

**ARKANSAS DEPARTMENT OF EDUCATION**

**Special Education Unit**

**XXXXXXXXX  
AS PARENTS OF  
XXXXXXXXXX**

**PETITIONER**

**VS.**

**Combined cases H-21-27 and H-21-37**

**PALESTINE-WHEATLEY SCHOOL  
DISTRICT**

**RESPONDENT**

**HEARING OFFICERS FINAL DECISION AND ORDER**

**ISSUES PRESENTED:**

**H-21-27**

1. Whether the Palestine Wheatley School District (hereinafter “District” or “Respondent”) denied Student a free appropriate public education (hereinafter referred to as “FAPE”) during the 2020-2021 school year, in violation of certain procedural and substantive requirements of the Individuals with Disabilities Education Act of 2004, 20 U.S.C. 1400-1485, as amended (hereinafter referred to as “IDEA”). Procedural violations alleged by Petitioner include: (1) failing to hold a transition conference prior to Student’s entering the District as a kindergarten student; (2) failing to have an IEP in effect at the beginning of Students 2020-2021 school year; (3) failing to assess Student in all areas of suspected disability; (4) failing to revise Student’s IEP to reflect and address his Autism diagnosis; (5) failing to include ABA therapy on the IEP; (6) failing to consider the UAMS evaluation conducted on October 13, 2020; (7) predetermining Student’s educational placement prior to an IEP meeting; (8) failing to include a behavior plan in Student’s IEP; (9) failing to provide the full continuum of placements; (10) failing to provide the services on student’s IEP.

Substantive violations alleged by Petitioner include: (1) Whether the District denied Student a FAPE because the District’s procedural violations caused a deprivation of educational benefits; (2) Whether the District denied Student a FAPE because the District’s procedural violations significantly impeded Parent’s opportunity to participate in the decision making process; (3) Student’s IEPs were not appropriate i.e., not reasonably calculated to enable a child to make progress in light of the child’s

circumstances. (4) Student's IEPs were not necessary, i.e., the least restrictive environment.

**H-21-37**

2. Whether the District denied Student FAPE from March 2, 2021-May 28, 2021?

**Procedural History:**

On March 2, 2021, the Arkansas Department of Education (hereinafter referred to as the "Department") received a request to initiate a due process hearing from XXXXXXXX (hereinafter referred to as "Parents", or "Petitioners"), the parents and legal guardians of XXXXXXXX (hereinafter referred to as "Student") against the Palestine Wheatley School District (hereinafter referred to as "District" or "Respondent"). Parents requested the hearing because they believed the District failed to comply with the Individuals with Disabilities Education Act of 2004, 20 U.S.C. 1400-1485, as amended (hereinafter referred to as "IDEA") and the regulations set forth by the Department by not providing Student with appropriate special education services, as noted supra in the statement of issues.<sup>1</sup> At the time that Parents filed their request for a due process hearing, Student was a 5-year-old male enrolled in kindergarten at District, specifically enrolled in Palestine-Wheatley School District.<sup>2</sup> Student was a student with a disability under IDEA. Student was diagnosed with seizure disorder, attention deficit hyperactivity disorder ("ADHD"), autism spectrum disorder and language deficits.<sup>3</sup>

In response to the Parent's request for a Due Process hearing, the Department assigned the case to an impartial hearing officer. Thereafter, a prehearing conference was scheduled for April 12, 2021, at 10:00a.m., and the hearing was scheduled for April 14-16, 2021. On April 6,

---

<sup>1</sup> See hearing officer File-Petitioner Complaint.

<sup>2</sup> See Hearing officer File-Petitioner Complaint, pg. 2.

<sup>3</sup> See Parents Exhibits, Pg. 168.

2021, the District filed an unopposed motion to continue stating that the parties had been unable to schedule a resolution conference and both parties believed a conference was necessary and would potentially resolve the issues in this case. The hearing officer reached out to the parties to ensure the continuance would not be lengthy. The hearing officer granted respondents motion for a continuance and reset the prehearing conference for May 3, 2021 at 10:00a.m. and the hearing for May 5-7, 2021. A prehearing conference was conducted, via zoom, on May 3, 2021.<sup>4</sup> Counsel for both the Parent and the District participated in the prehearing conference. During the prehearing conference, the parties explained that the student involved in the due process hearing request had been suspended indefinitely and they were looking for long term placement for the student. Both parties agreed that student would be better in a placement outside the school setting and requested a continuance to determine if a placement could be found. The parents were taking student to be evaluated at engage school in Jonesboro to determine if he could attend there.<sup>5</sup> Hearing officer agreed to grant the continuance provided a motion to continue was filed.

On May 3, 2021, Petitioner filed a motion for a continuance, stating that the Parents were taking student to be evaluated at engage school on May 5, 2021, which is a day the due process hearing is scheduled, and therefore all parties asked that a short continuance be granted so that a temporary placement for student can be located because student is unable to return to the District.<sup>6</sup> The Hearing Officer granted the continuance and the hearing was set for June 8-10, 2021.<sup>7</sup>

---

<sup>4</sup> First Pre-Hearing conference transcript.

<sup>5</sup> Id.

<sup>6</sup> See hearing officer file, Parent's motion for a continuance.

<sup>7</sup> See hearing officer file, Order granting motion for continuance.

On May 25, 2021, Mr. Kees, attorney for the District sent the hearing officer an email stating it was a joint motion for a continuance. At this time the two attorneys had two separate due process hearing requests involving the District. The attorneys asked that the hearing officer move H-21-27/H-21-37 to June 1-3, 2021 and grant a continuance in the separate due process complaint H-21-32. The hearing dates for H-21-27/H-21-37 were changed to June 1-3, 2021.

On May 27, 2021, a second prehearing conference was held in this case. During the pre hearing conference, the parties explained to the hearing officer the student's stay put placement had been changed to engage in Jonesboro, Arkansas. In addition, the hearing officer noted the change in hearing dates to June 2-4, 2021, and all parties agreed.<sup>8</sup> Ms. Caldwell, parents' counsel stated that she would be filing a second due process complaint in this case.

On Friday, May 28, 2021, at around 4:30 p.m., a second due process complaint, H-21-37, was filed by the Parents, on behalf of Student, against the Palestine Wheatley school District.<sup>9</sup>

On Monday, May 31, 2021, Parents' counsel sent an email to the District's attorney, and the hearing officer with the second due process complaint (H-21-37), attached.

The hearing officer, having not received official notice from the Arkansas Department of Education yet, but understanding that when a hearing request involves the same parties, facts, and school district, it will be assigned to the same hearing officer, sent an email out to the parties to as if they would like to consolidate H-21-27, and H-21-37, and asked if they needed a continuance or because the cases were very similar, if the parties would be ready to proceed the next day.<sup>10</sup> The District's attorney replied by email that the District was not opposed to consolidating H-21-27 and H-21-37.

---

<sup>8</sup> See trial transcript 2 pre hearing conference.

<sup>9</sup> See Due Process Complaint H-21-37.

<sup>10</sup> See hearing officer file email May 31, 2021, 3:15p.m.

