

**ARKANSAS DEPARTMENT OF EDUCATION
Special Education Unit**

IN RE:

XXXXXX and XXXXX XXXXXX,
Guardians of
XXXX XXXXXXXX, Student

PETITIONERS

VS.

ADE H-21-38

PALESTINE-WHEATLEY SCHOOL DISTRICT

RESPONDENT

HEARING OFFICER’S FINAL DECISION AND ORDER

ISSUES PRESENTED:

Whether the Palestine-Wheatley School District (hereinafter “District” or “Respondent”) denied XXXX XXXXXXXX (hereinafter “Student”) a free, appropriate, public education (hereinafter “FAPE”) between August 24, 2020¹ and June 16, 2021, in violation of certain procedural and substantive requirements of the Individuals with Disabilities in Education Act of 2004, 20 U.S.C. §§ 1400-1485, as amended (hereinafter “IDEA”), by failing to refer Student for a comprehensive educational evaluation, failing to conduct necessary evaluations so as to determine whether Student was eligible for special education programming, failing to develop an appropriate IEP, and failing to provide appropriate dyslexia interventions.

¹ August 24, 2020, represents the first day of school for District during the 2020-2021 school year.

PROCEDURAL HISTORY:

On June 16, 2021, the Arkansas Department of Education (hereinafter “Department”) received a written request from Petitioners to initiate due process hearing procedures on behalf of Student. Petitioners requested a due process hearing because they believed that District failed to comply with the IDEA by failing to refer Student for special education consideration, failing to evaluate Student for the purpose of determining whether Student has a disability in need of special education programming, failing to develop an appropriate IEP, and failing to provide appropriate dyslexia interventions.

In response to Petitioners’ request for hearing, the Department assigned ADE H-21-38 to an impartial hearing officer. Thereafter, following two continuances that this Hearing Officer granted for good cause, September 14, 2021 was set as the date on which a hearing would commence if the Petitioners and District failed to reach resolution prior to that time. On August 10, 2021, a prehearing conference regarding this matter was conducted, via telephone. Counsel for both parties participated in the hearing. During the prehearing conference, the parties discussed unresolved issues to be litigated at the hearing of this matter, as well as the witnesses and evidence necessary to address these issues. On September 14, 2021, the closed hearing of this matter commenced.

Testimony was heard on September 14, 2021, September 15, 2021, and September 16, 2021.² All testimony was heard either in person at the Hampton Inn in Palestine, Arkansas, or via ZOOM. This Hearing Officer presided over this hearing via ZOOM. The

² See Hearing Transcript, Vols. I-III.

hearing concluded on September 16, 2021. The following witnesses testified in this matter: Kristi Wilson, Mary Oltmann, Bonnie Brewer Halbert, Megan Jumper Hooker, Karen McGuirt, Lori Ginn, Jon Estes, and Petitioners (XXXXX XXXXX).³ Petitioners had the burden of proof regarding the issues raised in this case.

Having been given jurisdiction and authority to conduct the hearing pursuant to Public Law 108-446, as amended, and Arkansas Code Annotated §§ 6-41-202 through 6-41-223, Danna J. Young, J.D., Hearing Officer for the Arkansas Department of Education, conducted a closed impartial hearing. Petitioners were represented by Theresa Caldwell (Little Rock, Arkansas), and District was represented by Teddy Stewart and Cody Kees (Little Rock, Arkansas). Both parties were offered the opportunity to provide post-hearing briefs, and both timely submitted briefs for consideration.

FINDINGS OF FACT:

Student is a seven-year-old male (DOB 02/24/2014) who is enrolled in the Palestine-Wheatley School District. Between August 24, 2020 and June 16, 2021, the time period covered in this matter, Student attended first grade at District. The 2020-2021 school year was the first year that Student was enrolled in the District. When Student began first grade in August 2020, Petitioners expressed concerns to Student’s teachers about his foundational skills and whether he was prepared to begin first grade.⁴

Throughout the 2020-2021 school year, Student’s first-grade teacher, Megan Hooker (hereinafter “Mrs. Hooker”) corresponded regularly with Petitioners regarding Student’s

³ *Id.*

⁴ Hearing Transcript, Vol. 2, pp. 15-16; Hearing Transcript, Vol. 3, p. 147.

academic progress. On August 28, 2020, four days after school began, Petitioners sent a note to Mrs. Hooker and inquired about whether Student was eligible for a 504 program on account of academic difficulties.⁵ Three days later, on August 31, 2020, Mrs. Hooker spoke with Petitioners, and Petitioners expressed concern regarding Student and inquired as to whether he could be tested for dyslexia.⁶ Mrs. Hooker told Petitioners that she would check into their request and follow up.

