

**ARKANSAS DEPARTMENT OF EDUCATION  
SPECIAL EDUCATION UNIT**

**XXXXXXXXXXXXXXXXXX,  
Parents of XXXXXX**

**PETITIONER**

**VS.**

**NO. H-21-34**

**BENTON SCHOOL  
DISTRICT**

**RESPONDENT**

**HEARING OFFICERS FINAL DECISION AND ORDER**

**Issues Presented:**

Whether the Benton School District (hereinafter “District” or “Respondent”) denied XXXXXXXX (hereinafter “Student”) a free, appropriate, public education (hereinafter “FAPE”), between August 14, 2019 and April 26, 2021 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”), by: (1) failing to develop necessary and appropriate IEPs for the 2019-2020 and 2020-2021 school years; and (2) failing to provide special education and related services in conformity with XXXXXXXX 2019-2020 and 2020-2021 IEPs.

**Procedural History:**

On April 26, 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 Benton 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 7-year-old male enrolled in the First grade, specifically enrolled in

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

Benton School District.<sup>2</sup> Student was a student with a disability under IDEA. Student was diagnosed with Autism Spectrum Disorder.<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 June 14, 2021, and the hearing was scheduled for June 16-18, 2021.<sup>4</sup> On May 25, 2021, Respondent filed a Motion for a Continuance. Respondent's motion stated that the parties had held a resolution meeting on May 6, 2021, but had to continue the meeting to a later date, and additionally that attorney for Respondent had a scheduling conflict with the June 16-18, 2021 hearing dates. Petitioner did not object to this continuance. This hearing officer reached out to the parties to ensure that the continuance would not be lengthy. The continuance was granted the prehearing conference was rescheduled for July 19, 2021, and the due process hearing rescheduled for July 21-23, 2021. On June 14, 2021, attorney for Petitioner sent an email asking if the Due Process hearing could be held July 19-21, 2021.<sup>5</sup> Counsel for Respondent was agreeable and the prehearing conference was rescheduled to July 12, 2021, and the due process hearing rescheduled for July 19-21, 2021. On July 6, 2021, Respondent filed a motion for a continuance in this case, stating that several witnesses were unavailable to testify during the week of July 19-21, 2021. This Hearing Officer was hesitant to grant another motion for a continuance in this case and suggested that the parties discuss the witness issues during their prehearing conference scheduled for July 12, 2021.

A prehearing conference was held by Zoom on July 12, 2021. Counsel for both the Parents and the District participated in the prehearing conference. Discussion was held regarding

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

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

<sup>4</sup> See Scheduling order, Due process file

<sup>5</sup> See Hearing officer file-email 6-14-2021.

potential witness issues, but solutions were agreed to by all parties and the due process was to move forward as scheduled on July 19-21, 2021.<sup>6</sup>

Thereafter the Due Process hearing in this matter began as scheduled on July 19, 2021. Prior to the start of the due process hearing, attorney for the District announced that, the District had a meeting with its witnesses, the previous Wednesday, and that she had just received notice that one of the participants at the meeting had just tested positive for COVID-19. As a precaution, this Hearing Officer offered to continue the case, or at a minimum to conduct the due process hearing by zoom. The parties decided to conduct July 19, 2021, in person, and July 20-21, 2021, by Zoom. The Hearing Officer, having two immediate family members who are immunocompromised, left the hearing, returned to her office and participated in the hearing by Zoom July 19-21, 2021. Testimony was heard at the Benton School District administration building on July 19, 2021<sup>7</sup> and by Zoom July 20-21, 2021.<sup>8</sup>

Present for the Hearing were Theresa Caldwell, attorney for Petitioners, Jennifer Flinn, Attorney for the District, Audie Alumbaugh, advocate, Christina Locke, advocate, XXXXX, mother, XXXXXX, father, Angela McWhorter, LEA, and Debby Ferguson observed as a newly hired hearing officer by the Department.

The following witnesses testified in this matter: Debbie Ballard, Sandra Rayburn, Gina Jones, Lauren Bass, Meghan Roush, Sara Coleman, Molly Glover, XXXXX, Aimee Garofalo, XXXXXXXX, and Angela McWhorter.<sup>9</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, Dana

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<sup>6</sup> See Prehearing conference transcript.

<sup>7</sup> The hearing officer participated by Zoom.

<sup>8</sup> See trail Transcripts Vol. I-III.

<sup>9</sup> Id.

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, attorney for the District promptly file her post hearing brief. After the District had filed its post hearing brief, attorney for Petitioners sought two extra days to submit her brief. This hearing officer asked if the District had any objections as to the additional days. Attorney for the District, objected to the extension of time stating that the rules require the simultaneous filing of the post hearing briefs. Additionally, the District asked that Parents' attorney not be allowed to respond directly to the points made in the District's brief. Having considered the District's objections, this Hearing officer ordered Parents' attorney to not read District brief, and to submit her brief no later than Saturday, August 14, 2021. In addition, so that there would be no prejudice to the District, this Hearing Officer allowed the District's attorney to submit a reply to Parents' brief no later than Tuesday, August 17, 2021. All parties followed these timelines and submitted briefs accordingly.<sup>10</sup>

### **Findings of Fact**

1. Student is an 8-year-old boy in the Benton School District. Student was in kindergarten during the 2019-2020 school year, the first grade during the 2020-2021 school and will be in the second grade during the 2021-2022 school year.<sup>11</sup>
2. Student was referred to Pediatric Plus Therapy services by his primary doctor at 2 years old due to concerns with his development. Student's milestones were on track until he was 18 months old when there was notable regression in his skills.<sup>12</sup>

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<sup>10</sup> See Hearing Officer file, post hearing briefs, and District's reply brief.

<sup>11</sup> Parents' Exhibits, pgs. 1,13,46.

