

**ARKANSAS DEPARTMENT OF EDUCATION
SPECIAL EDUCATION UNIT**

**XXXXXXXXXXXXXXXXXX,
Parents of XXXXXXXX**

PETITIONER

VS.

NO. H-22-05

**BENTON SCHOOL
DISTRICT**

RESPONDENT

HEARING OFFICERS FINAL DECISION AND ORDER

Issues Presented:

1. Whether the Benton School District's (hereinafter "District" or "Respondent") proposed IEP developed for XXXXXX (hereinafter "Student") for the 2021-2022 school year was appropriate.
2. Whether the District Properly implemented Student's stay put IEP during the pendency of this due process hearing?

Procedural History:

On August 18, 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. ¹

The first due process request filed by Parent was ADE H-21-34, which was heard July 19-21, 2021 (hereinafter "Hearing #1 or ADE H-21-34"). This Hearing Officer issued a Final Decision and Order on August 23, 2021, finding that the District had denied Student FAPE by

¹ See hearing officer File-Petitioner Complaint.

failing to properly implement Student's 2019-2020, and 2020-2021 IEPs.² By agreement of the parties, ADE H-21-34 is incorporated in its entirety into ADE H-22-05.

At the time that Parents filed ADE H-22-05, request for a due process hearing, Student was an 8-year-old male enrolled in the second grade, specifically enrolled in Benton School District.³ Student was a student with a disability under IDEA. Student was diagnosed with Autism Spectrum Disorder.⁴

In response to the Parent's request for a Due Process hearing, the Department assigned the case to this impartial hearing officer. Thereafter, a prehearing conference was scheduled for September 27, 2021, and the hearing was scheduled for September 30, 2021, and October 1, 2021.⁵

A prehearing conference was held by Zoom on September 27, 2021. Counsel for both the Parents and the District participated in the prehearing conference. During the prehearing conference, the parties discussed unresolved issues to be addressed at the hearing, as well as the witnesses and evidence which would be necessary to address the same.⁶

Thereafter the Due Process hearing in this matter began as scheduled on September 30, 2021. Testimony was heard on September 30 and October 1, 2021 but was not completed and therefore in order to give all parties ample time to present their case, the case was continued and testimony was heard on October 19-20, 2021.

Present for the Hearing were Theresa Caldwell, attorney for Petitioners, Jennifer Flinn, Attorney for the District, Audie Alumbaugh, advocate, Christina Locke, advocate, XXXXXX,

² See Hearing Officer Decision in H-21-34.

³ See Hearing Officer File-Petitioner Complaint, pg. 2.

⁴ Id.

⁵ See Scheduling order, Due process file.

⁶ Pre-Hearing conference transcript.

mother, XXXXXXXX, father, Angela McWhorter, LEA, and Debby Ferguson observed as a newly hired hearing officer by the Department.

The following witnesses testified in this matter: Mike Skelton, Lauren Bass, Debbie Ballard, Beverly Mayfield, Molly Glover, Kimberly Hathcote, XXXXXXX, XXXXXXX, Lyndsey Tackett, and Chelsea Collins.⁷

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

Both parties were offered the opportunity to provide post-hearing briefs in lieu of closing statements, and both timely submitted briefs in accordance with the deadline set by this Hearing Officer.⁸

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.⁹
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.¹⁰

⁷ See Hearing Transcripts Vol. I-IV.

⁸ See Hearing Officer File-Post hearing briefs.

⁹ ADE H-21-34, Parents' Exhibits, pgs. 1,13,46.

¹⁰ ADE H-21-34, 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.¹¹ The Evaluator recommended Student receive speech and language therapy, occupational therapy, and enroll in a highly structured, developmental preschool.¹² The family enrolled Student in Pediatrics Plus Developmental Preschool program. Student was provided Speech, OT and development preschool services.¹³ Pediatric Plus recommended that Student be evaluated for Autism at the James Dennis Developmental Center.¹⁴
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.¹⁵
5. On September 23, 2016, Student was evaluated at Texas Children's Hospital in the Meyer Center for developmental Pediatrics TCH Autism Center.¹⁶ The evaluator stated:

“combining the history presented with direct observations of XXXX's behavior On exam today and his performance on the ADOS-2, XXXX 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.”¹⁷
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

¹¹ Id., pg. 152.

¹² Id., pgs. 152-153

¹³ ADE H-21-34, Hearing Transcript, Vol.III, pg. 11.