During the following month, September 2020, Mrs. Hooker continually communicated with Petitioners regarding Student’s classroom assignments and academic performance. In addition, Mrs. Hooker implemented a weekly notes system, whereby she sent home progress reports to Petitioners and provided a means for Petitioners to respond via same.⁷ One specific note dated for the week of September 7, 2020, included a statement from Mrs. Hooker which indicated that she and Petitioners could talk at parent-teacher conferences on September 29, 2020 “about a plan to help [Student].”⁸ On September 29, 2020, Petitioners spoke with Mrs. Hooker during parent-teacher conferences.⁹ It was noted by Mrs. Hooker on her communication log that she and Petitioners spoke about Student’s “learning issues” and Petitioner’s desire to have Student tested for dyslexia.¹⁰ Mrs. Hooker further noted that she told Petitioners about the referral process and took steps to begin dyslexia testing.¹¹ On this same date, Mrs. Hooker emailed the dyslexia supervisor for District

⁵ Combined Exhibits, p. 16.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at p. 32.

⁹ *Id.* at p.16.

¹⁰ *Id.*

¹¹ *Id.*

and notified her that she had submitted the required form to begin dyslexia screening for Student.¹² On October 2, 2020, Mrs. Hooker notified Petitioners that Student would begin dyslexia testing, and on October 6, 2020, Student was administered a dyslexia screener.¹³ The screener that Student was administered was the Comprehensive Test of Phonological Processing (CTOPP).¹⁴ The dyslexia supervisor for the District testified that, based on the CTOPP results, Student did not have markers of dyslexia and did not, therefore, require additional testing.¹⁵

Nearly one month later, on November 2, 2020, Mrs. Hooker again reached out to the dyslexia supervisor, via email, to inquire about the results of Student's dyslexia testing. Mrs. Hooker noted in her email to the dyslexia supervisor that Petitioners had requested an update. She also inquired as to whether she needed to provide any accommodations or modifications for Student's work, noting that Student was consistently "making zeros on his spelling tests" and that she expected Student to make low grades once students were required to begin reading tests on their own.¹⁶ The dyslexia supervisor stated that she would be in touch with Mrs. Hooker and that she would also start the process of determining necessary accommodations and modifications.¹⁷

On November 30, 2020, Petitioners again inquired about Student's dyslexia screener results.¹⁸ In response, Mrs. Hooker again reached out to the dyslexia supervisor seeking

¹² *Id.* at p. 233.

¹³ *Id.* at pp. 16, 48.

¹⁴ Hearing Transcript, Vol. 2, p. 256.

¹⁵ Hearing Transcript, Vol. 1, pp. 93-94.

¹⁶ Combined Exhibits, pp. 16, 235.

¹⁷ *Id.* at pp. 234-35.

¹⁸ *Id.* at p. 16.

information.¹⁹ On December 8, 2020, Mrs. Hooker received a notification from the dyslexia paraprofessional that Student was going to have a dyslexia “pull out” every Friday.²⁰ Since students attended school virtually on Fridays, Mrs. Hooker instructed Petitioners as to where to bring Student each week so that he could have dyslexia intervention.²¹ In addition, on December 10, 2020, classroom accommodations were created for Student to address spelling, handwriting, reading, and written expression.²² These accommodations included the following: (1) allow spell check when applicable and avoid point reductions for spelling inaccuracies (spelling); (2) provide notes for Student by photo copy, peer tutor or teacher notes (handwriting); (3) provide Student with supports when needed during sustained reading (reading); and (4) provide shortened assignments when needed (written expression).²³ In addition, as of January 7, 2021, Student was placed in an intervention group called the “95% group” to address phonological, phonemic, and reading deficits.²⁴ Student was receiving interventions every morning in his classroom pursuant to this program.²⁵ The 95% group interventions that Student was receiving each day were tailored to his specific deficits.²⁶ Mrs. Hooker believed that this program was a certified dyslexia program.²⁷ Student also began receiving reduced spelling words as an accommodation at approximately this

¹⁹ *Id.* at p. 236.