<sup>12</sup> Parents' Exhibits, pg. 150.

3. On September 23, 2015, Student underwent an evaluation by Pediatrics plus in which the results indicated severe delays in Student's social skills, self help skills, communication skills, fine motor skills and cognitive skills.<sup>13</sup> The Evaluator recommended Student receive speech and language therapy, occupational therapy, and enroll in a highly structured, developmental preschool.<sup>14</sup> The family enrolled Student in Pediatrics Plus Developmental Preschool program. Student was provided Speech, OT and development preschool services.<sup>15</sup> Pediatric Plus recommended that Student be evaluated for Autism at the James Dennis Developmental Center.<sup>16</sup>
4. Because of the significant wait time for evaluation at the James Dennis Developmental Center, and because the Parents had family connections in Houston, they took Student to Texas Children's for a comprehensive evaluation.<sup>17</sup>
5. On September 23, 2016, Student was evaluated at Texas Children's Hospital in the Meyer Center for developmental Pediatrics TCH Autism Center.<sup>18</sup> The evaluator stated:

“combining the history presented with direct observations of XXXX's behavior On exam today and his performance on the ADOS-2, XXXXX presents with the Difficulties in communication, social interaction and repetitive/stereotypic behaviors that can best be describes as meeting the criteria for a diagnosis of an autism spectrum disorder.”<sup>19</sup>
6. On April 4, 2019, a special education referral was made to the Benton School District regarding Student by Pediatrics plus developmental preschool. It stated that Pediatric plus provided Student speech and occupational therapy evaluations, as well as POC's

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<sup>13</sup> Id., pg. 152.

<sup>14</sup> Id., pgs. 152-153

<sup>15</sup> Hearing Transcript, Vol.III, pg. 11.

<sup>16</sup> Id.

<sup>17</sup> Id., at pgs. 11-12.

<sup>18</sup> Parents' Exhibits, pgs. 134-144.

<sup>19</sup> Parents' Exhibits, pg. 141.

and documentation from Texas Children's Hospital confirming a diagnosis of autism. Further, Student needs to improve in strength, balance, motor control and coordination. Student also has delays in language ability and needs to improve in overall functioning and independence. He has made progress in speech, increasing his ability to functionally communicate in his environment. He has age-appropriate self-care skills in home and school environment.<sup>20</sup>

7. On April 11, 2019, a referral conference was held. The purpose of this meeting was to consider the Pediatrics plus special education referral and also to conduct an existing data review. It was determined by the team that additional data was necessary to determine if Student continued to qualify for special education and related services and a comprehensive evaluation was determined warranted by the committee.<sup>21</sup> Parent signed consent for additional evaluations at the meeting.<sup>22</sup>
8. On April 18, 2019, a preschool classroom-based assessment was conducted by the District, which showed Student had weaknesses in: cognitive, perceptual skills, receptive language, auditory memory, following directions, comprehension, expressive language, reading (Student not reading yet), writing (still learning to write letters in pre k) and social skills (pragmatic language). Student did show strengths in cooperates with peers, uses good manners, shows empathy for others, and respects other property.<sup>23</sup>
9. On May 15, 2019, The District conducted a Psychological report regarding Student. Student was given the Adaptive Behavior Assessment System, Third Edition (ABAS-

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<sup>20</sup> Id., at pg. 102.

<sup>21</sup> Id., at pg. 106.

<sup>22</sup> Id., at pg. 107.

<sup>23</sup> Id., at pgs. 109-111.

- 3), Reynolds Intellectual Assessment Scales, Second Edition (RIAS-2) and the Wechsler Individual Achievement Test, Third Edition (WIAT-III). ABAS-2 indicated Student had adaptive behavior deficits in communication, Functional pre - Academics, leisure, social, communication, community use, home living, health and safety, self-direction, and motor. The RIAS-2 indicated that Student's intellectual ability falls within the below average range of measured intelligence with a composite intelligence index score of 81. The WIAT-III showed Student's academic skills in the areas of Early Reading and Alphabet writing fluency fell within the average range. Student's academic skills in the areas of math, problem solving, numerical operations, and spelling fell in the below average range.<sup>24</sup>
10. On May 15, 2019, an ADOS-2 was conducted on Student. Student scored an overall total score of 9 which according to Module 2 puts Student in high probability of autism.<sup>25</sup>
  11. On May 21, 2019, a notice of conference was sent to the Parents stating that a conference would be held May 24, 2019, to determine initial or continued eligibility for special education and related services; develop an initial Individualized Education Program ("IEP"); and consider extended school year services ("ESY").<sup>26</sup>
  12. On May 24, 2019, the IEP committee met as planned to discuss evaluations conducted regarding Student, Student's eligibility and initial placement and

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<sup>24</sup> Parents' Exhibits, pgs., 122-123.

<sup>25</sup> The evaluator states that student achieved an overall total score of 9 on the ADOS-2, but then states that Student achieved an over comparison score of 8 which fell in the moderate probability of being on the autism spectrum. However, evaluator states that according to Module 2, an overall score of 8 or higher indicates a high probability of autism, scores between 5-7 indicate a moderate reason to suggest an autism spectrum disorder, and scores at or below 4 are low and indicate a minimal chance of being on the autism spectrum. This causes the hearing officer to question the summary of Student's ADOS-2 but does not cause the hearing officer to question confirmation of Student's autism spectrum disorder diagnosis. (Parents' Exhibits, pg. 128).

