAC”).<sup>35</sup> Parents further stated that they had concerns about Student’s IQ score and his lack of progress in speech therapy.<sup>36</sup> District agreed to an independent comprehensive evaluation, and the process to begin testing was set in motion.<sup>37</sup> Parents also questioned at this meeting when Student’s dyslexia intervention would commence, again asking District to fund the NOW program, a program Parents chose for Student prior to Hearing #1.<sup>38</sup> District declined to fund the NOW program, explaining that it preferred to implement Take Flight, which is a dyslexia program that has been accepted by the state of Arkansas.<sup>39</sup> Parents’ concerns were recorded on the official, typed IEP that was finalized following the September 8, 2020 IEP meeting.<sup>40</sup> All actions taken by District were recorded on a Notice of Action that was dated September 15, 2020 and provided to Parents.

Student’s September 8, 2020 IEP, with duration of services through September 8, 2021, included a lengthy narrative in the section regarding present level of academic achievement.<sup>41</sup> Specifically, it noted that Student was able to identify, express, and manage feelings. Student, however, was unable to compute fluently with multi-digit numbers, find common factors and multiples, determine the meaning of words and phrases used in a text,

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<sup>34</sup> *Id.* at p. 20.

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

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

<sup>37</sup> *Id.* at p. 57.

<sup>38</sup> *Id.* at p. 20.

<sup>39</sup> *Id.* at p. 57.

<sup>40</sup> *Id.* at p. 1.

<sup>41</sup> *Id.* at pp. 3-4.

or analyze how a sentence, chapter, scene, or stanza fits into the overall structure of text.<sup>42</sup> It was also noted that Student needed redirection and encouragement, and that his greatest difficulties involved long-term memory and visual memory items.<sup>43</sup> The remainder of the narrative summarized evaluation results pertaining to Student.<sup>44</sup> On the IEP page pertaining to consideration of special factors, it was noted that Student received dyslexia intervention using the Take Flight program.<sup>45</sup> In addition, it was stated that Student's program modifications and accommodations included: (1) text to speech; (2) reduced writing assignments; (3) reduced multiple choice tests; (4) reduced assignments; (5) extended time for tests; (6) shortened directions; (7) established routines/structure; and (8) preferential seating.<sup>46</sup> Regarding the IEP goals, Student's September 8, 2020 IEP contained seven goals addressing language/literacy and math deficits.<sup>47</sup> Student's language goals provided that Student, by September 8, 2021, would be able to: (1) use technology to produce and publish writing, and demonstrate command of keyboarding skills to type a narrative story using punctuation and capitalization; (2) determine the meaning of a new word formed when a known prefix is added to a known word; (3) read, analyze, and answer comprehension questions relating to the story elements when presented with an on-level reading passage; (4) segment words into complete sequence of individual sounds when given a multiple syllable word; and (5) increase language skills by demonstrating command of the

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

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at p. 5.

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

<sup>47</sup> *Id.* at pp. 9-16.

conventions of standard English grammar and usage when writing or speaking, with 80% mastery.<sup>48</sup> Student's math goals provided that Student would be able to: (1) read and write multi-digit whole numbers using base ten numerals, number names, expanded form, and compare two numbers based on the meaning of the digits; and (2) reason about and solve one-variable equations and inequalities by the end of the current IEP year when given algebraic equations.<sup>49</sup> Each of Student's goals included stated objectives and notation regarding progress monitoring.<sup>50</sup>

Student's September 8, 2020 IEP also provided a schedule of special education services to include one period per day of virtual literacy (30 minutes per period, 150 minutes per week), one period per day of virtual math (30 minutes per period, 150 minutes per week), and 60 minutes per week of speech/language therapy.<sup>51</sup> This schedule of services also noted that Student was receiving four dyslexia intervention sessions (Take Flight Program) each week, but that these sessions were not included in his special education minutes.<sup>52</sup> Take Flight was the only program on the approved list from the ADE that met all five criteria for reading.<sup>53</sup> The LEA testified in this matter that dyslexia intervention is considered a general education initiative; therefore, dyslexia interventions are typically noted on a Student's IEPs, but the intervention minutes are not considered special education minutes and are provided separately.<sup>54</sup> In addition to this schedule of services, a separate

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

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

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

<sup>51</sup> *Id.* at 7.

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

<sup>53</sup> ADE H-21-13 and ADE H-21-18, Transcript Vol., pp. 146-47.