The District's attorney did not file a written response to H-21-37, but was given until June 11, 2021 to file a written response if he had wanted. The hearing officer felt that the District should be given the extra time to file a written response because of the tight timeline and the scheduling of the consolidated due process hearings. Additionally, the hearing office didn't believe Petitioners would be prejudiced by allowing the extra response time. At no point during the hearing did either party object to the consolidation of H-21-27 and H-21-37. At the close of the case, having realized she had neglected to put on the record in the beginning of the Consolidated Due Process Hearing that the parties had agreed to the consolidation of H-21-27 and H-21-37, the Hearing Officer asked the parties if they had agreed to the consolidation of these two due process complaints and attorneys for both parties responded affirmatively.<sup>11</sup>

Thereafter, the Due Process hearing in this matter began as scheduled on June 2, 2021. Testimony was heard in this case at the Palestine Wheatley elementary school on June 2<sup>nd</sup> and 3<sup>rd</sup>, 2021.<sup>12</sup> After testimony on June 3, 2021, Ms. Caldwell sent an email stating that she believed something in the hearing room at the school was making her ill and letting all parties know that she had booked the conference room at the Hampton Inn, in Forrest City, Arkansas for the rest of the hearing. The District offered to move the hearing to another classroom in the school, but Ms. Caldwell, parents' attorney stated that it was worth it for her to pay for the conference room. The hearing officer made it clear that this was Ms. Caldwell's choice and not something the District would reimburse her for.<sup>13</sup> Testimony was then heard at the Hampton Inn, in Forrest City, Arkansas on June 5, 7 and 9, 2021. Testimony was taken by Zoom, on June 11 and June 22, 2021.<sup>14</sup>

---

<sup>11</sup> See trial Transcript, V. VII, pgs. 168-169.

<sup>12</sup> See trial transcripts, V. 1, Vol 2.

<sup>13</sup> See hearing officer file email exchange June 3, 2021.

<sup>14</sup> See trial transcripts, Volumes. I-VII.

Present for the Hearing were Theresa Caldwell, attorney for Petitioner, Cody Kees, Attorney for the District, XXXXXXXX, parent, XXXXXXXX, parent, Lori Ginn, LEA, Audra Alumbaugh, advocate (via Zoom).

The following witnesses testified in this matter: Mary Oltmann, Terri Jo Knowlton, Myra Long, Kellie Griffith, Kristi Wilson, Lori Ginn, Jon Estes, XXXXXXXX, XXXXXXXX, Tracy Palm, and Dr. Mary Tracy Morrison.

Having been given jurisdiction and authority to conduct the hearing pursuant to Public Law 108-446, as amended and Arkansas Code Annotated §6-41-202 through §6-41-223, Dana McClain, J.D., Hearing Officer for the Arkansas Department of Education, conducted a closed impartial hearing.

Both parties were offered the opportunity to provide post-hearing briefs in lieu of closing statements, and both timely submitted briefs in accordance with the deadline set by this Hearing Officer.<sup>15</sup>

### **Findings of Fact**

1. Student is a 6-year-old male enrolled in the Palestine Wheatley School District and placed by agreement of the parties at Engage school in Jonesboro Arkansas. Student has diagnosis of seizure disorder, attention deficit hyperactivity disorder (“ADHD”), autism spectrum disorder and language deficits.
2. Student attended preschool at Kids for the Future (“KFF”) in Forrest City Arkansas until it was time for him to start kindergarten in the Palestine Wheatley School District.<sup>16</sup>

---

<sup>15</sup> See Hearing Officer File-post hearing briefs.

<sup>16</sup> Parents Exhibit, P. 42, 185. Trial Transcript Vol. III, p. 152.

3. While attending KFF, according to Student's IEP, Student received special education services from the Great Rivers Education Cooperative.<sup>17</sup>
4. Though it is unclear from the evidence and testimony what happened, it is clear that there was no transition conference held in order to transition Student from KFF to Palestine Wheatley School District. Therefore, student started kindergarten without an IEP.<sup>18</sup>
5. On September 11, 2020, a notice of conference was sent to the Parents, setting a meeting for September 25, 2020, to review existing data review, determine student's eligibility for special education and develop an initial IEP.<sup>19</sup>
6. On September 18, 2020, a notice of conference was provided to Parents, setting a meeting for September 18, 2020, to review existing data review, determine student's eligibility for special education and develop and initial IEP.<sup>20</sup>
7. Although there isn't a notice of conference setting a meeting for September 15, 2020, it is clear from both the documentation and testimony that a meeting was held and an initial IEP was created for student on September 15, 2020.
8. Student was without an IEP until September 15, 2020. On September 15, 2020, the District and Parents met to develop what claims to be an initial IEP.<sup>21</sup>
9. At the September 15, 2020, meeting, the IEP team determined after reviewing existing data, that they needed additional data including, evaluation/reevaluation to determine eligibility, reevaluation to consider new/additional eligibility, and reevaluation to gather information to aid instructional planning.<sup>22</sup> The IEP team decided to conduct a speech

---

<sup>17</sup> Parents Exhibit at 188.

<sup>18</sup> See Trial Transcript Vol. III, p. 152.

<sup>19</sup> District Exhibits, P. 138.

<sup>20</sup> Id., at 140.

<sup>21</sup> See Trail Transcript Vol. III, p. 154.

<sup>22</sup> District Exhibits, P. 147.



and language evaluation, an occupational therapy evaluation and a comprehensive evaluation.<sup>23</sup>

6. The IEP developed on September 15, 2020, states duration of services is from 8/24/20 to 5/26/21, however this IEP clearly states it was not developed until September 15, 2020.<sup>24</sup>
7. The September 15, 2020, IEP, placed Student in special education under other health impairment. Student was given Direct instruction in Literacy 50 minutes 5 times a week and in Math 50 minutes 5 times a week. Student was also provided related services encompassing speech therapy 30 minutes 1 time per week and occupational therapy 30 minutes one time per week.<sup>25</sup>
8. Parent (mom) notified the IEP team at the September 15, 2020, IEP meeting that Student was being tested for Autism.
8. Despite testimony and documents from Student's preschool, when the District developed the September 15, 2020, IEP, they failed to address students social/emotional behavioral issues. The IEP team clearly checked no on the IEP when asked if Student needed positive behavioral interventions and supports.<sup>26</sup>
9. Ms. Ginn's testimony made it clear that she didn't want to "label" Student as special ed even though the evidence showed student had significant issues and lacked appropriate skills for his age.<sup>27</sup>
10. On September 17, 2020, an occupational evaluation was conducted. The evaluations showed that Student scores on the Beery, VMI and BOT-2 in all subtest areas, indicated a significant delay. On the visual motor integration section of the Beery indicated that

---

<sup>23</sup> Id., at 149.

<sup>24</sup> Parent Exhibits, P. 29.

<sup>25</sup> Id. at 35.

<sup>26</sup> Parent exhibits, P. 32.

<sup>27</sup> See Trial Transcript Vol. III, pg. 156.