¹⁴ Id.

¹⁵ Id., at pgs. 11-12.

¹⁶ ADE H-21-34, Parents' Exhibits, pgs. 134-144.

¹⁷ ADE H-21-34, 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.¹⁸

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.¹⁹ Parent signed consent for additional evaluations at the meeting.²⁰
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.²¹
9. On May 15, 2019, The District conducted a Psychological report regarding Student. Student was given the Adaptive Behavior Assessment System, Third Edition (ABAS-

¹⁸ Id., at pg. 102.

¹⁹ Id., at pg. 106.

²⁰ Id., at pg. 107.

²¹ 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.²²
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.²³
 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").²⁴
 12. On May 24, 2019, the IEP committee met as planned to discuss evaluations conducted regarding Student, Student's eligibility and initial placement and

²² ADE H-21-34, Parents' Exhibits, pgs., 122-123.

²³ 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. (ADE H-21-34, Parents' Exhibits, pg. 128).

²⁴ ADE H-21-34, Parents' Exhibits, pg. 103.

determined that Student met IDEA eligibility requirements under the Autism category.²⁵

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, 2019.²⁶ 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, 2019.²⁷

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.²⁸

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.²⁹ Without

²⁵ Id., at pg. 117.

²⁶ Id., at pgs. 109, 120, 126.

²⁷ Id., at pgs., 181, 312, 390.

²⁸ See ADE H-21-34, District post hearing brief, pg. 1.

²⁹ ADE H-21-34, Parents’ Exhibits, pg. 187.

reason, the speech pathologist for the District determined Student should receive 90 minutes of speech therapy per week.³⁰

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.³¹ 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.

³⁰ Id., at pg. 180.

³¹ 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.³² 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.³³ 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.³⁴ 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-

³²ADE H-21-34 Parents' Exhibits, pg. 393.

³³ Id., at pg. 44.

³⁴ 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.³⁵
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.³⁶
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.³⁷

³⁵ Id., at pg. 49.

³⁶ ADE H-21-34, Parents' Exhibits, Pgs., 51-53.

³⁷ ADE H-21-34, 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.³⁸
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

³⁹

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.⁴⁰
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

³⁸ Id., at pg. 61.

³⁹ Id., at pg. 58.

⁴⁰ ADE H-21-34, Parents' Exhibits, pg. 86.

objectives including, descending stairs, jumping jacks, single leg hops, galloping, and skipping.⁴¹

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.⁴²
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.⁴³
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

⁴¹ ADE H-21-34, Parents' Exhibits, pgs. 55, 87.

⁴² Id., at pg. 89.

⁴³ Id., at pg. 94.

manual dexterity skills. The evaluator recommended Student receive OT services 30 minutes one time per week.⁴⁴

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).⁴⁵
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

⁴⁴ ADE H-21-34, Parents' Exhibits, pgs., 304-309.

⁴⁵ Id., pg. 96.

addition to school therapies, Student receives private speech therapy services through kid source weekly.⁴⁶

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.⁴⁷ 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

⁴⁶ ADE H-21-34, Parents' Exhibits, pgs. 100-101.

⁴⁷ 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.⁴⁸

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.⁴⁹
28. Student's April 13, 2020, IEP contained Identical Supplementary aids and services as listed above in Student's 2019-2020 IEP.⁵⁰
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.⁵¹

⁴⁸ Id., at pg. 15.

⁴⁹ Id.

⁵⁰ ADE H-21-34, Parents' Exhibits, pgs., 16-17.

⁵¹ 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.⁵²
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.⁵³
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.⁵⁴
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.⁵⁵

⁵² ADE H-21-34, Parents' Exhibits, pg. 22.

⁵³ Id., at 25.

⁵⁴ ADE H-21-34, Parents' Exhibits, pgs. 57-60.