<sup>54</sup> *Id.* at p. 148.

page addressing related services was included in the IEP. Pursuant to this page, Student was receiving 60 minutes per week of occupational therapy services.<sup>55</sup> Student, at Parents' request, was attending school virtually during the 2020-2021 school year on account of COVID-19.

On October 7, 2020, a Notice of Conference was provided to Parents, scheduling an IEP meeting for October 26, 2020.<sup>56</sup> The reason for scheduling this IEP meeting was to conduct a nine-week review of Student's progress, which had been ordered by this Hearing Officer in Hearing #1.<sup>57</sup> Parents' legal counsel and advocate again accompanied Parents to the October 26, 2020 meeting.<sup>58</sup> At this meeting, which lasted several hours, Parents requested additional speech minutes, as well as additional special education minutes for Student. Parents asserted that Student's special education minutes had been reduced from 45 minutes per day to 30 minutes per day in both reading and math.<sup>59</sup> Parents also requested specialized transportation for Student, as well as homebound services. Parents (mother) acknowledged that all members of the IEP team spoke during this meeting, providing updates and discussing progress with Parents.<sup>60</sup>

Pursuant to a Notice of Action dated October 28, 2020, it was noted that Student, in accordance with his September 8, 2020 IEP, was receiving 1:1 special education services for one hour per day (total of five hours per week split between reading and math), as well as

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<sup>55</sup> ADE H-21-13 and ADE H-21-18, Parent Exhibits, p. 8.

<sup>56</sup> *Id.* at p. 60.

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

<sup>58</sup> *Id.* at p. 62.

<sup>59</sup> ADE H-21-13 and ADE H-21-18, Transcript Vol., p. 65.

<sup>60</sup> *Id.* at p. 90.

one-hour Take Flight Therapy sessions four times per week (total of four hours per week).<sup>61</sup> Finally, Student was receiving speech and occupational therapy each week, pursuant to his September 8, 2020 IEP.<sup>62</sup> These services were being delivered via ZOOM because Student was enrolled as a virtual learner for the 2020-2021 school year.<sup>63</sup> In the academic areas of science and social studies, Student was provided with an additional period each day in which he could seek extra assistance with his teachers via Google Meet.<sup>64</sup> As of October 26, 2020, Student had not taken advantage of these additional sessions.<sup>65</sup> Parents asserted that these sessions conflicted with Student's speech and occupational therapy ZOOM meetings; however, the evidence regarding Student's schedule did not support this assertion.

District denied Parents' request for additional speech therapy minutes. Student's speech therapist provided a progress report for Student, stating that Student had made progress on his goals and, as result, did not need additional speech therapy minutes.<sup>66</sup> District denied Parents' request for additional special education minutes, explaining to Parents that although Student was receiving 45 minutes of instruction in reading, as well as 45 minutes of instruction in math each day during the prior school year, this instruction was being delivered in a group setting. Because Student was virtual during the 2020-2021 school year, his special education was individualized and, thus, 30 minutes per day in each subject equated to more time spent specifically with Student given that there were no other group

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<sup>61</sup> ADE H-21-13 and ADE H-21-18, Parent Exhibits, p. 64.

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

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

members to consider. District also denied Parents' requests for specialized transportation and homebound services.<sup>67</sup> Specifically, District denied specialized transportation because Student did not qualify for these services as a virtual student.<sup>68</sup> District denied homebound services because this placement would not have constituted Student's least restrictive environment, and there was no medical documentation to indicate that this was necessary.<sup>69</sup>

Student was comprehensively evaluated by District on July 21-23, 2020.<sup>70</sup> As agreed by District, Student was independently evaluated by CPAC four months later, specifically on November 23, 2020.<sup>71</sup> Parents communicated to the evaluator at CPAC that Student was receiving dyslexia intervention, but that they were concerned that the intervention was not appropriate for Student.<sup>72</sup> Parents also explained that they had enrolled Student in the NOW program for dyslexia intervention, and that he had been having intervention sessions five days a week for 45 minutes per day.<sup>73</sup> Parents reported that the results of the NOW program were remarkable.<sup>74</sup> Parents (father) testified that he had expectations prior to September 2020 that Student would continue using the NOW program, as opposed to starting a secondary dyslexia intervention program.<sup>75</sup>

The CPAC evaluator noted in her educational impressions that Student's "language deficit and dyslexic disorders make his acquisition of reading, math concepts, and

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<sup>67</sup> ADE H-21-13 and ADE H-21-18, Parent Exhibits, p. 64.

<sup>68</sup> ADE H-21-13 and ADE H-21-18, Transcript Vol., pp. 154-55.