<sup>26</sup> Parents' Exhibits, pg. 103.



determined that Student met IDEA eligibility requirements under the Autism category.<sup>27</sup>

13. During the May 24, 2019, IEP meeting, the team discussed the comprehensive evaluation results. As part of the comprehensive evaluation, the District conducted the following: (1) preschool classroom observation conducted on April 30, 2019; (2) the ADOS-2 conducted on May 15, 2019; and (3) a psychological evaluation dated May 16, 2019.<sup>28</sup> The District accepted and reviewed: (1) speech and language evaluation (“speech”) conducted by Pediatrics plus on February 27, 2019 and March 1, 2019; (2) an Occupational therapy (“OT”) evaluation conducted by Pediatrics Plus on March 29, 2019; and (3) Physical Therapy (“PT”) evaluation conducted by Pediatrics Plus on April 5, 2019.<sup>29</sup>

During the meeting the team discussed the preschool observation, the ADOS-2, and the psychological evaluation conducted by the District. Further, the team discussed the OT, PT, and speech evaluations conducted by pediatric plus and accepted by the District as current and valid evaluations.<sup>30</sup>

With regard to Speech therapy, Student’s evaluation showed he had difficulty focusing and carrying out tasks independently, Student requires direct intervention in articulation, Student struggles to use his language skill spontaneously across various settings. The evaluator recommended Student receive 180 minutes of speech language therapy per week to effectively treat delays in language abilities.<sup>31</sup> Without

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<sup>27</sup> Id., at pg. 117.

<sup>28</sup> Id., at pgs. 109, 120, 126.

<sup>29</sup> Id., at pgs., 181, 312, 390.

<sup>30</sup> See District post hearing brief, pg. 1.

<sup>31</sup> Parents’ Exhibits, pg. 187.

reason, the speech pathologist for the District determined Student should receive 90 minutes of speech therapy per week.<sup>32</sup>

With regard to Student's OT services, the OT evaluation recommended 135 minutes per week, to improve Student's overall functioning and independence across all environments. The evaluator noted that while this dosage is a fairly high intensity, it is not unrealistic for his age, but also necessary for his continued overall development in order to close the developmental gap between Student and his peers. The evaluator noted that Student needs skilled intervention to improve his social functioning in order to engage with his peers and build friendships. Student also needs direct intervention to address a delay in visual motor/fine motor skills to increase his functioning and independence across all environments. Student needs increased fine motor strength and endurance throughout his bilateral upper extremities to improve his overall visual motor skills and sensory processing skills as it relates to school related tasks. Student's sensory processing systems require additional organizational input in order to help him modulate, explore, learn and apply within his school and home environments. Additionally, Student needs direct intervention in order to address his self care delays in buttoning, snapping, zipping, donning clothing items to increase independence in activities of daily living.<sup>33</sup> Without explanation and upon review of the pediatric plus OT evaluation, the District's occupational therapist determined Student should receive 60 minutes a week of OT services.

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<sup>32</sup> Id., at pg. 180.

<sup>33</sup> Id., at pg. 320.

Regarding Student's PT services, the pediatric plus evaluation found that Student had poor motor control and coordination, and muscle weakness that limits his skill acquisition. Further, Student struggles to stay on task during activities, is easily frustrated because of his desire to be perfect, and lacks sport specific skills for sports he has indicated he would like to play such as basketball and baseball. The evaluator stated that 60 minutes per week is imperative to address Student's deficits, allow time for practicing functional goals, implementing home programming, and addressing additional needs.<sup>34</sup> Because there was no Physical Therapist at the May 24, 2021 meeting, the team did not address Student's physical therapy needs at that time.

14. Student's May 24, 2019, IEP indicated a duration of services from August 14, 2019 to May 23, 2020. The form box labeled "parent/guardian input" included a notation which stated mom provided helpful insight and information in Student's previous services and progress. Mom included Student's support team from Pediatric Plus to assist the team in making programming/placement decisions.<sup>35</sup> The IEP included a statement of Student's present level of academic achievement and functional performance, which included Student's strengths and weaknesses, along with Student's diagnosis of Autism and that it affects his social relationships, in that he fails to develop adequate peer relationships. Additionally, Student's communication skills are affected due to his impaired understanding of spoken language. Student also has fine and gross motor skills delays.<sup>36</sup> Student's IEP included an extensive list of supplementary aids and services including, daily/weekly progress report for Student, visual clues, use of fidget, chewy, headphones, weighted vest/blanket, T-

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<sup>34</sup> Parents' Exhibits, pg. 393.

<sup>35</sup> Id., at pg. 44.

<sup>36</sup> Id., at pg. 45.

band, visual timer, and modification of nonacademic times. Additionally, the IEP included that Student would need to be visually monitored during unstructured activities and transition times because Student was considered an eloper.<sup>37</sup>

15. Student's May 24, 2019, IEP also contained 4 goals. The first three goals related to Speech therapy. Goal one: Given instruction and daily practice, Student will improve his articulation skills by correctly producing the target sounds, and blends in all positions with 80% accuracy. Goal two: Given instruction and daily practice, Student will participate in collaborative conversations with diverse partners about kindergarten topics and texts with peers and adults in smaller and larger groups by following 1-2 step oral directions, use present progressive verbs in oral sentences, ask/answer wh?s and use regular past tense verbs with 80% accuracy. Goal Three: Student will increase his social skills by demonstrating appropriate initiation of social interaction with peers in the classroom, therapy setting, playground, and cafeteria with 70% accuracy. None of these three goals contained objectives.<sup>38</sup>
16. Student's May 24, 2019 IEP included one OT goal. Student will improve fine motor, visual motor, self-care, and sensory processing skills to increase independence with written or copied work, effective management of supplies and materials, and following classroom routines for independent work completion. This goal contained five objectives which focused on tracing numbers and letters, copying his name, grasping scissors independently and cutting simple shapes, and sensory motor, core and upper body strengthening exercises.<sup>39</sup>

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<sup>37</sup> Id., at pg. 49.

<sup>38</sup> Parents' Exhibits, Pgs., 51-53.

<sup>39</sup> Parents' Exhibits, pgs. 54.