Student is functioning at a very low level and has a significant delay in visual motor skills. The BOT-2 showed that Student is well below average in fine manual control and fine motor precision. It was recommended that Student receive occupational therapy for 60 minutes per week and once he could tolerate that they should reassess and determine if 90 minutes per week would be more beneficial to student.<sup>28</sup>

11. On September 22, 2020, and October 1, 2020, a speech evaluation was conducted. The evaluator completed the Arizona Articulation Proficiency Scale, Third Revision (ARIZ-3), the Goldman-Fristoe Test of Articulation (GFTA-3), Test of Language Development-Primary: Fourth Edition (TOLD-P; 4) and the Oral and Written Language Scales 2<sup>nd</sup> Edition: Listening Comprehension and Oral Expression Scales (OWLS II). These results showed that Student has a severe receptive and expressive language delay and a moderate to severe articulation delay given Student's age.<sup>29</sup>
12. A psychological assessment was conducted on October 14, 2020. The evaluator administered the Reynolds Intellectual Assessment Scales-2(RIAS-2), Wide Range Achievement Test Fifth Edition, Criterion Tests of Basic Skills 2-Reading and Arithmetic, Test of Auditory Processing Skills -3 (TAPS-3)-word discrimination subtest, and Burks Behavior Rating Scale -2. The Evaluator found the following:

**SUMMARY/CONCLUSIONS:**

1. Student's measured intelligence on the RIAS-2 is in the Well Below Average range when compared to same aged peers. Student was echolalic during testing and this may underestimate his true Intellectual abilities.
2. Student's scores on the achievement tests are at the expected level when compared with his measured abilities.
3. Student receives Speech and Language Therapy.

---

<sup>28</sup> District exhibits, P. 80-84.

<sup>29</sup> Id., at 87-91.

4. Student passed the Auditory Perception Screening test.
5. Student receives Occupational Therapy.
6. Student's ratings on the BBRs-2 indicated multiple elevated scales.

**Suspected Handicapping Condition:** Student is currently placed in Special Education under the handicapping condition of Other Health Impairment, while test data is being gather. This may be an appropriate handicapping condition, as the report from Dennis Developmental Center was not available when testing was completed. If documentation of Student's Autism Spectrum Disorder diagnosis is available, XXXX team may wish to consider Autism as his handicapping condition.

**RECOMMENDATIONS:**

Refer to the Educational Management Team to determine specific programming and placement recommendations.

The current test results suggest the need for individualized instruction of some form to address his academic, as well as behavioral deficits.

-Student's significant need for direct instruction may require more than the 100 minutes per day he is currently receiving.

-Additionally, his significant behavioral need suggest he may need a smaller peer to teacher ration to meet his individual needs.

Student should continue receiving Speech and Language Therapy and Occupational Therapy.

The following modifications should be considered in developing an appropriate plan to meet Student's educational needs:

Preferential seating- seating Student as close as possible to where the teacher gives instruction and away from potential distractions.

Allow for physical breaks and movements between academic tasks.

Checking in regularly to make sure Student is attending and on task and knows what is required for each assignment.

Have Student highlight all written directions for worksheets and tests; check in with Student to make sure he understands the directions; when possible, go over test directions

and questions orally.

Allow for extended time for assignments and tests.

Small group testing away from distractions.

Allow for Oral Testing when needed.

Allow for a Word Bank to help Student spell high frequency words.

Allow for the use of books on tape.

Bookshare.com is a good website resource.

Overdrive is an App for iPhones and Androids which provides access to many audio - books.<sup>30</sup>

13. On October 19, 2020, a notice of conference is sent to Parents, notifying parents that an IEP meeting would be held on November 2, 2020, to determine initial or continued eligibility and develop an initial IEP.<sup>31</sup>
14. On November 2, 2020, the team met to discuss the psychological testing/evaluation, the occupational therapy evaluation, and speech evaluation. Present at this meeting were Parent (mom), Mary Oltman, special education teacher, Terri Knowlton, general education teacher, and Lori Ginn, LEA representative, and the Individual present to interpret instructional implications of evaluation results. The psychological examiner, the speech therapist evaluator nor the occupational therapy evaluator were present or invited.<sup>32</sup>
15. The decision was to change Student's eligibility category from other health impairment to Intellectual disability.<sup>33</sup>
16. The November 2, 2020, IEP included four occupational therapy goals, three speech therapy goals, two academic goals, two English language goals, and one math goal. These goals appear to be developed by an IEP team that failed to

---

<sup>30</sup> District Exhibits pgs. 94-98

<sup>31</sup> Parent Exhibits pg. 91.

<sup>32</sup> Id. at 95.

<sup>33</sup> Parent Exhibits, Pg. 95.

include an occupational therapist or speech therapist.<sup>34</sup>

17. In the November 2, 2020, IEP, behavior difficulties student is having are mentioned. Student spits frequently at teachers, people, students, books, curses teachers and students, screams without provocation, throws items and has frequent bathroom accidents.<sup>35</sup> However, the team fails to address Students clear lack of maladaptive behavior and for the second time, when the IEP document gives the team a perfect opportunity under Positive behavioral interventions and supports to address behavior the team checks no.<sup>36</sup>
18. Based on the testimony of the superintendent and the Parent (mom), I find that mom turned over the evaluation from the UAMS Dennis developmental center diagnosing Student with autism to the District prior to the December 16, 2020 IEP meeting.<sup>37</sup>
20. The letter from Dr. Davis, UAMS, and the completed evaluation diagnosed Student with Autism. Dr. Davis states in her letter that Student “Exhibits multiple symptoms that significantly impair him in the home, academic, and social settings. These include hyperactivity, impulsivity, significant tantrums including physical aggression and property destruction, difficulty with transitions, sensory sensitivities, and repetitive behaviors. He too has significant issues with speech and communication. In addition to these symptoms, Student struggles with activities of daily living including but not limited to toileting and

---

<sup>34</sup> Id., at pgs. 5-25.

<sup>35</sup> Id., at 2.

<sup>36</sup> Id., at 4.

<sup>37</sup> Trial Transcript IV, Pgs. 29, 184-185.

dressing himself as is common in children with developmental disabilities.<sup>38</sup>

The evaluation made a number of suggestions and recommendations.<sup>39</sup>

19. On December 15, 2020, a notice of conference is sent to Parents stating an IEP meeting will be held on December 16, 2020. The only reason checked under purpose of the meeting was other which stated separate programming conference.<sup>40</sup>
20. On December 16, 2020, an IEP meeting was held and the UAMS evaluation was mentioned.<sup>41</sup>
21. On December 16, 2020, the IEP committee recommended that Student attend the developmental center in Brinkley, Arkansas in light of his Autism diagnosis. The team believed Student needed a more restrictive setting.<sup>42</sup>
22. On January 4, 2021, a notice of conference was sent to Parents stating that an IEP meeting would be held on January 11, 2021.<sup>43</sup>
23. On January 11, 2021, an IEP meeting was held to discuss parents concerns about Student's placement at the Monroe County Developmental Center (MCDC) in Brinkley Arkansas. Since the Meeting on December 16, 2020, parent visited the MCDC and decided that she did not feel it was an appropriate placement. Mom was told that there were no verbal children currently attending MCDC. After discussing Mom's concerns, the IEP team determined that although Student needs a more restrictive class, MCDC is not a viable choice

---

<sup>38</sup> Parents exhibits, P. 165-171.

<sup>39</sup> Id.

