

**ARKANSAS DEPARTMENT OF EDUCATION
SPECIAL EDUCATION UNIT**

**XXXXXXXXXXXXXXXXXX,
Parents of XXXXXX**

PETITIONER

VS.

NO. H-22-38

**BENTON SCHOOL
DISTRICT**

RESPONDENT

HEARING OFFICERS FINAL DECISION AND ORDER

Issues Presented:

1. Whether the District denied Student a FAPE from December 6, 2021, through March 17, 2022?

Procedural History:

On March 17, 2022, 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 XXXX Xxxx (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 failing to properly implement Student’s 2019-2020, and 2020-2021 IEPs.²

On August 18, 2021, Parents filed their second due process hearing request (hereinafter Hearing #2 or ADE H-22-05). This Hearing Officer issue a Final Decision and Order on

¹ See hearing officer File-Petitioner Complaint.

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

November 23, 2021, finding for the District and stating that the Parents failed to introduce sufficient evidence in the record to establish by preponderance of the evidence that the District's proposed 2021-2022 IEP for Student was not appropriate or that the District failed to implement Student's stay put IEP.³

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 April 25, 2022, and the hearing was scheduled for April 27-29, 2022.⁴

On April 22, 2022, counsel for Petitioners filed a motion to continue stating that she had several conflicts with this hearing, including a Facilitated IEP which has been 2 years in the making. Petitioner further avers that counsel for Respondent does not have an objection provided this Due Process Hearing is scheduled in May.⁵ On April 24, 2022, this hearing officer granted Petitioners' Motion to Continue, and the prehearing conference was rescheduled for May 23, 2022, and the Due Process Hearing scheduled for May 24-26, 2022.

On May 2, 2022, Attorney for Petitioners sent an email stating that she had booked an airline ticket on May 26, 2022, to visit her daughter and family in Maryland over Memorial Day weekend. Counsel further asked if the third day of the hearing could be rescheduled for May 27 or another date. After exchanging emails between counsels, it was determined that the Due Process Hearing could be completed in two days and the hearing was set to go forward on May 24-25, 2022.

On May 18, 2022, attorney for Petitioners filed her second Motion for a Continuance, stating that she had been out of her office in due process hearings every week for the past month

³ See Hearing Officer Decision H-22-05.

⁴ See Scheduling order, Due process file.

⁵ See Motion for Continuance dated April 22, 2022, due process file.

and had not confirmed the availability of the Parents for the Due Process Hearing scheduled for May 24-25, 2022. Counsel further stating that the Mother of Student had a conflict because she was accompanying Student on a planned field trip and due to Student's anxiety he would be unable to attend without her.⁶

On May 18, 2022, Attorney for the District sent an email objecting to the continuance, reiterating that the District only agreed to the previous continuance because Attorney for Petitioner assured her the hearing would be completed in May. Further, the parties had agreed to May 24-26, 2022, as hearing dates. Attorney for the District has been upfront from the beginning that May 23-27, 2022, is her last week in her office until the fall because of a family medical issue.⁷

On May 19, 2022, after weighing all the facts this Hearing Officer denied Petitioners' Motion for Continuance and stated that the prehearing conference would be held as scheduled on May 23, 2022, and the Due Process Hearing would take place on May 24-25, 2022.

On May 20, 2022, this Hearing Officer was made aware that another Due Process Hearing involving Petitioners' attorney had not been completed on Friday and a request was made that the Pre-Hearing Conference in this case be cancelled. As this was the third Due Process Hearing request in this case, involved the same parties and issues familiar to all parties, and there was no objection from the District, this Hearing officer cancelled the prehearing conference and stated that if there were any issues, we needed to address we could take them up prior to the hearing on May 24, 2022.

Thereafter the Due Process hearing in this matter began as scheduled on May 24, 2022. Testimony was heard on May 24 and 25, 2022.

⁶ See Motion for Continuance dated May 18, 2022, due process file.

⁷ See email, due process file.

Present for the Hearing were Theresa Caldwell, attorney for Petitioners, Jennifer Flinn, Attorney for the District, Amanda Amick-Lytle, Attorney for the District, Audie Alumbaugh, advocate, Christina Locke, advocate, xxxxxxxxxxx, mother, xxxxxxxxxxx, father, and Angela McWhorter, LEA.⁸

The following witnesses testified in this matter: Angela McWhorter, Kimberly Hathcote, Lauren Bass, Beverly Mayfield, xxxxxxxxxxx, Tracy Morrison, xxxxxxxxxxx, and Dana Sollas.⁹

For judicial economy, the records for due process hearings in H-21-34 and H-22-05 were incorporated into the record of this case.¹⁰

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.¹¹

⁸ See Hearing Transcript Vol. I.