17. Student's May 24, 2019, IEP also included a form addressing least restrictive environment considerations. The IEP team noted on this form that Student would not participate 100% of the time with non-disabled peers because: (1) small group instruction is necessary for the child to acquire skill specified in the IEP; (2) Additional individualized instruction is needed to facilitate learning; and (3) a more structured environment is needed than can be provided in the general education setting. Thereafter it was noted that Student would spend 96% of his time in the general education setting.<sup>40</sup>
18. Student's May 24, 2019, IEP included related services in the area of OT and Speech. Student was to receive:

Occupational Therapy	30 minutes	2x per week	Therapy room/classroom
Speech therapy	30 minutes	3x per week	Therapy room/classroom

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19. On August 8, 2019, a Notice of Conference was sent to Parents stating that a conference would be held August 15, 2019, to develop an initial IEP, and review/revise IEP.<sup>42</sup>
20. On August 15, 2019, an IEP meeting was held. Student's draft IEP was discussed and approved and Physical therapy 60 minutes per week was added along with a physical therapy goal to address gross motor skills to increase independence. The goal included 5

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<sup>40</sup> Id., at pg. 61.

<sup>41</sup> Id., at pg. 58.

<sup>42</sup> Parents' Exhibits, pg. 86.

objectives including, descending stairs, jumping jacks, single leg hops, galloping, and skipping.<sup>43</sup>

21. On September 9, 2019, a notice of action was documented to amend Student's PT objectives on his IEP. The reason for the change was that Student had already mastered 2 short term gross motor objectives (descending stairs, and skipping), and sit ups, pushups, and throwing a small ball underhand and overhand were added to address upper body strength. Parent consented for this action to take effect immediately.<sup>44</sup>
22. On January 24, 2020, the IEP team met to discuss Student's PT and OT therapy services. Notice of action form stated that Student made significant progress in school based PT services by meeting 4 of his 6 short term objectives and is progressing toward meeting the remaining objectives. Student participates in the general education PE class with no restrictions/limitations and will be dismissed from school-based PT services. Additionally, it was agreed that an OT reevaluation was needed. Parent granted consent for the OT reevaluation and the dismissal from PT services.<sup>45</sup>
23. On March 13, 2020, an OT evaluation was conducted by the District. Test given included: Bruinininks-Oseretsky Test of Motor Proficiency (BOT-2), Berry-Buktenica Developmental Test of Visual Motor Integration (VMI), and the Sensory Processing Measure-Classroom form. The testing indicated Student had severe deficits in visual motor coordination, and fine motor precision skills. He also showed moderate delays in fine manual control, and minimal delays in visual perception, fine motor integration and

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<sup>43</sup> Parents' Exhibits, pgs. 55, 87.

<sup>44</sup> Id., at pg. 89.

<sup>45</sup> Id., at pg. 94.

manual dexterity skills. The evaluator recommended Student receive OT services 30 minutes one time per week.<sup>46</sup>

24. On April 10, 2020, a notice of conference was sent to the Parents stating that a IEP team meeting would be held April 13, 2020 by zoom to discuss, continued eligibility for special education services, review/revise the IEP, and consider extended school year services (ESY).<sup>47</sup>
25. On April 13, 2020, Student's annual review was conducted by Zoom because of Covid-19. The IEP team discussed the results of Student's OT evaluation and Student's progress in speech/language therapy and OT during the school year. He met zero of his speech language goals, but did make significant progress. Student is able to use /L/ blends in words/phrases/sentences and can follow 1-2 step oral directions, use correct verb tenses and ask/answer WH?s with 75% accuracy. In OT Student met 4/5 objectives and made progress toward the remaining objective with 50% or more accuracy. Student continues to have difficulty with sequencing steps appropriately and cut on a line. OT re-evaluation indicates Student continues to work on fine motor precision, fine motor control/coordination and sensory processing. Student is above grade level in Literacy and Math with modifications/accommodations utilized when needed. Student benefits from sensory breaks, visual scheduling, consistent routines/structure and monitoring during transition times. Student will continue to receive Speech/language therapy 90 minutes per week and OT services will be reduced to 30 minutes per week. Student did not demonstrate a need for Extended year services in speech or occupational therapy. In

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<sup>46</sup> Parents' Exhibits, pgs., 304-309.

<sup>47</sup> Id., pg. 96.

addition to school therapies, Student receives private speech therapy services through kid source weekly.<sup>48</sup>

26. Student's April 13, 2020, IEP indicated duration of services from September 3, 2020 to April 12, 2021. The form box labeled "parent/guardian input, included notation that mom provided helpful insight and information in regards to Student's past successes in school and perception of his needs going into first grade. Further mom stated that the family was going thru some changes and mentioned she was considering counseling for Student. Parents will continue to provide miscellaneous items for Student at school such as noise cancelling headphones, thera-band, chewies, saucer, etc. Mom had concerns about Student's use of the common hall restroom as that is a change from kindergarten. The team agreed to address mom's concerns with needed signage, social skills role playing and transitioning to insure success.<sup>49</sup> Under present level of academic achievement and functional performance, the team noted that Student cannot ask and answer questions, use correct verb tenses, follow multi-step directions in order to seek help, get information, or clarify something that is not understood. Further, Student's communication skills are affected, specifically by impaired understanding of spoken language. Developmental Rates and Sequences are affected as exhibited by fine and gross motor skills delay. Additionally, classroom data includes: Istation Math level 4; Reading -level 2. Subtests: phonemic awareness-some difficulty; letter knowledge-ongoing difficulty; Vocabulary-struggling; letter knowledge-struggling. It was noted that computer based test such as the Istation do not allow for modifications to testing, and that observations in the classroom show Student is at grade level in math and reading with

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<sup>48</sup> Parents' Exhibits, pgs. 100-101.