<sup>40</sup> Parent exhibits, P. 97.

<sup>41</sup> Parent exhibits, P. 98.

<sup>42</sup> Parent exhibits, P. 103-104.

<sup>43</sup> Id., at 105.

because student is higher functioning than the children who attend MCDC.

Student's placement was determined to be at the Palestine Wheatley Elementary school in the resource room.<sup>44</sup>

24. No changes to the IEP document were made during either the December 16, 2020, or January 11, 2021, IEP meetings.
25. On February 2, 2021, a notice of conference was sent to the Parents stating that an IEP meeting was to be held on February 9, 2021. The purpose of the meeting was to conduct a manifestation determination and separate programming.<sup>45</sup>
26. Although, the District was aware of Student's Autism diagnosis as early as December of 2020, Student's eligibility category had remained intellectual disability.<sup>46</sup>
27. At the February 9, 2021, IEP meeting the team changed Student's eligibility category to Autism.<sup>47</sup>
28. At the February 9, 2021 IEP meeting again the team determined that student would attend MCDC because he needs a more structured environment to meet his academic, behavior and social emotional goals in his IEP. There is no indication that anything had changed at MCDC to now make it an appropriate placement for Student. It appears from testimony and documents that MCDC is where Palestine Wheatley School District puts children with significant maladaptive behaviors.<sup>48</sup>
29. The Notice of action dated February 9, 2021, states that increased time in the

---

<sup>44</sup> Id., at 106-108.

<sup>45</sup> Parent exhibits, pg. 109.

<sup>46</sup> Id.

<sup>47</sup> Id.

<sup>48</sup> Id. at 114.

resource room, self-contained (although testimony shows the District does not have a self-contained classroom for elementary students), and other placements have been tried and rejected. Homebound and virtual were also rejected as well.<sup>49</sup>

30. Student was out of school without an agreed upon placement due to maladaptive behaviors attributable to his Autism Diagnosis started February 9, 2021.
30. On February 16, 2021 a notice of Conference was sent to the Parents stating that a facilitated IEP would be held on February 24, 2021. This facilitated IEP by UALR Bowen School of law, was requested by the Parents and agreed to by the District.<sup>50</sup>
31. A facilitated IEP was held on February 24, 2021. There was no action taken on this date. No IEP changes were agreed upon by the parent. The Parent requested a sensory screener and the committee agreed to conduct the screener. The committee determined that a circuit referral would be initiated because Student's behaviors had recently reached TIER 3 which qualified for CIRCUIT referral. Parent stated that Student would not be attending MCDC as it was not an appropriate placement for Student. Parent asked the District to put Student with a teacher one on one in a portable building that was on campus. The District declined this option. Ms. Ginn, LEA, offered homebound services, virtual services or shortened school day. Parent rejected homebound and virtual services and said she would speak with her husband about shortened school

---

<sup>49</sup> Id. at 115.

<sup>50</sup> Parents Exhibits, pg. 117.



days.<sup>51</sup>

32. The District stated at the meeting that it had increased Student's time in the resource room, provided special education in excess of 60% of the school day which is considered to be self-contained in the resource room. They assigned a paraprofessional to work with Student. According to the District none of this has help with student's maladaptive behaviors.<sup>52</sup>
33. On March 2, 2021, Parents filed their first Due Process Hearing request, H-21-27.
34. Between March 2, 2021, and May 1, 2021, the Student continued to exhibit maladaptive behaviors and the District continually failed to address these behaviors. Student was suspended and finally determined that Student could no longer attend Palestine Wheatley Elementary school.
35. On May 3, 2021, the Parents and District agreed for Student to begin attending Engage, a private school in Jonesboro Arkansas. The District agreed to pay for Engage and agreed to pay the Parents to transport student to Engage.<sup>53</sup>
36. On May 6, 2021, Student started receiving services at Engage.<sup>54</sup>
37. On May 18, 2021, Engage submitted a proposal to provide services to Student. It provided for daily tuition of \$346.75 per day, but no transportation.<sup>55</sup>
38. On May 18, 2021, the District emailed Parents to notify them that it would no longer reimburse them for transporting Student to Engage starting the following day. The District's plan was for Parent to provide a car seat for Student and the

---

<sup>51</sup> Id. at 121.

<sup>52</sup> Id. at 122

<sup>53</sup> See Transcript pretrial, pgs. 7-8.

<sup>54</sup> Trial Transcript IV., p. 262.

<sup>55</sup> Parent Exhibits, pg. 155.

District would provide a car and a driver. The driver was not trained in Autism or seizures, or the bathroom protocols currently being implemented by Engage. The District stated that Parent (Mom) could ride in the District's car with Student.<sup>56</sup>

39. The Parent's found the District's transportation offer inappropriate and continued to transport Student to Engage themselves without transportation reimbursement from the District.<sup>57</sup>
40. It was simply too expensive for Parent's to continue transporting Student without reimbursement from the District and therefore Student's last day at Engage was May 26, 2021.<sup>58</sup>
41. On May 26, 2021, Ms. Ginn, the Districts LEA and its legal counsel visited Engage and found it an appropriate placement for Student.<sup>59</sup>
42. On May 28, 2021, Parents filed their second Due Process Complaint seeking to compel the District to pay for Student to attend Engage. Additionally, parents asked that the District be responsible for transportation services or cost and to reimburse Parents for past transportation costs.<sup>60</sup>
43. On June 1, 2021, Mr. Estes the District's Superintendent sent an email to Engage, agreeing to pay for services for Student to attend Engage during the summer of 2021, and during the 2021-2022 school year.<sup>61</sup>
44. Because of the disagreement over transportation, Student did not attend Engage

---

<sup>56</sup> Parent Exhibits, pg. 630, Trial Transcript Vol. III, pgs. 77-78.

<sup>57</sup> See Trial Transcript IV., p. 302.

<sup>58</sup> See Trial Transcript Vol. IV, pgs. 239-240.

<sup>59</sup> See Trial Transcript Vol. VII, pg. 91.

<sup>60</sup> See Hearing officer file, Second Due Process Complaint H-21-37.

<sup>61</sup> See Trial Transcript Vol. VII, pgs. 90-94.

after May 26, 2021.

## **DISCUSSION AND CONCLUSIONS OF LAW**

### **General Legal Principles**

In general, the burden of proof is viewed as consisting of two elements: the burden of production and the burden of persuasion. Before consideration of the Parents' claims, it should be recognized that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). Accordingly, the burden of persuasion, in this case, must rest with the Parents.

In the role of factfinders, special education hearing officers are charged with the responsibility of making credibility determinations of the witnesses who testify. See *J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008). This hearing officer found each of the witnesses who testified to be credible in that they all testified to the facts to the best of their recollection; minor discrepancies in the testimony were not material to the issues to be determined and, in any event, were not deemed to be intentionally deceptive.

The weight accorded the testimony, however, is not the same as its credibility. Some evidence, including testimony, was more persuasive and reliable concerning the issues to be decided, discussed as necessary below. However, the hearing officer found the District employee witnesses sometimes lacked basic knowledge of the requirements of IDEA and their obligations to meet them. It was clear while listening to the testimony of all district employees that their knowledge of IDEA and its requirements was often lacking. The documentation and testimony was sometimes conflicting, although the hearing officer does not necessarily find that

any one witness was untruthful, the lack of knowledge about IDEA certainly played a roll in the hearing officers decisions.