²⁰ *Id.* at p. 16.

²¹ *Id.*

²² *Id.* at p. 18.

²³ *Id.*

²⁴ Hearing Transcript, Vol. 1, p. 164.

²⁵ *Id.* at p. 37.

²⁶ Hearing Transcript, Vol. 2, p. 252.

²⁷ *Id.* at pp. 73-74.

same time.²⁸ In addition, testimony in the record indicated that Student, during the months of November and December 2020, was receiving interventions for phonological and phonemic awareness through Heggerty, A to Z reading, and Flyleaf books.²⁹

On January 21, 2021, Mrs. Hooker wrote an email to the dyslexia supervisor which stated the following:

I know I am a broken record, but I wanted you to see [Student's] test. The five words didn't do anything for his grade, unfortunately. You can see that he is still struggling/stuck on three letter words/sounds. I am just kind of at a loss. I am trying to do everything I can to help him, but I feel like I am struggling. I know he is in the WIN group, but I feel like he needs more. I understand that this may not happen, I just want to make sure I advocate for him as much as I can. Thank you for your help. I really do appreciate it.³⁰

Four months later, on the weekly note for April 12, 2021, Petitioners asked Mrs. Hooker whether Student was still receiving dyslexia intervention and whether he qualified for a 504 plan.³¹ Mrs. Hooker responded on April 19, 2021, that the regular groups were helping Student, and that she believed Student would start the following school year with additional skills. She recommended holding off on a 504 plan or additional testing as a result.³² Ultimately, it was recommended that Student be retained in the first grade for the 2021-2022 school year.³³

On the weekly note for the week of May 10, 2021, Petitioners wrote that they had contacted District regarding creating an individualized education program for Student;

²⁸ Combined Exhibits, p. 237.

²⁹ Hearing Transcript, Vol. 1, p. 164.

³⁰ Combined Exhibits, p. 241.

³¹ *Id.* at p. 190.

³² *Id.* at p. 224.

³³ *Id.* at p. 245.

however, they had not yet received a call back.³⁴ On June 1, 2021, Petitioners received an email from the Special Education Director for District which indicated that, per Petitioners' request, a referral conference for Student would be held on June 16, 2021.³⁵ A Notice of Conference dated June 2, 2021 and setting a meeting for June 16, 2021, was provided to Petitioners.³⁶ Pursuant to this Notice of Conference, the purpose of the meeting was to consider a referral for special education and related services.³⁷

Student's grades showed a decline throughout the 2020-2021 school year.³⁸ At the end of the fall 2020 semester, Student had two Cs (reading and math), one D (language), and one F (spelling). At the end of the spring 2021 semester, Student had one D (language), and three Fs (spelling, reading, and math).³⁹

Student was administered the DIBELS assessment three times during the 2020-2021 school year, specifically in the fall, winter, and spring. In fall 2020, Student was administered the assessments for Phoneme Segmentation Fluency, Nonsense Word Fluency (correct letter sounds), and Nonsense Word Fluency (whole words read).⁴⁰ The results of these assessments indicated that the level of support needed for Student with regard to phonemes was "core," and the level of support required for nonsense word fluency (both assessments) was "intensive."⁴¹ In the winter (midyear), Student was administered assessments for

³⁴ *Id.* at p. 196.

³⁵ *Id.* at p. 19.

³⁶ *Id.* at p. 20.

³⁷ *Id.*

³⁸ *Id.* at p. 251.

³⁹ *Id.*

⁴⁰ *Id.* at p. 244.