⁵⁵ 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.⁵⁶
35. On March 16, 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.⁵⁷
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

⁵⁶ Id., at 15, 81,

⁵⁷ Parents' Exhibits, pg. 35.

ability to maintain and carryover the goals he has met in therapy to the general education classroom.⁵⁸

37. On April 9, 2021, Student's 2021-2022 IEP was developed. The committee agreed that Student was doing well and had made great strides during his first grade year. His teacher stated that Student was doing really well in the general education classroom and she didn't have any educational concerns at the present time.⁵⁹ Student's 2021-2022 IEP contained a statement of Students present levels of academic achievement and functional performance.⁶⁰ The IEP discusses student's Autism diagnosis and how it effects his educational performance, as well as his behavior. The IEP also disusses how Student has met 3/3 of his goals in his IEP including articulation, language, and social skills. Additionally, Student has mastered all reading foundational skills and language skills for first grade. Student is showing progress in his writing. He has mastered first grade social development and work skills, his reading literature and informational standards, and all skills in math as well.⁶¹ The IEP included a list of supplementary aids and services student would need in the general education setting. The IEP included one speech goal and one occupational therapy goal. Both of these goals were to be implemented in the regular classroom setting by the classroom teacher and monitored by the speech therapist and the occupational therapist to ensure that Student was successful.⁶² Finally the IEP included a schedule of services that included thirty minutes of indirect services in speech therapy and occupational therapy.⁶³

⁵⁸ Id., pg. 36.

⁵⁹ Parent's Exhibits P. 1.

⁶⁰ Id., at 2.

⁶¹ Id.

⁶² Id., at 6-7.

⁶³ Id., at 8.

38. The Kidsource speech evaluation conducted on April 15, 2021 regarding Student, notes Student's diagnosis includes Autistic Disorder and developmental disorder of speech and language, unspecified.⁶⁴ 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-II⁶⁵ and CASL⁶⁶. His articulation skills were found to be severely delayed with standard scores of 71 and 59 on the CAAP-2⁶⁷ and GFTA-3⁶⁸. The evaluation stated that children like Student, with expressive language, pragmatic, and articulation disorders 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 doing well in the classroom and no longer needs direct speech therapy services during his 2021-2022 school year.
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.⁶⁹ Based on the BOT-2⁷⁰, Student's score indicates a delay in manual coordination skills as evidenced by a z-score of -2.0. His scores on the BRIEF⁷¹ indicate that he presents with executive functioning delays that impede his ability to

⁶⁴ Id., at 40-50.

⁶⁵ Oral and Written Language Scales-Second Edition (OWLS-II)

⁶⁶ Comprehensive Assessment of Spoken Language (CASL)

⁶⁷ Clinical Assessment of Articulation and phonology-Second Edition (CAAP-2)

⁶⁸ Goldman-Fristoe Test of Articulation-Third Edition (GFTA-3)

⁶⁹ Parent's Exhibit's pgs. 63-71.

⁷⁰ Bruininks-Oseretsky Test of Motor Proficiency-Second Edition (BOT-2)

⁷¹ Behavior Rating Inventory of Executive Function (BRIEF)

complete age-appropriate occupations with age appropriateness. These delays are affecting Student's occupational performance across environments.⁷²

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

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

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

The weight accorded the testimony, however, is not the same as its credibility. Some evidence, including testimony, was more persuasive and reliable concerning the issues to be decided.

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.

⁷² Parents' Exhibits, pgs. 290-298.

Applicable Legal Principles

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

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

Further the 8th Circuit held in *K.E. vs. Independent School District No. 15*, that "An IEP is a snapshot, not a retrospective," and we must "take into account what was, and was not,

objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated.” Roland M., 910 F.2d at 992.” 647 F.3d 795, 808 (8th Cir. 2011).

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 Petitioners do not allege any procedural violations in their Due Process Request and therefore, this Hearing officer finds that the District complied with the procedures set forth in IDEA, will move to Petitioner’s alleged substantive IDEA violations.

SUBSTANTIVE VIOLATIONS OF IDEA

Having analyzed the first prong of the FAPE analysis, specifically that of procedural violations, and determined that the District did not procedurally violate IDEA in the present case, it is now necessary to look at the substantive violations alleged by Petitioners. Specifically whether the proposed 2021-2022 IEP developed for Student was appropriate and whether the District failed to implement Student’s stay put IEP during the pendency of this hearing.

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 *Endrew 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 *Endrew 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).

Parents allege that the District failed to develop an appropriate IEP for Student’s 2021-2022 school year.

Whether the proposed 2021-2022 IEP was appropriate.