<sup>49</sup> Id., at pg. 14.



math higher. Current report card: Reading level 188; 34/34 in 1:1 letter/sounds. All kindergarten math skills have been achieved.<sup>50</sup>

27. At the April 13, 2020, IEP meeting the OT evaluation conducted on March 12, 2020 results were discussed. Student still presents with severe deficits in visual motor coordination, and fine motor precision skills. He also presents with moderate delays in fine manual control and minimal delays in visual perception, fine motor integration and manual dexterity skills.<sup>51</sup>
28. Student's April 13, 2020 IEP contained Identical Supplementary aids and services as listed above in Student's 2019-2020 IEP.<sup>52</sup>
29. Student's April 13, 2020 IEP contained four goals. The first three goals related to Speech therapy. Goal one: Given instruction and daily practice, Student will improve his articulation skills by correctly producing target sounds /L/ blends in all positions words/phrases/sentences/conversational speech with 85% accuracy. Goal two: Given instruction and daily practice, Student will participate in collaborative conversations with diverse partner about First Grade topics and texts with peers and adults in small and larger groups by following 1-2 step oral directions and present progressive verbs in oral sentences, ask/answer WH?s and use regular past tense verbs with 85% accuracy. Goal three: Student will increase social skills by demonstrating appropriate initiation of social interaction with peers in the classroom, therapy setting, playground, cafeteria with 75% accuracy.<sup>53</sup>

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<sup>50</sup> Id., at pg. 15.

<sup>51</sup> Id.

<sup>52</sup> Parents' Exhibits, pgs., 16-17.

<sup>53</sup> Id., pgs. 19-21.

30. Student's April 13, 2020 IEP contained one OT goal. Student will improve visual motor, fine motor, and sensory processing skills through various means such as classroom or activity accommodations/modifications, teacher training, etc. in order to increase independence with written or copied work, effective management of supplies and materials, and following classroom routines for independent academic success. This goal contained two objectives, which focused on writing, and using the restroom appropriately.<sup>54</sup>
31. Student's April 13, 2020, IEP also included a form addressing least restrictive environment. The IEP team noted on this form that Student would not participate 100% of the time with non-disabled peers because: small group instruction is necessary for the child to acquire skills specified in the IEP. Thereafter it was noted that Student would spend 96% of his time in the general educational setting.<sup>55</sup>
32. Related services contained in Student's April 13, 2020 IEP are unclear and confusing. From the IEP, testimony and the District's post hearing brief it appears that because of Covid-19 and blended learning consisting of some virtual and some in person schooling, Student's OT and Speech therapy minutes were changed to monthly to allow flexibility of delivery. The IEP states that Student is to receive OT 120 minutes per month and Speech therapy 360 minutes per month.<sup>56</sup>
33. On September 3, 2020, a notice of conference is sent to Parents stating that a meeting will be held on September 3, 2020, to review/revise IEP.<sup>57</sup>

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<sup>54</sup> Parents' Exhibits, pg. 22.

<sup>55</sup> Id., at 25.

<sup>56</sup> Parents' Exhibits, pgs. 57-60.

<sup>57</sup> Id., at 80.

34. On September 3, 2020, an IEP team meeting was held to discuss learning options for the 2020-2021 school year because of Covid-19 disruptions. The District offered two options. One was complete virtual learning, and the second option was a blended learning which reflected a combination of onsite and virtual learning. Student's Parents chose the blended option, and the IEP was noted as such.<sup>58</sup>
35. On March 15, 2021, a Notice of Conference was sent to the Parents stating a meeting will be held on April 9, 2021, to: review/revise Student's IEP, and consider Extended School Year Services.<sup>59</sup>
36. On April 9, 2021, an annual review was conducted. Notice of action states that Student's OT and speech therapy minutes are both changing to 30 minutes per month of indirect services. Explanation of action states that Student met both short term objectives for his 2020-2021 school year. Therapist observed student participate in the classroom appropriately. Student's handwriting is legible, and he is able to use the hallway bathroom appropriately. Classroom teacher has no concerns with Student's ability to access and participate in the classroom at this time. Further regarding Student's speech therapy progress. Student met 3/3 goals on his IEP, including articulation, language, and social skills. Student is also carrying these skills over outside of therapy. Classroom teacher reports she has no concerns with Student accessing and participating in the general education setting. The committee decided to reduce Student's OT and Speech therapy to 30 indirect minutes per month, to allow the therapists to monitor Student's

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<sup>58</sup> Id., at 15, 81,

<sup>59</sup> Parents' Exhibits, pg. 83.

ability to maintain and carryover the goals he has met in therapy to the general education classroom.<sup>60</sup>

37. The Parent's include in their Exhibits and discuss in their post hearing brief, evaluations conducted by Kidsource therapy. Kidsource conducted a speech evaluation regarding Student on April 15, 2021, an OT evaluation regarding Student on April 12, 2021, and a PT evaluation regarding Student on May 18, 2021.<sup>61</sup>
38. The Kidsouce speech evaluation conducted on April 15, 2021 regarding Student, notes Student's diagnosis include Autistic Disorder and developmental disorder of speech and language, unspecified. It was consistent with all of Student's previous speech evaluations in that Student was found to exhibit delays in expressive language, pragmatics and articulation skills. Student's expressive language skills were found to be moderate to severely delayed as evidenced by his standard scores of 67 and 77 on the OWLS-II<sup>62</sup> and CASL<sup>63</sup>. His articulation skills were found to be severely delayed with standard scores of 71 and 59 on the CAAP-2<sup>64</sup> and GFTA-3<sup>65</sup>. The evaluation stated that children like Student, with expressive language, pragmatic, and articulation disorder are at risk for poor peer relationships, falling behind in the classroom and struggling with everyday living tasks in the home. Student's results in all of his occupational evaluations, including this one are not compatible with the testimony by the District that Student is

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<sup>60</sup> Id., pg. 84. Parents did not plead in their Due Process complaint that Student's 2021-2022 IEP was inappropriate. Therefore, this hearing officer does not address the appropriateness of Student's 2021-2022 IEP in her decision.