⁹ See Hearing Transcripts Vol. I-II.

¹⁰ See Hearing Transcripts Vol. 1, pg. 12.

¹¹ See Hearing Officer File-Post hearing briefs.

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 year and second grade during the 2021-2022 school year.¹²
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.¹³
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.¹⁴ The Evaluator recommended Student receive speech and language therapy, occupational therapy, and enroll in a highly structured, developmental preschool.¹⁵ The family enrolled Student in Pediatrics Plus Developmental Preschool program. Student was provided Speech, OT and developmental preschool services.¹⁶ Pediatric Plus recommended that Student be evaluated for Autism at the James Dennis Developmental Center.¹⁷
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.¹⁸

¹² ADE H-21-34, Parents' Exhibits, pgs. 1,13,46.

¹³ ADE H-21-34, Parents' Exhibits, pg. 150.

¹⁴ Id., pg. 152.

¹⁵ Id., pgs. 152-153

¹⁶ ADE H-21-34, Hearing Transcript, Vol. III, pg. 11.

¹⁷ Id.

¹⁸ Id., at pgs. 11-12.

5. On September 23, 2016, Student was evaluated at Texas Children’s Hospital in the Meyer Center for developmental Pediatrics TCH Autism Center.¹⁹ The evaluator stated:

“combining the history presented with direct observations of XXXXX’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.”²⁰

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 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.²¹

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

¹⁹ ADE H-21-34, Parents’ Exhibits, pgs. 134-144.

²⁰ ADE H-21-34, Parents’ Exhibits, pg. 141.

²¹ Id., at pg. 102.

- related services and a comprehensive evaluation was determined warranted by the committee.²² Parent signed consent for additional evaluations at the meeting.²³
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.²⁴
 9. On May 15, 2019, The District conducted a Psychological report regarding Student. Student was given the Adaptive Behavior Assessment System, Third Edition (ABAS-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.²⁵

²² Id., at pg. 106.

²³ Id., at pg. 107.

²⁴ Id., at pgs. 109-111.

²⁵ ADE H-21-34, Parents' Exhibits, pgs., 122-123.

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.²⁶
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”).²⁷
12. On May 24, 2019, the IEP committee met as planned to discuss evaluations conducted regarding Student, Student’s eligibility and initial placement and determined that Student met IDEA eligibility requirements under the Autism category.²⁸
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, 2019.²⁹ 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

²⁶ 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).

²⁷ ADE H-21-34, Parents’ Exhibits, pg. 103.

²⁸ Id., at pg. 117.

²⁹ Id., at pgs. 109, 120, 126.

on March 29, 2019; and (3) Physical Therapy (“PT”) evaluation conducted by Pediatrics Plus on April 5, 2019.³⁰

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.³¹

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.³² Without reason, the speech pathologist for the District determined Student should receive 90 minutes of speech therapy per week.³³

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

³⁰ Id., at pgs., 181, 312, 390.

³¹ See ADE H-21-34, District post hearing brief, pg. 1.

³² ADE H-21-34, Parents’ Exhibits, pg. 187.

³³ Id., at pg. 180.

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.³⁴ 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.

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.³⁵ 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

³⁴ Id., at pg. 320.

³⁵ADE H-21-34 Parents' Exhibits, pg. 393.

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.³⁶ 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.³⁷ 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-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.³⁸

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,

³⁶ Id., at pg. 44.

³⁷ Id., at pg. 45.

³⁸ Id., at pg. 49.

- 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.³⁹
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.⁴⁰
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.⁴¹
18. Student's May 24, 2019, IEP included related services in the area of OT and Speech. Student was to receive:

³⁹ ADE H-21-34, Parents' Exhibits, Pgs., 51-53.

⁴⁰ ADE H-21-34, Parents' Exhibits, pgs. 54.

⁴¹ Id., at pg. 61.

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.⁴³
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 objectives including, descending stairs, jumping jacks, single leg hops, galloping, and skipping.⁴⁴
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.⁴⁵
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

⁴² Id., at pg. 58.