<sup>69</sup> *Id.* at p. 149.

<sup>70</sup> ADE H-21-13 and ADE H-21-18, Parent Exhibits, p. 94.

<sup>71</sup> *Id.* at p. 66.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at p. 67.

<sup>74</sup> *Id.*

<sup>75</sup> ADE H-21-13 and ADE H-21-18, Transcript Vol. II, p. 8.

spelling/writing much slower than children who only have dyslexia.”<sup>76</sup> To illustrate this point, she further noted that Student, despite having direct instruction for reading in the past five years, was still performing at the 1<sup>st</sup> percentile in this academic area.<sup>77</sup>

District conducted a speech evaluation for Student on July 30, 2020. Student was administered the following assessments: (1) Test of Language Development – Intermediate: Fourth Edition (TOLD-1:4); (2) Comprehensive Assessment of Spoken Language (CASL); (3) Comprehensive Test of Phonological Processing – 2 (CTOPP-2); and (4) Test of Auditory Processing Skills – 3 (TAPS-3).<sup>78</sup> A comparison of the July 2020 speech evaluation with Student’s prior speech evaluation in 2017 indicated that Student’s scores declined in some areas and improved in others.<sup>79</sup> The conclusion of the July 2020 speech evaluation, however, was the same as that in the 2017 evaluation. Student was determined to have a moderate to severe language delay that adversely affects his ability to effectively communicate and participate in classroom instruction.<sup>80</sup> It was recommended in the July 2020 speech evaluation, as it had been three years earlier, that Student receive 60 minutes of speech therapy per week.<sup>81</sup>

Student’s report card for the Fall 2020 semester indicated that he received one A, two Bs, and two Ds for the first nine weeks.<sup>82</sup> Student received three As, one B, and two Cs in the second nine weeks.<sup>83</sup> Student’s semester grades included three As, one B, and two Cs.

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<sup>76</sup> ADE H-21-13 and ADE H-21-18, Parent Exhibits, p. 88.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at p. 108.

<sup>79</sup> *Id.* at pp. 108, 116.

<sup>80</sup> *Id.* at p. 113.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at p. 245.

<sup>83</sup> *Id.*



Student's report cards did not indicate a failing grade for any period in the Fall 2020 semester.<sup>84</sup> District utilizes iReady as a growth monitoring diagnostic tool. Student's scaled score on the reading iReady diagnostic on October 10, 2020 was 449, as compared to 543 (grade level 4) on January 21, 2021.<sup>85</sup> Student's scaled score on the math iReady diagnostic on October 10, 2020 was 404, as compared to 438 (grade level 3) on January 21, 2021.<sup>86</sup>

Student officially began the Take Flight program on September 28, 2020.<sup>87</sup> Parents received Student's lesson plans pertaining to the Take Flight program each week.<sup>88</sup> Prior to the start of the program, Student's interventionist met with Parent (mother) and introduced herself and explained what she would be doing with Student.<sup>89</sup> Despite the fact that Student began a new program at school, Parents continued to provide Student with the NOW program at home.

#### **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

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<sup>84</sup> *Id.*

<sup>85</sup> ADE H-21-13 and ADE H-21-18, District Exhibits, pp. 111, 160.

<sup>86</sup> *Id.* at pp. 110, 174.

<sup>87</sup> *Id.* at p. 62.

<sup>88</sup> *Id.* at pp. 62-109.

<sup>89</sup> ADE H-21-13 and ADE H-21-18, Transcript Vol. II, p. 56.

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 District complied with the procedures set forth in the IDEA, counsel for Parents allege in both ADE H-21-13 and ADE H-21-18 that District failed to provide Parents a meaningful opportunity to participate in the decision-making process regarding Student's educational placement and program.

### **Parental Participation**

The IDEA requires that the parents of a child with a disability either be present at each IEP meeting or be afforded the opportunity to participate. *Lathrop R-II Sch. Dist. v. Gray*, 611 F.3d 419, 427 (8th Cir. 2010). Furthermore, a school district can neither refuse to consider parents' concerns when drafting an IEP, nor predetermine the educational program for a disabled student prior to meeting with parents. *Schaffer v. Weast*, 546 U.S. 49, 53 (2005). Such predetermination could deprive parents of a meaningful opportunity to participate in the formulation process pertaining to the IEP. *Gray*, 611 F.3d at 424 (citation omitted). "The IDEA explicitly requires school district to include parents in the team that drafts the IEP to consider 'the concerns of the parents for enhancing the education of their child' and to address 'information about the child provided to, or by, the parents.'" *M.M. ex. rel. L.M. v. Dist. 0001 Lancaster County Sch.*, 702 F.3d 479 (8th Cir. 2012). Certainly, a school district's

obligation under the IDEA regarding parental participation in the development of a student's IEP "should not be trivialized." *Rowley*, 458 U.S. at 205-06.