<sup>61</sup> Id., pgs. 154, 290, 378.

<sup>62</sup> Oral and Written Language Scales-Second Edition (OWLS-II)

<sup>63</sup> Comprehensive Assessment of Spoken Language (CASL)

<sup>64</sup> Clinical Assessment of Articulation and phonology-Second Edition (CAAP-2)

<sup>65</sup> Goldman-Fristoe Test of Articulation-Third Edition (GFTA-3)

doing well in the classroom and no longer needs direct speech therapy services during his 2021-2022 school year.<sup>66</sup>

39. The Kidsource Occupational Therapy evaluation conducted 4/12/2021 regarding Student indicated that Student demonstrates delay in sensory processing, motor coordination as well as poor attention skills. Based on the BOT-2<sup>67</sup>, Student's score indicates a delay in manual coordination skills as evidenced by a z-score of -2.0. His scores on the BRIEF<sup>68</sup> indicate that he presents with executive functioning delays that impede his ability to complete age-appropriate occupations with age appropriateness. These delays are affecting Student's occupational performance across environments.<sup>69</sup>

## **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.*

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<sup>66</sup> It should be noted that there is discussion during this case and exhibits regarding the changes made to Student's 2021-2022 IEP. Parents do not raise the issue regarding the appropriateness of Student's 2021-2022 IEP in their Due Process complaint and therefore this hearing officer does not address the appropriateness of Student's 2021-2022 IEP.

<sup>67</sup> Bruininks-Oseretsky Test of Motor Proficiency-Second Edition (BOT-2)

<sup>68</sup> Behavior Rating Inventory of Executive Function (BRIEF)

<sup>69</sup> Parents' Exhibits, pgs. 290-298.

*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.

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, and the District's reply brief.

### **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.” *Andrew 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. 20 U.S.C. § 1412(a); 34 C.F.R.



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

### **PROCEDURAL VIOLATIONS**

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 alleges only one procedural violation in her Due Process Complaint. Whether the District failed to provide special education and related services in conformity with Student's 2019-2020 and 2020-2021 IEPs?

#### **2019-2020 IEP**

Regarding the Parents' allegation that the District failed to provide special education and related services in conformity with Student's 2019-2020 IEP, we must look at the contents of the IEP. The services on Student's 2019-2020 IEP included 60 minutes per week of occupational therapy, 90 minutes per week of speech therapy, and 60 minutes per week of physical therapy. The Parents in their post hearing brief argue that the District failed to provide Student with the

requisite minutes of OT and Speech therapy.<sup>70</sup> The Parents provide therapy logs to support their position. There are 36 weeks of school and therefore 36 x 90 minutes, Student was entitled to 3240 minutes of speech therapy during the duration of Student's 2019-2020 IEP. Parents provide speech therapy logs that show Student only received 2160 speech therapy minutes during the duration of Student's 2019-2020 IEP.<sup>71</sup> Therefore, the Student did not receive 1,080 minutes or 18 hours of speech therapy he was to receive according to his 2019-2020 IEP.

Further, Parents argue that District failed to provide Student all OT minutes provide for on his 2019-2020 IEP. 36 weeks x 60 minutes per week and Student was entitled to 2160 minutes of OT according to his 2019-2020 IEP. The therapy logs show Student only received 900 minutes of OT for the duration of his 2019-2020 IEP.<sup>72</sup> Student did not receive 1,260 minutes or 21 hours of OT he was entitled to receive according to his 2019-2020 IEP. The District in its post hearing brief argues that the "therapy logs" parents introduced are merely therapy plans, and therefore shouldn't be used as definitive time during which Student received Speech therapy and OT services. The District cites to October 14, 2019, in which it appears from the "logs" that Student received speech therapy from 10-1030 that day, but as the District points out according to Student's attendance record Student was out of school on October 14, 2019. While it does appear in that instant there is a conflict, there is little evidence suggesting which document is correct. This hearing officer finds that the "logs" do lay out the time for delivery of services. This Hearing Officer finds that the District failed to provide the requisite minutes of OT and Speech therapy in conformity with Student's 2019-2020 IEP and thus procedurally violated IDEA.

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<sup>70</sup> See Parents' post hearing brief pg. 11.

<sup>71</sup> Parents' Exhibits, pgs. 240-289.

<sup>72</sup> Parents' Exhibits, pgs. 368-373.

## **2020-2021 IEP**

Parents also allege that the District failed to provide Speech therapy and OT services in conformity with Student's 2020-2021 IEP. Again, we must look at the services listed on Student's 2020-2021 IEP. On 9/3/2020, it appears from the IEP and from the testimony by the District that Student's minutes were changed to monthly minutes. Student was entitled to receive 360 minutes per month, so 360 x 9 months means, 3240 minutes of speech therapy for the duration of his 2020-2021 IEP. According to the therapy logs, Student only received 1800 minutes of speech therapy during his 2020-2021 school year.<sup>73</sup> Student missed 1440 minutes or 24 hours of speech therapy during his 2020-2021 school year. Additionally, Student was entitled to 780 minutes of OT, but based on OT therapy logs Student only received 300 minutes of OT during his 2020-2021 school year.<sup>74</sup> Therefore, Student missed 480 minutes or 8 hours of OT services during his 2020-2021 school year. This Hearing Officer finds that the District failed to provide the requisite minutes of OT and Speech therapy in conformity with Students 2020-2021 IEP and thus procedurally violated IDEA.