⁴¹ *Id.*

Nonsense Word Fluency (correct letter sounds), Nonsense Word Fluency (whole words read), Oral Reading Fluency, and Oral Reading Fluency Accuracy.⁴² The results of these assessments indicated that the level of support needed for Student with regard to nonsense word fluency (correct letter sounds) was “strategic,” and for nonsense word fluency (whole words read), oral reading fluency, and oral reading fluency accuracy was “intensive.”⁴³ In the spring 2021, Student was again administered assessments for Nonsense Word Fluency (correct letter sounds), Nonsense Word Fluency (whole words read), Oral Reading Fluency, and Oral Reading Fluency Accuracy.⁴⁴ The results of these assessments indicated that the level of support needed for Student with regard to nonsense word fluency (correct letter sounds) was “strategic,” for nonsense word fluency (whole words read) was “core,” and for oral reading fluency and oral reading fluency accuracy was “intensive.”⁴⁵

In addition, Student was assessed during the 2020-2021 school year using Istation. In the fall 2020, Student’s Istation reading level was 183, which represented a reading level below kindergarten.⁴⁶ Student’s reading level remained the same during the mid-year assessment.⁴⁷ In the spring 2021, Student’s Istation reading level was 187, which represented a reading level of mid-kindergarten.⁴⁸ Istation documentation indicates that a score of 187 requires “critical intervention.”⁴⁹ The spring 2021 Istation scores indicated that

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* at p. 246.

Student's scores fell in the 3rd percentile for overall reading, the 4th percentile for letter knowledge, the 28th percentile for phonemic awareness, the 5th percentile for alphabetic decoding, the 1st percentile for reading comprehension, the 2nd percentile for vocabulary, and the 1st percentile for spelling.⁵⁰

District officials testified that they did not suspect Student of needing special education, explaining that Student made progress in his intervention group.⁵¹ Testimony indicated that District believed that Student was "closing the gap" and gaining on his peers because some of his test scores on his DIBELS assessments improved, as evidenced from support levels moving from intensive to strategic, and others from strategic to core.⁵²

CONCLUSIONS OF LAW AND DISCUSSION:

Pursuant to Part B of the IDEA, states are required to provide a FAPE for all children with disabilities between the ages of three and twenty-one. 20 U.S.C. § 1412(a); 34 C.F.R. §300.300(a). In 1982, in *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, the United States 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); *K.E. ex rel. K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795, 804 (8th Cir. 2011). 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. *Id.* Thereafter, it must be determined

⁵⁰ *Id.* at pp. 247-48.

⁵¹ Hearing Transcript, Vol. 2, pp. 135, 252.

⁵² *Id.* at pp. 138, 258-59.

whether the student's education was reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Id.*; see also *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).

1. Procedural Violations of FAPE: Child Find

It must first be determined whether District complied with the procedures set forth in the IDEA. In the present case, Parent alleged that District failed to refer Student for a comprehensive educational evaluation, failed to conduct necessary evaluations so as to determine whether Student was eligible for special education programming, failed to develop an appropriate IEP, and failed to provide appropriate dyslexia interventions. The essence of Petitioner's allegations is that of a "child find" violation. Some circuits have expressly stated that child find and failure to evaluate 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 (3d Cir. 2012); *D.A. ex rel. Latasha A. v. Houston Indep. Sch. Dist.*, 629 F.3d 450, 453 (5th Cir. 2010); *Bd. of Educ. of Fayette Cnty. v. L.M.*, 478 F.3d 307, 313 (6th 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 States, 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. 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. The IDEA requires that initial evaluations and reevaluations meet certain requirements. 34 C.F.R. § 300.304. Specifically, a public agency must utilize a "variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child." *Id.* at § 300.304(b)(1). In addition, evaluations and reevaluations must assess all areas related to Student's suspected disability, "including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. *Id.* at § 300.304 (c)(4).

In the present case, it is the opinion of this Hearing Officer that District did not fulfill its child find obligations regarding Student and, therefore, failed to timely evaluate Student. First and foremost, it is noted that Petitioners repeatedly inquired about Student's academic deficiencies and requested testing. In fact, Petitioners expressed concern that Student was not foundationally prepared for first grade at the start of school. A few days later, specifically on August 28, 2020, Petitioners requested that Student's teacher, Mrs. Hooker, have him tested for dyslexia. Certainly, it is reasonable that District did not immediately schedule a

special education referral conference and have Student evaluated during the first week of school, particularly given that Student had transferred into District and his academic deficits were not well established. However, Petitioners' request, combined with District's knowledge of Student's academic deficits after the first two months of school, was sufficient to trigger a special education referral and comprehensive evaluation of Student. By October 2020, Student's academic deficits in the classroom had reinforced Petitioners' concerns and justified action on the part of the District.