In *Rowley*, the Court stated that "[i]t seems . . . no exaggeration to say that Congress placed every bit as much emphasis on compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard." *Id.* It should be noted, however, that by requiring parental participation, the IDEA in no way requires a school district to accede to parents' demands without considering suitable alternatives. A district does not procedurally violate the IDEA simply by failing to grant a parent's request.

**ADE H-21-13.** In ADE H-21-13, Parents allege that they were denied a meaningful opportunity to participate in Student's education, specifically asserting that District refused to discuss or allow Parents to take part in determining Student's dyslexia methodology and, also, that District predetermined decisions outside of IEP meetings. Having reviewed the testimony in this case, it is the opinion of this Hearing Officer that District did not impede Parents' ability to participate in Student's educational programming.

Here, Parents allege that their opinions as to the dyslexia methodology for Student were ignored, and that a predetermination of program was made prior to the IEP meeting. Parents, however, have presented no evidence that District refused to talk with them about dyslexia programming options for Student. Parents attended an IEP meeting on September 8, 2020 that lasted several hours, and Student's dyslexia methodology was discussed at that meeting. Parents requested the same program, specifically the NOW program, that they

chose for Student prior to Hearing #1, and District did not agree that this was the most appropriate program for Student. District, instead, followed the order of this Hearing Officer in Hearing #1 and chose the only program on the ADE approved list that met all required criteria.

It is noted that Parents are resistant to consider any dyslexia program other than the NOW program. Parents report that Student's progress on this program has been "remarkable." Data indicates, however, that as of September 8, 2020, Student had been on the NOW program for approximately one year. Despite this, evaluations of Student indicated that Student was still reading at the 1<sup>st</sup> percentile. In addition, this program is not approved by the ADE and adopting this program at Parents' request would have been contrary to what this Hearing Officer ordered in Hearing #1, ADE H-20-15.

The IDEA in no way requires a school district to accede to parents' demands without considering suitable alternatives. A district does not procedurally violate the IDEA simply by failing to grant a parent's request. Here, Parents did not come to the September 8, 2020 IEP meeting with the intention to discuss different dyslexia programs for Student. They came to the meeting expecting to reassert that they wanted the NOW program. District denied this request because there was another program on the approved list that was more appropriate for Student. As such, Parents were not denied the right to meaningfully participate in Student's education with regard to the determination of Student's dyslexia methodology.

**ADE H-21-18.** In ADE H-21-18, Parents allege denial of meaningful participation, specifically asserting that their requests for speech therapy minutes, specialized transportation, homebound services, and additional special education minutes were ignored

and rejected. Having reviewed the testimony in this case, it is the opinion of this Hearing Officer that District did not impede Parents' ability to participate in Student's educational programming. As addressed previously, District's denial of Parents' requests does not, in and of itself, constitute a denial of meaningful participation of Parents. Here, Parents made requests, District discussed these requests with Parents, and District ultimately denied Parents' requests and provided rational explanations for same.

Regarding Parents' request for additional speech therapy minutes, District denied Parents' request because Student's 2020 speech evaluation, although it differed from a previous evaluation in some respects, ultimately diagnosed Student as having the same deficits as diagnosed in prior speech evaluations. In addition, Student's July 2020 speech evaluation recommended 60 minutes of speech therapy per week, which was also consistent with past speech evaluations. At the time of the October 26, 2020 IEP meeting, Student had been in the sixth grade for only nine weeks. As such, it seems reasonable that Student's speech therapist wanted to continue to monitor Student prior to considering a change to his therapy minutes or goals. This seems even more logical given that Student was attending speech therapy sessions via ZOOM during a year in which Student was attending school virtually on account of a pandemic.

Regarding Parents' requests for specialized transportation and homebound services, Student did not qualify for either of these services. Had Student been attending school in person, as opposed to being virtual, he would not have qualified for either of these services. There was no need for specialized transportation, and homebound services was a more restrictive placement than necessary for Student. The fact that Parents opted for Student to

be virtual during the 2020-2021 school year, as opposed to attending school in person, does not automatically change Student's eligibility for these services.