## **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 failing to provide a significant number of OT and speech therapy minutes pursuant to Student's 2019-2020 and 2020-2021 IEPs.

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<sup>73</sup> Parents' Exhibits, pgs. 224-236.

<sup>74</sup> *Id.*, at pgs. 224-236.

### **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 provide all OT and speech therapy minutes pursuant to Student's 2019-2020 and 2020-2021 IEPs, it is now necessary to consider whether these procedural violations or other actions of the District 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.

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 *Endrew 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 *Endrew F.*, the standard set forth by the Court is "markedly more demanding" as compared to the "merely *de minimis*" test outlined in *Rowley*. *Endrew F.*, 137 S. Ct. at 1000. The Court stated the following:

It cannot be the case that the Act typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom but is satisfied with barely more than *de minimis* progress for those who cannot. When all is said and done, a student offered an educational program providing “merely more than *de minimis*” progress from year to year can hardly be said to have been offered an education at all. For children with disabilities, receiving instruction that aims so low would be tantamount to “sitting idly . . . awaiting the time when they were old enough to “drop out.”

*Andrew F.*, 137 S.Ct. at 1001 (citations omitted). The Court held that the IDEA requires, even demands, more. Specifically, the IDEA requires that students under the Act be provided with an “educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Id.*

The IEP is the guiding document and primary method for providing special education services to disabled children under the IDEA. *Honig v. Doe*, 484 U.S. 305, 311 (1988). “Through the development and implementation of an IEP, the school provides a FAPE that is ‘tailored to the unique needs of a particular child.’” *Paris Sch. Dist.*, 2017 WL 1234151, at \*5 (citing *Andrew F.*, 2017 WL 1066260, at \*1000). An IEP is not designed to be merely a form but, instead, a substantive document that is developed only after a district has carefully considered a student’s “present levels of achievement, disability, and potential for growth.” *Id.* (citations omitted). Pursuant to *Andrew F.*, a district “must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” 2017 WL 1066260, at \*1000. For most students, to comply with this standard, providing FAPE “will involve integration in the regular classroom and individualized special education calculated to achieve advancement from grade to grade.” *Id.* However, in the event that this is not possible, the

education of a disabled child still needs to be “appropriately ambitious” in light of a student’s individual circumstances. *Id.*

Every IEP, pursuant to the IDEA, is required to include the following: (1) a statement of a student’s present levels of academic achievement and functional performance; (2) a description of how a student’s disability affects his or her involvement and progress in the general education curriculum; (3) annual goals that are measurable, as well as a description as to how progress toward stated goals will be measured; and (4) a description of special education and related services provided to student. 20 U.S.C. § 1414(d)(1)(A)(i)(I)-(IV).

To prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. This approach affords local agencies some flexibility in implementing IEP's, but it still holds those agencies accountable for material failures and for providing the disabled child a meaningful educational benefit. *Houston Independent School Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000)<sup>75</sup> Similarly, the Eighth Circuit held in *Neosho R-V School Dist. v. Clark*, 315 F.3d 1022 (8th Cir. 2003) that the IDEA is violated "if

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<sup>75</sup> This case is slightly different in posture from others we have seen because it involves a failure to implement a necessary provision of an otherwise appropriate IEP. *See Houston Ind. Sch. Dist. v. Bobby R.*, [200 F.3d 341, 349](#) (5th Cir. 2000) (setting forth the analysis that a party who is challenging the implementation of an IEP must demonstrate that the school authorities failed to implement a substantial or significant provision of the IEP; and noting that this analysis affords schools some flexibility in implementing IEPs but still holds them accountable for material failures and for providing a meaningful educational benefit), *cert. denied*, [531 U.S. 817, 121 S.Ct. 55, 148 L.Ed.2d 23](#) (2000). While the analysis set forth in *Bobby R.* more accurately suits the posture of this case, the parties did not make this argument. Thus, we confine our analysis to the framework of *Rowley*

*Neosho R-V School Dist. v. Clark*, 315 F.3d 1022, 1027 n.3 (8th Cir. 2003)

there is evidence that the school actually failed to implement an essential element of the IEP that was necessary for the child to receive an educational benefit." 315 F.3d at 1027.

Parents allege that the District failed to develop and implement appropriate IEPs for both the 2019-2020 and 2020-2021 school year by: (1) failing to develop necessary and appropriate IEPs; and (2) failing to provide special education and related services in conformity with Student's IEPs.

### **Appropriate IEPs**

Parent's assert that the District failed to develop and implement an appropriate IEPs for both the 2019-2020 and 2020-2021 school years. IDEA requires that IEPs include the following: (1) a statement of a student's present levels of academic achievement and functional performance; (2) a description of how a student's disability affects his or her involvement and progress in the general education curriculum; (3) annual goals that are measurable, as well as a description as to how progress toward stated goals will be measured; and (4) a description of special education and related services provided to student. 20 U.S.C. § 1414(d)(1)(A)(i)(I)-(IV).

In the present case, the record shows that Student's 2019-2020 and 2020-2021 IEPs were necessary, appropriate, and reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.<sup>76</sup> As discussed above in the fact section, Student's 2019-2020 and 2020-2021 IEPs included a statement of Student's present levels of academic achievement and functional performance, a description of how Student's Autism diagnosis affects his involvement and progress in the general curriculum, annual goals in Speech therapy and OT that are measurable, as well as a description as to how progress will be measured, and a description of special education and related services provided Student. The IEPs also outlined

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<sup>76</sup> *Endrew F.*, 2017 WL 1066260, at \*1000

Student's progress toward his goals, in that each goal included a percentage per quarter which represented Student's level of mastery. A review of all goals indicated that Student mastered some of the stated goals for kindergarten (2019-2020 school year) and made progress toward mastery on all remaining goals. In first grade (2020-2021 school year) Student's IEP indicates that he mastered all his speech and language goals, but the IEP fails to provide data regarding Student's progress on his OT goals.<sup>77</sup> There is a separate OT annual review that states Student met his two short term objectives on his 2020-2021 IEP.<sup>78</sup> I find that the 2019-2020 and 2020-2021 IEPs developed for Student were appropriate.