⁴³ ADE H-21-34, Parents' Exhibits, pg. 86.

⁴⁴ ADE H-21-34, Parents' Exhibits, pgs. 55, 87.

⁴⁵ Id., at pg. 89.

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.⁴⁶

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 manual dexterity skills. The evaluator recommended Student receive OT services 30 minutes one time per week.⁴⁷
24. On April 10, 2020, a notice of conference was sent to the Parents stating that an 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).⁴⁸
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/

⁴⁶ Id., at pg. 94.

⁴⁷ ADE H-21-34, Parents' Exhibits, pgs., 304-309.

⁴⁸ Id., pg. 96.

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 addition to school therapies, Student receives private speech therapy services through kid source weekly.⁴⁹

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 regard 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

⁴⁹ ADE H-21-34, Parents’ Exhibits, pgs. 100-101.

playing and transitioning to ensure success.⁵⁰ 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 math higher. Current report card: Reading level 188; 34/34 in 1:1 letter/sounds. All kindergarten math skills have been achieved.⁵¹

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.⁵²
28. Student's April 13, 2020, IEP contained Identical Supplementary aids and services as listed above in Student's 2019-2020 IEP.⁵³

⁵⁰ Id., at pg. 14.

⁵¹ Id., at pg. 15.

⁵² Id.

⁵³ ADE H-21-34, Parents' Exhibits, pgs., 16-17.

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.⁵⁴
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.⁵⁵
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

⁵⁴ Id., pgs. 19-21.

⁵⁵ ADE H-21-34, Parents' Exhibits, pg. 22.

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.⁵⁶

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.⁵⁷
33. On September 3, 2020, a notice of conference was sent to Parents stating that a meeting will be held on September 3, 2020, to review/revise IEP.⁵⁸
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.⁵⁹
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.⁶⁰
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

⁵⁶ Id., at 25.

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

⁵⁸ Id., at 80.

⁵⁹ Id., at 15, 81,

⁶⁰ ADE H-22-05 Parents' Exhibits, pg. 35.

services. Explanation of action states that Student met both short term objectives for his 2020-2021 school year. Therapist observed student participated 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 ability to maintain and carryover the goals he has met in therapy to the general education classroom.⁶¹

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.⁶² Student's 2021-2022 IEP contained a statement of Students present levels of academic achievement and functional performance.⁶³ The IEP discusses student's Autism diagnosis and how it effects his educational performance, as well as his behavior. The IEP also discusses 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

⁶¹ Id., pg. 36.

⁶² ADE H-22-05, Parent's Exhibits P. 1.

⁶³ Id., at 2.

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.⁶⁴ 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.⁶⁵ Finally the IEP included a schedule of services that included thirty minutes of indirect services in speech therapy and occupational therapy.⁶⁶

38. The Kidsouce speech evaluation conducted on April 15, 2021, regarding Student, notes Student's diagnosis includes Autistic Disorder and developmental disorder of speech and language, unspecified.⁶⁷ 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-II⁶⁸ and CASL⁶⁹. His articulation skills were found to be severely delayed with standard scores of 71 and 59 on the CAAP-2⁷⁰ and GFTA-3⁷¹. 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

⁶⁴ Id.

⁶⁵ Id., at 6-7.

⁶⁶ Id., at 8.

⁶⁷ Id., at 40-50.

⁶⁸ Oral and Written Language Scales-Second Edition (OWLS-II)

⁶⁹ Comprehensive Assessment of Spoken Language (CASL)

⁷⁰ Clinical Assessment of Articulation and phonology-Second Edition (CAAP-2)

⁷¹ Goldman-Fristoe Test of Articulation-Third Edition (GFTA-3)

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 April 12, 2021, regarding Student indicated that Student demonstrates delay in sensory processing, motor coordination as well as poor attention skills.⁷² Based on the BOT-2⁷³, Student's score indicates a delay in manual coordination skills as evidenced by a z-score of -2.0. His scores on the BRIEF⁷⁴ 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.⁷⁵
40. On November 16, 2021, a Notice of Conference was sent to the Parents stating that an IEP meeting would be held on November 30, 2021. The purpose of the meeting was to Conduct an existing data review (EDR), review/revise the IEP, and to discuss options for providing compensatory services ordered from due process number one.⁷⁶
41. Parent was unable to attend on November 16, 2021 and requested the IEP meeting be changed to December 8, 2021.
42. On December 8, 2021, an IEP meeting was held. The IEP team agreed that Student would continue with his Stay Put IEP for the duration of the ninety (90) day appeal process except for updated OT and Speech goals that the committee (including the

⁷² ADE H-22-05, Parent's Exhibit's pgs. 63-71.