In reviewing the record, the testimony of all witnesses and each admitted exhibit's content were thoroughly considered in issuing this decision, as were the parties' post hearing briefs.

### **Applicable Legal Principles**

The IDEA requires the provision of a "free appropriate public education" (FAPE) to children who are eligible for special education services. 20 U.S.C. § 1412. FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. Decades ago, in *Hendrick Hudson Central School District Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court addressed these statutory requirements, holding the FAPE mandates are met by providing personalized instruction and support services that are reasonably calculated to benefit educationally from the instruction, provided that the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase "free appropriate public education" to require "significant learning" and "meaningful benefit" under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999).

Districts meet the obligation of providing FAPE to eligible students through development implementation of an IEP that is "'reasonably calculated' to enable the child to receive 'meaningful educational benefits' in light of the student's 'intellectual potential.'" *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Recently, the U.S. Supreme Court considered the application of the *Rowley* standard, and it observed that an IEP "is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth." *Endrew F. v. Douglas County School District RE-1*, \_\_\_ U.S. \_\_\_, \_\_\_, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017). The IEP

must aim to enable the child to make progress. The essential function of an IEP is to set out a detailed individualized program for pursuing academic and functional advancement in all areas of unique need. *Andrew F.*, 137 S. Ct. 988, 999 (citing *Rowley* at 206-09) (other citations omitted). The *Andrew* court thus concluded that “the IDEA demands ... an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” 137 S. Ct. at 1001, 197 L.Ed.2d at 352.

*Andrew*, *Rowley*, and the IDEA make abundantly clear, the IEP must be responsive to the child’s identified educational needs. See 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. However, a school district is not required to provide the “best” program, but rather one that is appropriate in light of a child’s unique circumstances. *Andrew F.* In addition, an IEP must be judged “as of the time it is offered to the student, and not at some later date.” *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993).

"The IEP is 'the centerpiece of the statute's education delivery system for disabled children.'" *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, U.S. 137 S. Ct. 988, 994, 197 L. Ed. 2d 335 (2017) (quoting *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988)). An IEP is a comprehensive program prepared by a child's "IEP Team," which includes teachers, school officials, the local education agency (LEA) representative and the child's parents, an IEP must be drafted in compliance with a detailed set of procedures. 20 U.S.C. § 1414(d)(1)(B). An IEP must contain, among other things, "a statement of the child's present levels of academic achievement," "a statement of measurable annual goals," and "a statement of the special education and related services to be provided to the child." *Id.* § 1414(d)(1)(A)(i). A FAPE, 24 as the IDEA defines it, includes individualized goals, "specially-designed instruction" and "related services." *Id.* § 1401(9). "Special education" is

"specially designed instruction . . . to meet the unique needs of a child with a disability"; "related services" are the support services "required to assist a child . . . to benefit from" that instruction. Id. §§ 1401(26), (29). A school district must provide a child with disabilities such special education and related services "in conformity with the [child's] individualized education program," or "IEP." 20 U.S.C. § 1401(9)(D).

When formulating an IEP, a school district "must comply both procedurally and substantively with the IDEA." *Rowley*, at 206-07 A procedural violation occurs when a district fails to abide by the IDEA's safeguard requirements. A procedural violation constitutes a denial of a FAPE where it "results in the loss of an educational opportunity, seriously infringes the parents' opportunity to participate in the IEP formulation process or causes a deprivation of educational benefits." *J.L. v. Mercer Island Sch. Dist.*, 592 F.3d 938, 953 (9th Cir. 2010). A substantive violation occurs when an IEP is not "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances," *Andrew F.*

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.<sup>118</sup> 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.<sup>119</sup> 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 receive educational benefits.<sup>62</sup>

## **PROCEDURAL VIOLATIONS**

---

<sup>62</sup>20 U.S.C. § 1412(a); 34 C.F.R. § 300.300(a).

Regarding the first inquiry, that of whether the District complied with the procedures set forth in the IDEA, this Hearing Officer notes that counsel for the Parents raised ten possible violations in H-21-27 that were classified in the Complaint as procedural. Additionally, there were no issues cited in H-21-37 as procedural violations.

**Due Process Complaint H-21-27 Procedural violations**

(1). Parents' claim that the District failed to hold a transition conference prior to Student entering the District as a kindergarten student. Some circuits have expressly stated that child find claims are procedural in nature and, therefore, must be analyzed prior to determining whether there was a substantive violation of the IDEA. *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249-250 (3<sup>rd</sup> cir. 2012); *D.A. ex rel. Latasha A. v Houston Indep. Scho Dist.* 629 F.3d 450, 453 (5<sup>th</sup> Cir. 2010); *Bd. Of Educ. of Fayette Cnty. V. L.M.*, 478 F.3d 307, 313 (6<sup>th</sup> Cir. 2007).

Congress enacted the IDEA for the purpose of ensuring that all children with disabilities have access to a "free appropriate public education." 20. U.S.C. 1400(d)(1)(A). In order to ensure that all children with disabilities receive a FAPE, school districts are required to satisfy a "child find" obligation. 20 U.S.C. 1412(a)(3). Specifically, districts must ensure that:

All children with disabilities residing in the State, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.

20 U.S.C. §1412(a)(3)(A).

Child find extends to children who are suspected of having a disability and in need of special education, even though they are advancing from grade to grade and performing on grade level. 34 C.F.R. §300.111(c)(1). Once a child is identified as potentially having a disability, the

child's school district is required to conduct a full and individual evaluation to determine whether the child has a disability and is in need of special education and related services. Further, the Arkansas Department of Education special education Rules and regulations 3.01 states:

Each local educational agency is responsible for ensuring that all children with disabilities from birth to twenty-one (21) years within its jurisdiction and in need of special education and related services are identified, located and evaluated, regardless of the severity of their disability.

In the present case Student attended a Kids for the Future developmental preschool and according to the IEP was receiving special education services from the Great Rivers Co-operative.<sup>63</sup> Ms. Ginn the District LEA works out of the Great Rivers Co-operative. Yet Ms. Ginn testified that she didn't think Student was receiving special education services from the Great Rivers Co-operative immediately preceding his enrollment in kindergarten. Ms. Ginn further testified that no one invited her to a transition meeting, therefore she was unaware of Student.<sup>64</sup> Child find is a proactive requirement on the District. It is inconceivable to the hearing officer that the District and the Great Rivers Co-operative do not have a process in place whereby both entities have an obligation to make sure that any students receiving special education services by the Great Rivers Co-operative who are transitioning into Palestine Wheatley School District have a transition meeting to ensure that there are no disruptions in services and that the school Student will be attending is ready the day Student begins. Here, somehow the District wrongly believes the entire obligation rests with the Great Rivers Cooperative. This hearing officer finds that is simply not the case. A preschool that provides

---

<sup>63</sup> Parents exhibits, pg. 42

<sup>64</sup> Trial Transcript, Voll. III, pgs. 205-209



services to students with disabilities should be the first place a District should look to meet its child find obligations. Here, the District completely failed Student by not attempting to locate, evaluate and program for transition from preschool to kindergarten in violation of IDEA. This failure further created an environment in which student was thrust into a setting without any aids or services in place and expected to perform appropriately. This was a recipe for disaster. This hearing officer finds that the District failed under its child find obligation to hold a transition conference which is a procedural violation of IDEA.