Parent’s assert that the District failed to develop an appropriate IEP for Student’s 2021-2022 school year. 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 proposed 2021-2022 IEP was necessary, appropriate, and reasonably calculated to enable Student to make progress appropriate in light of the child's circumstances.⁷³ As discussed above in the fact section, Student's proposed 2021-2022 IEP 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. A review of Student's previous 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.⁷⁴ There is a separate OT annual review that states Student met his two short term objectives on his 2020-2021 IEP.⁷⁵ Therefore, in light of Student's previous progress, the IEP team moved to provide indirect speech and occupational therapy services and monitor Student's progress during the 2021-2022 school year, while maintaining Student's eligibility for special education services.

Parent's point to Student's NWEA scores to suggest that Student is struggling in reading, to support their premise that Student's 2021-2022 fails to address these needs. While that one test does show Student has significant deficits in reading, this hearing officer found the testimony of Debbie Ballard, Student's first grade teacher, Kim Hathcote, Student's current teacher and Chelsea Collins, an instructional facilitator at Student's school, compelling and persuasive. Ms. Ballard, testified at length, in both the H-21-34 hearing and the present hearing,

⁷³ *Andrew F.*, 2017 WL 1066260, at *1000

⁷⁴ ADE H-21-34, Parents' Exhibits, pgs. 19-21.

⁷⁵ *Id.*, at 303.

that Student is producing grade level work.⁷⁶ Specifically, with regard to reading, Ms. Ballard explained that Student has performed at grade level on all district wide reading assessments.⁷⁷ Those assessments included: (1) letter ID assessments; (2) the beginning and advanced decoding surveys; (3) the oral fluency benchmark exam; and (3) the phonological awareness screening test (PAST).⁷⁸ Further, Ms. Collins, an instructional facilitator testified that it is not uncommon for students to perform better in the classroom. Further Ms. Collins, Ms. Ballard, and Ms. Hathcote all testified that Student's NWEA scores are not indicative of his reading abilities.

The Parents further argue that the Kidsource's speech evaluation conducted on April 15, 2021, and Occupational therapy evaluation conducted on April 12, 2021, show Student has definitive deficits in speech and occupational areas. However, the District rightfully points out in its post hearing brief that these evaluations were not available to the IEP team at the time Student's 2021-2022 IEP was developed. I agree with the District that based on the 8th Circuit's holding in *K.E. vs Independent School District No. 15*, this hearing officer is unable to consider information that was unavailable to the IEP team in determining the appropriateness of the 2021-2022 IEP.

Finally, the Parent's argue that the proposed 2021-2022 IEP is inappropriate because it fails to address Student's sensory needs and elopement issues. However, this hearing officer finds that the Parent's failed to present evidence to support this claim. The first grad IEP required that Student be monitored during transition times, unstructured activities, on the playground and during emergencies.⁷⁹ However, Ms. Hathcote, Student's current second grade teacher, testified that she has never witnessed Student eloping or wandering off. She further

⁷⁶ ADE H-21-34 Transcript Vol. 1 p. 12; Transcript vol. 2, pg. 59, 63.

⁷⁷ Hearing Transcript Vol. 2, pgs. 52, 80.

⁷⁸ Parent's Exhibit, pgs. 123, 125, 129-130.

⁷⁹ *Id.*, p. 17.

stated that student goes to the bathroom and right back, and she sees Student frequently in the hallway, and has never seen him wander off or separate from his peers.⁸⁰ Parent's fail to show any tangible elopement issues or sensory issues not being addressed by the District at this time.

Whether the District failed to implement Student's stay put IEP?

Parent states that the District failed to implement Student's stay put IEP. However, Parent fails to provide any evidence to support their allegation that the District failed to implement Student's stay put IEP. Even Parent's post hearing brief is without argument on this issue. The testimony by Ms. Bass and Ms. Glover was that Student's 2020-2021 IEP was still being implemented because that is the stay put IEP.⁸¹ This hearing officer finds that the evidence supports a finding that the District implemented Student's stay put IEP.

Conclusion

Having considered Petitioners' allegations, and in light of the findings of fact and conclusion of law above, it is the conclusion of this Hearing Officer that the District did not deny Student FAPE.

ORDER

The results of the testimony and evidence warrant a finding for the District. Specifically, Parents failed to introduce sufficient evidence in the record to establish by preponderance of the evidence that District's Proposed 2021-2022 IEP for Student was not appropriate or that the District failed to implement Student's stay put IEP.

⁸⁰ Hearing Transcript, Vol. III, pgs. 190-191, 203.

⁸¹ Hearing Transcript, Vol. I, pg. 82, Vol. III, pgs. 86-90.

If Petitioners 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

11/23/2021
DATE