Second, Student's teacher, Mrs. Hooker, made several attempts to get assistance for Student, all of which put District on notice that Student was academically struggling and may have a learning disability. As early as September 7, 2020, Mrs. Hooker was talking with Petitioners about devising a "plan to help [Student]." She further spoke to Petitioners on September 29, 2020 during parent-teacher conferences about Student's learning issues, and followed up after the conference by sending an email to the District's dyslexia supervisor to begin dyslexia screening. As a result of Mrs. Hooker's persistent action, Student was administered the CTOPP on October 6, 2020. This, however, is where things went awry.

Nearly a month later, at the beginning of November 2020, neither Mrs. Hooker nor Petitioners had received information about Student's testing, prompting Mrs. Hooker to inquire again about Student and whether she needed to provide accommodations or modifications to him in the classroom. The dyslexia supervisor responded that she would be back in touch; however, as of November 30, 2020, there had been no response, prompting another inquiry by Mrs. Hooker and Petitioners. Finally, in December, Mrs. Hooker learned through a dyslexia paraprofessional that Student was going to be pulled out every Friday for

interventions. She was also provided a list of accommodations to implement in the classroom for Student. Beginning January 7, 2021, Student began receiving daily interventions in his classroom to address phonological, phonemic, and reading deficits. There is no evidence, however, that the dyslexia supervisor provided test results to Petitioners or to Mrs. Hooker or provided other guidance regarding a plan for Student at any point. Also, despite these efforts, Mrs. Hooker emailed the dyslexia supervisor on January 21, 2021, and expressed that Student was continuing to struggle. Student was failing nearly all of his classes. Student's assessments indicated that he had exhibited no growth between the fall 2020 and midyear progress assessments, and he was still reading on a pre-kindergarten level. Still, the District took no action to seek a special education referral. Even if District felt that it was providing appropriate interventions prior to January 21, 2021, Mrs. Hooker's email, in combination with data regarding Student's classroom performance, should have further put District on notice of the severity of Student's deficits and triggered a special education referral and comprehensive evaluation.

Third, on May 10, 2021, Petitioners contacted the school and inquired about creating an IEP for Student. It was not until June 1, 2021, approximately three weeks later, that Petitioners heard back from District about a referral conference. Even then, pursuant to a June 2, 2021 Notice of Conference, a referral conference was not scheduled. Instead, District scheduled a meeting for June 16, 2021, to determine whether a referral conference was necessary. Despite Petitioner's requests and Mrs. Hooker's communications throughout the year, District was still resistant to conduct a special education referral conference for Student. In addition, in the short time between Petitioner's May 10, 2021 request for an IEP

and District's June 2, 2021 Notice of Conference, District notified Petitioners that it was recommending that Student be retained in the first grade for the upcoming school year. Essentially, in the midst of Petitioners exploring special education options for Student, and prior to the June 16 meeting scheduled by District, District made the decision that it would be best for Student to repeat the first grade. This, likely, explains why the June 2, 2021 Notice of Conference did not specify that an actual referral conference was going to take place. It appears that District had no intention, whatsoever, of going through with an official special education referral for Student. District had made up its mind to retain Student and continue with the same, ineffective options that it had already explored.

Considering all of these issues, it is apparent that District was placed on notice many times that Student might have a learning disability and be in need of special education services. Between Petitioners requests, Mrs. Hooker's communications with the dyslexia supervisor, and Student's academic performance on schoolwork and progress assessments, it was apparent as early as October 2020 that Student may have a disability that was impacting his ability to be successful at school. District ignored all of these triggers and, therefore, violated its child find obligations with regard to Student.

It is noted that District argued in its post-hearing brief that Student's CTOPP did not indicate that Student had markers of dyslexia. In the same brief, however, District argued that it was aware that Student had foundational deficits and that Student had been provided interventions which had been successful in closing the gap between Student's grade level and his academic performance. These two arguments are inconsistent on their face. Certainly, District cannot successfully argue that testing did not reveal an issue while, at the

same time, starting interventions daily in the classroom and providing accommodations to Student. This indicates to this Hearing Officer that, despite the results of the CTOPP, District was aware that Student showed significant deficits.