(2) Parents' further claim that the District failed to have an IEP in effect at the beginning of Student's 2020-2021 school year. As discussed above because the District failed to meet its child find obligations above and hold a transition conference prior to Student entering kindergarten, student began his kindergarten year without an IEP in place. This hearing officer looking at the testimony and the exhibits agrees that this is a procedural violation of IDEA.

(3) Parents claim that the District failed to assess Student in all areas of suspected disability. At the IEP meeting on September 15, 2020, the IEP team determined it necessary to conduct a speech and language evaluation, an occupational therapy evaluation and a comprehensive evaluation.<sup>65</sup> Further, the District was made aware that the Parents were in the process of having Student evaluated at UAMS child study center for Autism. The District conducted a full psychological evaluation, speech therapy evaluation and occupational evaluation.<sup>66</sup> Parents do not present any testimony or document evidence to show that the District failed to evaluate Student for all suspected areas of disability. This hearing officer finds no procedural violation of IDEA here.

---

<sup>65</sup> District Exhibits, pgs., 80-84, 87-91, 94-98.

<sup>66</sup> Id.

(4) Parents claim the District failed to revise Student's IEP to reflect his Autism diagnosis.

Parent provided the District with the completed UAMS evaluation where student received an autism diagnosis in December 2020. According to District records there was an IEP meeting on December 16, 2020, at which the UAMS, child study center evaluation was mentioned.<sup>67</sup>

Another IEP meeting was held on January 11, 2021. There were no changes to the IEP, the eligibility category, or services provided to Student. Both IEP meetings were held to discuss moving Student to MCDC because the IEP team determined Student needed a more restrictive setting. It wasn't until February 9, 2021, that the District held an IEP meeting and changed Student's category of eligibility to Autism. The District wrote on the top of the UAMS evaluation that it received the evaluation by the Parent at the February 9, 2021 IEP conference.

This hearing officer disagrees. The documents from the December 16, 2020 IEP meeting and the Superintendent's testimony that he received the evaluation sometime in December support the Parent's testimony that the District received the UAMS evaluation in December of 2020 and held two IEP meetings without changing Student's eligibility category or including the Autism diagnosis on Student's IEP. Further the District failed to program to address Student's Autism diagnosis. This Hearing Officer finds this to be a procedural violation of IDEA.

(5) Parents claim that the District failed to include ABA therapy on the IEP. While it is true that the UAMS evaluation did recommend ABA therapy, that is a team decision. And while there is no evidence that there was a thorough discussion of Student's need for ABA therapy, there is no evidence supporting the opposite. For this reason, this hearing officer finds this is not a procedural violation of IDEA.

(6) Parents claim the District failed to consider the UAMS evaluation conducted on October 13, 2020. As discussed above the District received the UAMS evaluation in December of 2020, held

---

<sup>67</sup> Parent Exhibits, pg. 98

two IEP meetings, one on December 16, 2020 and one on January 11, 2021, and although they acknowledge the documents existence, they fail to include Student's diagnosis of autism or implement or discuss the recommendations in the UAMS evaluation. As mentioned previously there were not changes made to Student's IEP at the December and January IEP meetings. What was apparent in both the documents and the testimony was that the District read the UAMS evaluation and decided Student needed to go to MCDC. There is no evidence that the IEP team discussed recommendations made in the UAMS evaluation, services that could be implemented, or any behavior services to help Student learn the skills needed to be successful in the school setting. It wasn't until the February 9, 2021, IEP meeting that Student's eligibility category was changed to Autism. However, it was at this IEP meeting that the District decided student had to go to MCDC because they were unable or unwilling to provide the services he needed. Again, the District failed to discuss the UAMS evaluation. This hearing officer finds this a procedural violation of IDEA.

(7) Parents claim the District predetermined Student's educational placement prior to IEP meetings. I do not find evidence supporting the District predetermined Student's placement at the December 16, 2020 IEP meeting or the January 11, 2020 IEP meeting. However, the evidence and testimony does support Parents' claim that the District predetermined Student's placement at the February 9, 2021 IEP meeting. I find that the entire reason for the February 9, 2021 IEP meeting was because the District no longer wanted Student in their school. Student's behaviors had become increasingly more severe and the District was unable or unwilling to program appropriately to address Student's behaviors related to his disability. The District in all of the previous IEP meetings failed again and again to put any positive behavior supports in place for Student. They failed to develop and implement a behavior plan for Student. At the

February 9, 2021, IEP meeting the District had already decided that Student needed to attend MCDC prior to the IEP meeting. Thus, procedurally violating IDEA.

(8) Parents claim the District failed to include a behavior plan in Student's IEP. This hearing officer finds the record supports Parent's claim. This Student's behavior is what prevents Student from being able to be in a classroom with his non-disabled peers. Student's behavior consisted of hitting, spitting, throwing objects, screaming, cursing, etc., yet every IEP developed for Student has a check mark by no when asked if positive behavior supports are warranted. There was no evidence presented that a behavior plan was ever developed. There was testimony that they had to wait until Student's behaviors reached tier III before calling in CIRCUIT and that wasn't even mentioned until the Facilitated IEP that was held on February 24, 2021.<sup>68</sup> Tier III behaviors may be required for a CIRCUIT referral but they are not required to develop and implement a behavior plan. The District failed to develop and implement a behavior plan, which Student desperately needed, which is a procedural violation of IDEA.

(9) Parents claim that the District failed to provide Student with the full continuum of placements. Section 300.115 of IDEA regulations states:

(a) Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.

(b) The continuum required in paragraph (a) of this section must—

(1) Include the alternative placements listed in the definition of special education under §300.39 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and

(2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

---

<sup>68</sup> Parents Exhibits, pg. 121.

This hearing officer finds that although Ms. Ginn did testify that the District did not have a designated self-contained classroom available for elementary students with disabilities, Ms. Ginn further stated that the District was capable of creating one should the District determine there was a need. There was no evidence offered that a “self contained” classroom would have been appropriate for Student nor was there sufficient evidence presented that another placement on the continuum other than Engage would be an appropriate placement for Student. As Engage is Student’s current placement, this hearing officer finds no evidence to support the District failed to provide the full continuum of placements, and thus finds no procedural violation here.

(10) Parents’ claim District failed to provide the services in Student’s IEP. This hearing officer finds the record lacking support for Parent’s position. There was little testimony about what Student received and didn’t receive per his IEP. This hearing officer finds no procedural violation here. This is not a conclusion that the IEPs were appropriate to meet Students unique needs only that the evidence presented doesn’t support a finding of a procedural violation.