Regarding Parents' request for Student to have additional special education minutes, District's decision was appropriate. It is true that Student was receiving 45 minutes of special education instruction in reading, as well as 45 minutes of special education instruction in math, during the 2019-2020 school year. It is further the case that District, during the 2020-2021 school year, reduced Student's reading and math special education instruction to 30 minutes each per day. On its face, this appears to be a reduction of services for a student who was woefully deficient in reading and math. Testimony established, however, that Student's services were not technically reduced, but were instead changed. During the 2019-2020 school year, Student was receiving his special education instruction in a group setting, meaning that his 45 minutes of special education instruction in both reading and math were shared with other students. During the 2020-2021 school year, Parents opted for Student to be virtual. As such, Student's special education reading and math instruction became 1:1. Although Student was receiving 15 minutes less reading and math instruction per day, the result was that he ultimately received more individualized time than he had during the 2019-2020 school year.

**Conclusion.** Therefore, having considered Parents' allegations of procedural violations of FAPE in ADE H-21-13 and ADE H-21-18, this Hearing Officer hereby finds that District did not impede Parents' right to participate in any educational decision-making process regarding Student.

### *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). 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).

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.*



**ADE H-21-13.** In ADE H-21-13, Parents allege that District substantively denied Student FAPE by failing to include Student's dyslexia intervention and related goals on his IEP. There is no case directly on point in the Eighth Circuit, specifically, there is no case that directly addresses whether dyslexia interventions and goals must be provided on an IEP where the qualifying disability is specific learning disability. However, a district court decision in the Ninth Circuit is factually similar to this case and provides some guidance. In *L.C., on behalf of A.S. v. Issaquah Sch. Dist.*, petitioner asserted that student's IEP goals were not appropriately ambitious in light of student's circumstances of being dyslexic. 2019 WL 2023567. Specifically, petitioner alleged that student's goals only generically addressed student's dyslexia. The court held that the district "was not obligated to formulate IEP goals that tracked a dyslexia-specific curriculum or methodology, as long as the goals met the needs resulting from student's disability and were reasonably calculated to support [ ] educational progress." *Id.*

Here, Student was deemed eligible for special education services pursuant to the IDEA on account of being diagnosed with a specific learning disability in the areas of reading, written expression, and math. Student's diagnosis of dyslexia contributes to these deficit areas. Student's IEP referenced that Student would receive dyslexia interventions pursuant to the Take Flight program, and that these interventions would be separate from and additional to Student's special education minutes in reading and math. Student's IEP contained goals that addressed reading, written expression, and math, essentially covering Student's deficit areas. In addition, some of Student's reading goals addressed topics specific to Student's dyslexia diagnosis, such as the goal regarding segmenting words into complete

sequence of individual sounds. Based on these facts, it appears that this case is like the Ninth Circuit precedent discussed above. Although District may not have formulated IEP goals that tracked with Student's Take Flight dyslexia intervention program, the goals that are included in Student's IEP meet the needs resulting from Student's disability and appear reasonably calculated to support educational progress.

**ADE H-21-18.** Parents allege in ADE H-21-18 that Student was substantively denied FAPE, asserting that District reduced Student's special education minutes outside of an IEP meeting and without Parent's knowledge, and that District failed to hold a failure conference for Student during the first and second nine weeks of the 2020-2021 school year. Based on the facts in the record, this Hearing Officer disagrees. Regarding Parents' allegation that Student's special education minutes were reduced outside of an IEP meeting and without their knowledge, Parents failed to present sufficient evidence. While the issue of reduced minutes was raised repeatedly in this hearing, Parents did not sufficiently address or provide evidence to establish that this reduction of minutes was executed without their knowledge or outside of an IEP meeting. Regarding Parents' allegation that District failed to hold a failure conference for Student in the first and second nine weeks of the 2020-2021 school year, a review of Student's grades throughout the first semester of the 2020-2021 school year indicates that Student did not have a failing grade in any class. As such, it is not clear what Parents intended by this allegation. Certainly, District could not have failed to hold a failure conference where Student, in actuality, was not failing any classes. This Hearing Officer finds that there was no substantive violation of FAPE on either of these bases.

**ORDER:**

The results of the testimony and evidence warrant a finding for District in both ADE H-21-13 and ADE H-21-18. Specifically, Parents have failed to introduce sufficient evidence in the record, in both cases, to establish by a preponderance of the evidence that District denied Student a FAPE between August 29, 2020 and December 8, 2020.

**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**

10/15/2021

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**DATE**