⁷³ Bruininks-Oseretsky Test of Motor Proficiency-Second Edition (BOT-2)

⁷⁴ Behavior Rating Inventory of Executive Function (BRIEF)

⁷⁵ ADE H-22-05 Parents' Exhibits, pgs. 290-298.

⁷⁶ Parent's Exhibit's pg. 31

parents) agreed needed to be updated. Options for compensatory services awarded by this hearing officer in the first due process case (H-21-34) was discussed but not agreed upon. Options included Occupational and Speech therapy services during school pushing in to the regular classroom, after school services provided by the district, summer services provided by the district, or clinical services funded by the district up to the amount of minutes awarded to the student. Parents were to think about these options and let the district know which would work best. The committee also discussed obtaining consent for school-based re-evaluation but the parents and district agreed to reconsider this school based evaluation at a later date.

The Committee considered accepting the Kidsource Speech evaluation completed on April 15, 2021, and the Kidsource Occupational therapy evaluation completed on April 12, 2021, provided by the Parents. The District agreed that Student's clinical evaluations are valid and represent his clinical needs, and agree that Student has deficit areas as indicated at the time those evaluations were completed. However, the District did not accept those evaluations as indicators of Student's school-based needs and did not accept the recommended service frequency and duration as necessary to access and benefit Student in his educational programming. The District felt it would be more appropriate to obtain a school-based evaluation that would contain both standardized assessments and classroom based assessments to gauge the educational needs related to any possible deficit areas indicated on the standardized assessments.⁷⁷

43. On February 16, 2022, a notice of conference was sent to Parents, stating that an annual review would be held February 28, 2022. The purpose of the meeting was to conduct an

⁷⁷ Parents' Exhibits, pg. 36

existing data review, determine initial or continued eligibility for special education and related services, review/revise the IEP, and consider extended school year services.⁷⁸

44. On February 28, 2022, the IEP team met and developed Students 2022-2023 IEP. The IEP was to begin on February 28, 2022 and run to February 27, 2023. The Committee discussed the provision of continued compensatory Occupational therapy and Speech therapy services. The committee agreed that Student's special education services would be indirect. Extended school year services were discussed, and parent declined the option to receive services during the summer. Student will continue to take the state assessment with accommodations. The February 28, 2022, IEP included Student's present level of academic achievement and functional performance. It stated that Student "has made great progress at Ringgold. He enjoys and does well working in a group setting. He has made many friends and easily initiates conversation with his peers now. He has gotten better with social turn taking skills as well. He follows rules and is easily redirected if off-task. He is not able to transition to and from the classroom without support"⁷⁹ Student still carries a number 9 plush with him throughout the day. However, he no longer engages in conversations with the plush but instead simply transitions with it and sets it beside him. Student still swings a lot on the playground, but also engages with his peers. Student is starting to self-monitor when it is appropriate to speak out during classroom discussions, and in conversations. Student is benefiting socially, academically, and emotionally in the general education classroom. Student benefits from cueing to focus and stay on task. He sometimes confuses if a person is talking only to him or to the entire group so the teacher will call his name prior to asking him a question. Student

⁷⁸ Id., at pg. 38.

⁷⁹ Parents' Exhibits Pg. 43.

thrives on schedules and routines, so he has a daily/weekly schedule in the classroom. When his schedule is disrupted, or changes Student sometimes becomes overwhelmed and will cry.

Student met three of three speech goals. Regarding articulation, student produced /l/ and blends in conversation 99% of the time. Regarding language, Student participated in collaborating conversations with diverse partners about first grade topics 94% of the time. Student is following 1-2 step directions 100% of the time and using present progressive verbs in sentences 95%. Student is answering WH?'s 96% of the time and using regular past tense verbs 86% of the time. Further Student increased social skills by demonstrating appropriate initiation of social interaction with peers in various settings 95%. Speech therapist recommended Student spend more time in general education classroom and that Speech therapy be indirect and 30 minutes per month.⁸⁰ However, Student will continue to receive compensatory speech services 360 minutes per month for the remaining 1,405 minutes he is owed under hearing H-21-34.