### **Conclusion**

Having considered Parent’s allegations of procedural due process violations, and in light of the findings and conclusions *supra*, it is the conclusion of this Hearing Officer that District procedurally violated the IDEA by (1) failing to hold a transition conference prior to Student entering kindergarten; (2) failing to have an IEP in effect at the beginning of Student’s 2020-2021 school year; (3) failing to revise Student’s IEP to reflect and program for his Autism diagnosis; (4) failing to consider the UAMS evaluation; (5) predetermining Student’s education placement prior to IEP meetings; (6) failing to include a behavior plan in Students IEP. The District however did not commit any procedural violations with regard to (1) assessing Student in all areas of suspected disability; (2) failing to include ABA therapy in Student’s IEP; (3)

failing to provide the full continuum of placements; and (4) failing to provide the services on Student's IEP.

### **ALLEGATIONS OF SUBSTANTIVE VIOLATIONS OF IDEA**

Having analyzed the first prong of the FAPE analysis, specifically that of procedural violations, and determined that the District failed to hold a transition conference prior to student entering kindergarten, failed to have an IEP in effect at the beginning of the Student's 2020-2021 school year, failed to revise Student's IEP to reflect and program for his Autism diagnosis, failed to consider the UAMS evaluation; failed to include a behavior plan in Student's IEP and predetermined Student's education placement prior to IEP meeting, it is now necessary to consider whether these procedural violation resulted in a substantive denial of FAPE to Student. Even if a school district violated IDEA procedures, it does not automatically follow that the school district has denied the child a FAPE. *K.E. v. Indep. Sch. Dist. 15*, 647 F.3d 795, 804 (8<sup>th</sup> Cir. 2011). Rather, a school district's educational plan for a given student will only be set aside for IDEA procedural violations "if the procedural inadequacies compromised the pupils right to an appropriate education, seriously hampered the parent's opportunity to participate in the formulation process or caused a deprivation of educational benefit." *Id.* At 804-805. Here, as discussed above, the District failed student in the most basic requirements of IDEA. The District failed to transition the student from pre school to Kindergarten and have an IEP in place the day Student began kindergarten. This failure by District seriously hampered the Parents' opportunity to participate in the formulation process, compromised Student's right to an appropriate education and caused deprivation of any educational benefit. Without the appropriate transition meeting and the development of a kindergarten IEP, Student was without an appropriate program when he started kindergarten. The Parents were denied the opportunity to participate in the development of Student's special education program and because of these failures by the

District, Student started kindergarten with nothing in place to address disability related, maladaptive behaviors that deprived Student of any educational benefit. I find that these denials amount to a substantive denial of FAPE by the District.

Further, the District failed to revise Student's IEP to reflect and program for his Autism diagnosis, failed to consider the UAMS evaluation, and failed to implement a behavior intervention plan. This information is critical to the development of an appropriate program for Student. As discussed above, the District received Student's autism diagnosis in December of 2020. There was an IEP meeting held December 17, 2020, and January 11, 2021, where the UAMS evaluation and Student's autism diagnosis was available to the IEP team. Not one change was made to Student's IEP during either of these IEP meetings. It wasn't until the February 9, 2021 IEP meeting, in which Student was being sent to MCDC, that the IEP changed to identify student under the Autism category. So, for at least two months, while students behaviors escalated, the IEP team met, failed to identify Student as having autism, failed to fully consider the UAMS evaluation, failed to provide student with positive behavior supports and failed to implement a behavior intervention plan. This hearing officer finds that these procedural violations compromised Student's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process and caused a deprivation of educational benefit to Student.

Lastly and perhaps most concerning is that the evidence supports a finding that the District, at the February 9, 2021, IEP meeting, predetermined Student's placement prior to that meeting. One of IDEA's foundational principles is the right of parents to participate in educational decision making regarding their child with a disability. It is of utmost importance that Parents be involved in where the educational services provided on the IEP will take place.

Here, the testimony and the documents show that the only thing discussed at the December 11, 2020 IEP meeting and the January 11, 2021 IEP meeting was placement of Student at the MCDC. Parent rejected that placement because upon visiting the facility found that the children there were lower functioning than Student and were all nonverbal. At the February 9, 2021 IEP meeting there wasn't much discussion. The decision was made that Student would attend MCDC. I find that determination was made before the Parents attended the IEP meeting on February 9, 2021. The Parents were told Student would be going to MCDC. This hearing officer finds this to be a substantive violation of IDEA. This procedural violation compromised Student's right to an appropriate education and seriously hampered the Parent's opportunity to participate in the formulation process.

Now we must look at whether the District failed to provide IEPs that were reasonably calculated to enable Student to make appropriate progress in light of his individual circumstances. Parents argue that the District failed to develop and implement an appropriate IEP for Student's 2020-2021 kindergarten school year. Further Parents assert that the IEPs were not reasonably calculated to provide student educational benefit. Parents state, primarily, that Student's behavioral issues were not adequately addressed such that Student had necessary resources to maintain appropriate behavior and academically progress.

Regarding appropriateness of the IEP, "[a]cademic progress is an 'important factor' in deciding 'whether a disabled student's IEP was reasonably calculated to provide educational benefit'."<sup>69</sup> For children who are Student's age, the IDEA requires that IEPs include the following: "(1) a statement of the student's present levels of academic and functional performance, (2) measurable annual goals, (3) a description of how progress will be measured, (4) a statement of educational and related services to be provided, (5) an explanation of the

---

<sup>69</sup> *M.M.*, 702 F.2d at 479 (citing *CJN*, 323 F.3d at 638 (citing *Rowley*, 458 U.S. at 202)).



extent to which the student will not be in the regular classroom, (6) a statement of accommodations necessary to measure achievement, and (7) the date on which services will commence.<sup>70</sup>

Regarding behavioral issues, courts have stated that “[w]hen a child’s learning is impeded by behavioral issues, the IDEA requires that the IEP team ‘consider the use of positive behavioral interventions and supports, and other strategies, including positive behavioral interventions’.”<sup>71</sup> A failure to address behavioral issues appropriately can amount to a denial of FAPE for a student.<sup>72</sup> The Eighth Circuit Court of Appeals has stated that “it is ‘largely irrelevant’ if the school district could have employed ‘more positive behavior interventions’ as long as it made a ‘good faith effort’ to help the student achieve the educational goals outlined in his IEP.”<sup>73</sup>

In the present case, the form of Student’s September 15, 2020 IEP, and the November 2, 2020, IEP appear on the surface to meet all requirements. There are goals that appear appropriate for Student, and both IEPs include a statement of Student’s present levels of academic performance, a statement of educational and related services being provided to Student, an explanation of the extent to which Student would be in special education classes versus the general education, a statement of accommodations necessary to measure Student’s achievement and the date of which services outlined in the IEPs would commence. However, there are some anomalies. Neither IEP identifies Student as having autism. Neither IEP programs for Student’s autism diagnosis and both IEPs purport to start on August 24, 2020, the first day of Student’s kindergarten year, and we know from the evidence and testimony that

---

<sup>70</sup> *Park Hill Sch. Dist. v. Dass*, 655 F.3d 762 (8th Cir. 2011). See also 20 U.S.C. § 1414(d)(1)(A)(i).

<sup>71</sup> *M.M.*, 702 F.2d at 479 (citing 20 U.S.C. §1414(d)(3)(B)(i)).

<sup>72</sup> *Neosho R-V School District v. Clark*, 315 F.3d 1022 (8th Cir. 2003).