### **Implementation of 2019-2020 and 2020-2021 IEPs**

The problem is not the District's failure to develop appropriate IEPs during 2019-2020 and 2020-2021 school years, rather it is the District's failure to adhere to Student's IEPs. First, it must be pointed out that, over dozens of exhibits, multiple evaluations, 2 IEPs, witness testimony and reports, there is remarkable consistency across the entire record on fundamental aspects of the student's strengths, challenges, and education. The student's needs are clear: Occupational Therapy evaluations conducted 3/29/2019 by pediatrics plus and reviewed and accepted by the Benton Public Schools on 5/9/2019; Occupational Therapy evaluation completed by the Benton School District on 3/13/2020; and Occupational Therapy evaluation completed by Kidsource Therapy on 4/12/2021, all conclude that Student presents with severe deficits in visual motor coordination, and fine motor precision skills. He also presents with moderate delays in fine manual control, and minimal delays in visual perception, fine motor integration and manual dexterity skills. Additionally, Student presents with a "definite dysfunction" in hearing, and body awareness, "some problems" in social participation, vision, touch, balance and motion,

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<sup>77</sup> Parents' Exhibits, pgs. 19-21.

<sup>78</sup> Id., at 303.



planning and ideas, and total sensory processing skills.<sup>79</sup> According to the District OT evaluation completed on 3/13/2020, Student's motor coordination skills, fine motor precision, auditory processing and body awareness skills limit his ability to be successful in the classroom.<sup>80</sup> Although the District's testimony suggests Student is able to participate fine in the classroom not one evaluation, including the District's evaluation supports this finding.

Speech therapy evaluations conducted on 3/1/2019, by pediatric plus, and reviewed and accepted by District on 5/21/2019, on 1/27/2020 by Kidsource therapy, and on 4/15/2021 by Kidsource Therapy, all conclude that Student has moderate language and severe articulation delays. Student's expressive and core language skills are moderately delayed, and his articulation skills are severely delayed. Delays in these areas can prevent children from interacting with same age peers, decrease independence and abilities to perform ADLs, decrease confidence, increase safety concerns, and prevent further, more complex speech milestones from being reached.<sup>81</sup> Per Student's Speech evaluation completed on 4/15/2021, "It is believed without direct language therapy services, Student will not be able to attain appropriate communication skills to participate fully with his age matched peers in social skills. Without direct and consistent speech language therapy services to address his delays, Student's functional communication skills will not be commensurate with his age-matched peers."<sup>82</sup>

In the present case the only elements on Student's IEP are Speech and language Therapy and Occupational Therapy Services. Here, Student failed to receive 1,080 minutes or 18 hours of speech therapy services and 1260 minutes or 21 hours of occupational therapy services required by his 2019-2020 IEP. Additionally, Student failed to receive 1440 minutes or 24 hours of

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<sup>79</sup> Parents' Exhibits, pgs. 302, 304, 311, 312.

<sup>80</sup> Id., pg. 308.

<sup>81</sup> Parents' Exhibits, pgs., 154, 169, 176, 181. There are additional speech and language evaluations conducted on Student: 2015, pg. 213, 2016, pg.207, 2017, pg. 199, 2018, pg. 190.

<sup>82</sup> Parents' Exhibits, pg. 166.

speech therapy and 480 minutes or 8 hours of occupational therapy contained in his 2020-2021 IEP. Certainly, as the District points out in its post hearing brief, some of these missed sessions could be attributed to student absences and school closure. However, records indicate that Student's occupational and physical therapists, had missed sessions for various other reasons, i.e., conferences, illness, and that there is no evidence that these sessions were covered by other therapists. While this hearing officer does acknowledge, as discussed in the District's post hearing brief, that the Arkansas Department of Education has laid out the difference between Educational Model and the Medical Model for the delivery of therapy services. This hearing officer finds that the Speech therapy and OT services provided for in Student's IEPs do, as all of the evaluations state, support an educational need. They assist Student in achieving educational goals developed by the IEP team, promote access to academic curriculum and participation in other school activities, and improve access to the school environment.

Given: (1) these were the only services contained in Student's IEP; (2) the IEP team deemed these services necessary and appropriate to meet Student's unique needs during Student's 2019-2020 and 2020-2021 school years; and (3) that Student received less than half in total of the speech and language therapy and occupational therapy services provided for in his IEPs, I find that the District's failure to provide speech and language therapy and Occupational Therapy services in conformity with Student's 2019-2020 and 2020-2021 school years is more than a de minimis failure and constitutes a substantive violation of IDEA. Even if this hearing officer agreed with the District's argument in its post hearing brief that there were legitimate reasons for missing a portion of Student's speech therapy and OT minutes, there was no evidence presented through documents or testimony that would support this material deviation from the IEP document. However, this hearing officer does find it impossible to determine minute for

minute OT and Speech therapy services that were denied Student and those services which were not delivered because Student was unavailable. Therefore, in computing compensatory education I will reduce minutes by 15%, to ensure the award considers all factors in evidence.

### **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 14, 2019, to April 26, 2021.

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

1. District is ordered to provide Student compensatory education in the amount of 2140 minutes of Speech therapy and 1480 minutes of Occupational therapy. The minutes of therapy will be spread over time and agreeable to the District and Parent, taking into account Student's ability, given his Autism diagnosis and young age, to endure additional therapies. The therapy minutes ordered will be carried forward on Student's IEP until completed.

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

8/23/2021

DATE