Student met two of two occupational therapy short term objectives. Student can demonstrate the ability to tie his shoes using a modified shoe tying technique for OT two out of two times. Goal met and discontinued. Student can appropriately complete steps of walking into his classroom/putting up his backpack and other belongings independently using accommodation/modifications such as visual schedule or visual cards. This goal was met and discontinued. Occupational Therapist recommends that occupational therapy be indirect for thirty (30) minutes per month. However, Student will continue to receive compensatory occupational therapy services for thirty (30)

⁸⁰ Parents' exhibits, pg. 43.

minutes, two times per week for the remaining 1,315 minutes he is owed under hearing H-21-34.⁸¹

The IEP included four speech and language therapy goals and one Occupational therapy goal. Three of the speech and language therapy goals were to compensatory services and one was indirect services.⁸² There is no mention of the evaluations that were discussed in the December 8, 2021, meeting in the notice of action or in the IEP that was developed on February 28, 2022.⁸³

45. On February 28, 2022, following the IEP meeting the Parents sent an email to the District expressing their dissatisfaction with the IEP developed at the meeting. Specifically, the email stated that all the evaluations show Student has significant deficits and they don't understand why the District would not consider the Kidsource evaluations for determining services. Additionally, the Parents disagreed with Speech and Occupational therapy services being indirect.⁸⁴

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*,

⁸¹ Id., at pgs. 43-44

⁸² Id., at pgs. 48-53.

⁸³ Id., at pgs. 40-58.

⁸⁴ District's Exhibits, pgs. 111-113.

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.

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.*

Further the 8th Circuit held in *K.E. 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, and will move to Petitioner’s alleged substantive IDEA violations.⁸⁵

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 District denied Student a FAPE from December 6, 2021, through March 17, 2022, by failing to include direct speech therapy and occupational therapy services?

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

⁸⁵ The District states in its post hearing brief that the Parents allege that it was inappropriate to provide compensatory services during the school day, and that they were denied meaningful participation in the decision of when to provide compensatory services. Although these statements are contained in the facts section of Parents Due Process Hearing request, they are not raised in the complaint as issues, there was little if any evidence presented to address these statements and Parents do not discuss these statements in their post hearing brief. As such, this hearing officer does not find these to be issues raised for decision, but merely factual statements contained in the Parents’ Due Process Hearing request.

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 denied Student FAPE from December 6, 2021 through March 17, 2022 because they failed to include Direct Speech Therapy and Occupational therapy services.

Whether the District denied Student FAPE from December 6, 2021 through March 17, 2022?

In H-22-05, Parents’ second due process hearing request, this hearing officer ruled that Students 2021-2022 IEP was appropriate. This Hearing Officer was unable to include or consider in her decision the Kidsource speech therapy evaluation conducted on April 15, 2021, and the Kidsource occupational therapy evaluation conducted on April 12, 2021, because these evaluations were not available to the IEP team when they developed Student’s 2021-2022 IEP. However, the present case includes the Kidsource speech therapy evaluation conducted on April 15, 2021, and the Kidsource occupational therapy evaluation conducted on April 12, 2021. Both

of these evaluations were available to the IEP team during the December 8, 2021, IEP team meeting. In fact the notice of action states that

“the committee considered accepting the outside evaluations provided by the parent during the due process hearing, but the district’s position on those clinical evaluations is as follows: The district agrees that XXXXX’s clinical evaluations are valid and represent his clinical needs, and agree that XXXXX has deficit areas as indicated at the time those evaluations were completed. However, the district does not accept those evaluations as indicators of XXXXX’s school-based needs and does not accept the recommended service frequency and duration as necessary to access and benefit in his educational programming. The district feels it would be more appropriate to obtain a school-based evaluation that will contain both standardized assessments and classroom-based assessments to gauge the educational needs related to any possible deficit areas indicated on the standardized assessments. Parents and district agreed to reconsider this school based evaluation at a later date.”⁸⁶

The District never conducted a school based speech evaluation on Student in this case. Instead, at an IEP meeting on April 9, 2021, to justify changing both Occupational Therapy services and Speech therapy services to thirty (30) minutes per month of indirect services, the OT therapist observed student participate in the classroom appropriately. Student’s handwriting was legible, and Student was able to use the hallway and bathroom appropriately. The Speech Therapist stated that student had met 3/3 goals on his IEP, including articulation, language, and social skills. That student was carrying these skills over outside of therapy, and the classroom teacher had no concerns with Student accessing and participating in the classroom.