In addition, District argued that the interventions that it had provided to Student had resulted in Student making progress. District's position in this regard is refuted by the evidence in the record. Student was failing nearly all of his classes by the end of the 2020-2021 school year. Despite some slight growth, Student was still more than a grade level behind his peers in reading, and his Istation assessments indicated that he fell below the 5th percentile in all areas of reading with the exception of one. Finally, and most importantly, District was recommending that Student be retained in the first grade because he had not made sufficient progress to advance to the second grade. District cannot maintain the position that it thought Student was improving in light of these facts.

Conclusion. It is the opinion of this Hearing Officer that District procedurally violated the IDEA by failing to meet its child find obligations regarding Student. Specifically, District failed to timely refer Student for a comprehensive educational evaluation and failed to conduct necessary evaluations so as to determine whether Student was eligible for special education programming. Given that District failed in this regard, it is impossible to conclude whether District failed to develop an appropriate IEP or provide appropriate dyslexia interventions, as eligibility for services cannot be determined without necessary evaluations.

2. Substantive Violations of FAPE

Having analyzed the first prong of the FAPE analysis, specifically that of procedural violations, and determined that District failed to engage in child find activities and timely evaluate Student, it is now necessary to consider whether District's actions resulted in a substantive denial of a FAPE to Student. 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. ex rel. 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)).

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.*, 2017 WL 1066260, 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."

Endrew F., 2017 WL 1066260, 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.*

In the present case, it is the opinion of this Hearing Officer that District’s failure to refer Student prior to the end of the 2020-2021 school year and initiate an evaluation resulted in a substantive denial of a FAPE. Ultimately, Student entered the second grade with the reading abilities of a mid-kindergartner, approximately one-and one-half grade levels behind his peers. Had District taken steps to refer Student for a comprehensive evaluation at the beginning of the 2020-2021 school year, when Petitioners first requested dyslexia screening, or even mid-year, when it became apparent that Student was continuing to struggle and was failing his classes, Student could have been identified and, to the extent that he was eligible, provided appropriate special education to counteract his deficits. As such, it is the opinion of this Hearing Officer that Petitioners have proven that District’s procedural failure to meet its child find obligations more likely than not resulted in a substantive violation of FAPE for Student.

Conclusion. It is the opinion of this Hearing Officer that District procedurally violated the IDEA with regard to its child find obligations, and that such violation constituted a substantive violation of FAPE between August 24, 2020 and June 16, 2021.

ORDER:

The results of the testimony and evidence warrant a finding for Petitioners. Petitioners introduced sufficient evidence in the record to establish by a preponderance of the evidence that District denied Student FAPE between August 24, 2020 and June 16, 2021 by failing to comply with its child find obligations and comprehensively evaluate Student to

determine special education eligibility. As such, District is hereby ordered to take the following actions regarding Student:

- (1) By or before January 1, 2022, District shall ensure that a comprehensive evaluation is completed for Student for the purpose of determining whether he is eligible for special education programming pursuant to the IDEA. This evaluation is not to be conducted by District staff, but, instead, must be conducted by an independent evaluator that is agreed upon by Petitioners and District. District is responsible for paying for this evaluation in full.
- (2) Assuming the results of the comprehensive evaluation indicate that Student has a qualifying disability pursuant to the IDEA and is eligible for special education programming, District shall hold an IEP meeting by January 10, 2022 for the purpose of creating an IEP for Student, to take place immediately.
- (3) Assuming the results of the comprehensive evaluation indicate that Student has a qualifying disability pursuant to the IDEA and is eligible for special education programming, District shall provide compensatory education to Student in the form of a reading tutor for two hours per week beginning January 10, 2022 and continuing weekly throughout the remainder of the 2021-2022 school year. Petitioners will choose the reading tutor, and District will pay in full for the tutor's services.

It is also noted that any non-IDEA claims made in Petitioners' due process complaint, such as claims brought pursuant to Section 504 of the Rehabilitation Act, are hereby dismissed without prejudice, as this Hearing Officer only has jurisdiction to adjudicate claims

brought pursuant to the IDEA. Any and all outstanding motions, to the extent that there are any, are hereby deemed moot.

FINALITY OF ORDER AND RIGHT TO APPEAL:

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

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

IT IS SO ORDERED.

/s/ Danna J. Young

HEARING OFFICER

10/28/2021

DATE

ADE H-21-38