<sup>73</sup> *M.M.*, 702 F.2d at 479 (citing *CJN*, 323 F.3d at 639).

Student did not have an IEP in place when he began kindergarten. Further, in substance the IEPs drafted on September 15, 2020, and November 2, 2020 were inappropriate for Student.

Regarding the September 15, 2020, IEP team looked at the IEP and evaluations from Kids for the Future developmental preschool. The team also had Student in school a little over two weeks and student had already begun to exhibit behaviors such as spitting, hitting, and screaming. It was obvious that Student was engaging in behaviors that ultimately interfered with his ability to function and learn in the classroom.

At the November 2, 2020, IEP meeting, the team had an OT evaluation, a Speech evaluation, and a psychological evaluation. The OT evaluator noted in her evaluation that Student had significant difficulty paying attention and following simple, one-two step instructions. Student would purposefully throw manipulatives such as scissors, pencils, blocks, etc. Although tester attempted to use positive reinforcers Student appeared to not understand that concept. Additionally, Student's behavior had deteriorated since the first day of school. Student was spitting frequently at teachers, people, students, and books. Student was cursing at teachers and students and screaming without provocation. Student was throwing items and having frequent bathroom accidents.<sup>74</sup> No behavior plan was developed at the September 15, 2020 IEP, the November 2, 2020 IEP. Additionally, there were IEP meetings held on December 16, 2020, and January 11, 2021, and February 9, 2021, to discuss moving student to the MCDC. Not once during this time was a behavior plan discussed, developed or implemented. There was also no use documented of positive behavior supports being implemented for Student. District's testimony that Student didn't reach TIER III behavior until February of 2021 and therefore they could not make a CIRCUIT referral is not persuasive. IDEA doesn't require TIER III behavior before the implementation of a behavior plan or the use of positive behavior supports. Student

---

<sup>74</sup> Parents exhibits, pg. 2.

did not merely have bad days, he had extremely difficult days and created much chaos in the classroom. According to Ms. Oltman's behavior logs, Student's entire day was spent "misbehaving", and no one helped him.<sup>75</sup>

At any point the District could have called an emergency IEP meeting and met with Parents for the purpose of starting a Functional Behavior Assessment ("FBA") and creating a Behavior Intervention plan ("BIP"). The District did not conduct a manifestation determination and an FBA until after Parents filed their first Due Process Hearing request. This is a five year old child, who was left to languish in an environment he did not possess the skills to function in. Had the District provided the supports that Student needed in the classroom and timely conducted an FBA, it is likely that Student could have been quickly provided a BIP and additional placement decisions might have been unnecessary. Unfortunately, that did not happen here. The District's staff is currently without the tools they need to help Student develop skills necessary for Student to function in the classroom. For the reasons stated above, it is the conclusion of the Hearing Officer that Student's IEPs dated September 15, 2020, and November 2, 2020 were inappropriate and therefore constituted a substantive violations of the IDEA in that Student was denied FAPE.

### **Due Process Hearing H-21-37**

Parents argue in their second Due process Hearing complaint that the District Denied Student FAPE from March 2, 2021- May 28, 2021. Specifically, that the District failed to provide appropriate transportation reimbursement or appropriate transportation to Engage, the last agreed

---

<sup>75</sup> Parent Exhibits, pgs. 314-546.

upon placement in which Student is currently enrolled. This hearing officer finds that the testimony and the documents show that there was an agreement between the District and the Parents that Student would attend Engage in Jonesboro Arkansas. Engage was Student's agreed stay put placement under IDEA. Additionally, the District agreed to reimburse the Parents for mileage. Student began at Engage on May 6, 2021, and on May 18, 2021, without warning, Parents received an email stating that the District would no longer be reimbursing the Parents for transporting Student to Engage, and starting the next day May 19, 2021, the District would have a driver and a car to take Mom and Student to Engage. District would need mom to provide a car seat for Student. When the superintendent, Mr. Estes, was asked what mom was suppose to do with her other two children (a one year old and an older son), he stated they could all ride to take Student to Engage. Mr. Estes testified that the driver he proposed was not trained in what to do in case Student had a seizure, not trained in Autism or Students bathroom protocol initiated by Engage<sup>76</sup>. Parents continued to transport Student until May 26, 2021 when it became cost prohibitive. This hearing officer finds the District substantively violated IDEA in failing to provide appropriate transportation or reimburse the Parents for transportation to the facility, Engage, which all parties agreed would be Students educational placement. Further, the Superintendent testified that he had agreed in an email for Student to attend Engage during the summer of 2021, and the 2021-2022 school year.

### **Student's Current Placement**

This is not a tuition reimbursement case. Student is currently placed at Engage, a private facility in Jonesboro Arkansas. According to testimony and documentary evidence presented

---

<sup>76</sup> See Trial Transcript, Vol. IV., pgs. 71-75

placement was determined by all parties to be appropriate to meet Student's needs. Having heard the testimony of Dr. Morrison, director of Engage, District witnesses, and reviewed documentary evidence from Engage, I see no reason to disagree with the parties that Engage is an appropriate placement for Student at this time.

### **Conclusion**

The results of the testimony and evidence warrant a finding for the Parents. Specifically, Parents introduced sufficient evidence in the record to establish by preponderance of the evidence that District denied Student a FAPE between August 24, 2020, to May 28, 2021.

District is hereby ordered to take the following actions regarding Student:

1. District is to continue pay for Student to attend Engage, where Student is currently enrolled, for the 2021-2022 school year and the summer of 2022. Unless Dr. Morrison at Engage determines Student is ready to return to the school setting before the start of the 2022-2023 school year.
2. District is to reimburse Parents for transporting Student to engage and back home on days he attends Engage at the rate previously agreed to by the District, until such time as appropriate transportation for Student by the District can be developed. Appropriate transportation means student is transported in a school vehicle with a paraprofessional, agreeable to Parents, riding with student who is trained in Student's seizure disorder, autism, behaviors and bathroom protocol established by Engage, or District enters into an agreement with Engage to provide appropriate transportation.
3. Parents are to submit a bill to District with mileage for transporting Student to Engage from May 18, 2020- May 26, 2020. District is to reimburse parents for

transporting Student from May 18, 2020-May 26, 2020, at the rate the district had agreed to previously within thirty days of receiving Parents' invoice.

4. District is to work with Dr. Morrison at Engage to develop an appropriate program for Student, that will enable Student's transition back into the school setting to be as seamless as possible.

4. District is to provide training to District personnel on IDEA and its requirements.

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

#### **Finality of Order and Right to Appeal:**

The decision of this Hearing Officer is final. A party aggrieved by this decision has the right to file a civil action in either Federal District Court or a State Court of competent jurisdiction, pursuant to the Individuals with Disabilities Education Act, within ninety (90) days after the date on which the Hearing Officer's Decision is filed with the Arkansas Department of Education.

Pursuant to Section 10.01.36.5, Special Education and Related Services: Procedural Requirements and Program Standards, Arkansas Department of Education 2008, the Hearing Officer has no further jurisdiction over the parties to the hearing.

**IT IS SO ORDERED.**

*Dana McClain*  
**HEARING OFFICER**

8/11/2021  
**DATE**