⁸⁶ Parents’ exhibits, pg. 36.

The Kidsource speech and language evaluations conducted on April 15, 2021⁸⁷, performed the following tests: Oral written language scales (OWLS-II)⁸⁸ The OWLS-II is an assessment of receptive and expressive language for children and young adults aged 3-21. It evaluates language processes on four separate scales: Listening Comprehension, Oral Expression, Reading Comprehension, and Written Expression. Each of these scales assesses four linguistic structures: Lexical/Semantic, syntactic, pragmatic, and supralinguistic. Scales yield standard scores where 100 is the mean with a standard deviation of 15. Student received:

SCALE SCORES

	Listening Comprehension	Oral Expression
Raw Score	68	35
Standard Score	89	57
Percentile Rank	23	1
Test Age Equivalent	6 years 7 months	5 years 6 months
Description	Mild Delay	Moderate Delay

COMPOSITE SCORES

	Oral Language Composite
Standard Score	76
Percentile Rank	5
Description	Moderate delay

⁸⁷ Was conducting on April 15, 2021, and was not available to the IEP team on April 9, 2021

⁸⁸ The OWLS-II is an assessment of receptive and expressive language for children and young adults aged 3-21. It evaluates language processes on four separate scales: Listening Comprehension, Oral Expression, Reading Comprehension, and Written Expression. Each of these scales assesses four linguistic structures: Lexical/Semantic, syntactic, pragmatic, and supralinguistic. Scales yield standard scores where 100 is the mean with a standard deviation of 15.

Student was also given the Goldman-Fristoe Test of Articulation-Third edition (GFTA-3). The GFTA-3 is an articulation assessment of the consonant and consonant cluster sounds for Individuals aged 2-21. It provides information about an individuals speech sound abilities across two tests, Sounds-in words and Sounds-in sentences. The Sounds in words test evaluates an individual's articulation skill of single words during spontaneous production when labeling pictures. The Sounds in Sentences test, for ages 4-21, is used to evaluate an individual's articulation of connected speech by imitating sentences of a story. These tests have a mean score of 100 with a standard deviation of 15, therefore a score of 85-115 is considered within the average range. Student received:

Scores Summary

	Total Raw Score	Standard Score	Percentile Rank	Test Age Equivalent	Comments
Sounds-in- Words	20	59	.3	4 years	severe

Student was also given the Clinical Assessment of articulation and phonology-second edition (CAAP-2). The CAAP-2 is designed to assess English articulation and phonology in preschool and school age children aged 2-11. This assessment includes an articulation inventory and two phonological process checklists. The articulation Inventory examines various consonants and clusters at the word level, and the production of sounds in sentences (for children 5 years and

⁸⁹ Parents' Exhibits, pg. 95.

⁹⁰ Parents' Exhibits, pg. 96

older). The phonological process checklists assess the occurrence of ten deviation of 15 and an average range of 88-115. Student Scored:

CONSONANT SUMMARY

	Initial	Final
L		omitted
R	W	
“ng”		n

ARTICULATION INVENTORY

	Consonant Inventor
Score	9
Standard score	71
Percentile rank	4
Age Equivalent	5 years

Student had a standard score of 71 which indicates that his articulation skills are moderately delayed.⁹¹

Student also completed the Test of Problem Solving-Third Edition Elementary (TOPS-3 elementary). TOPS-3 Elementary focuses on language-based thinking, reasoning and problem-solving abilities in individuals aged 6-12. The test questions focus on a broad range of skills, including, clarifying, analyzing, generating solutions, evaluating, and affective thinking. The

⁹¹ Id., at 97.

TOPS-3 Elementary is composed of 18 situations that examine six thinking tasks: Making inferences, Sequencing, Negative Questions, Problem Solving, Predicting and Determining Causes. Student had a standard score of 66 which indicates that he demonstrates poor reasoning and pragmatic skills.⁹²

Based on the complete evaluation, the evaluator found:

1. Student's receptive language was found to be within normal limits.
2. Student's expressive language was found to be moderate to severely delayed.
3. Student's articulation skills were found to be severely delayed for his age and gender.
4. Student's pragmatic skills and executive functioning skills were found to be moderate to severely delayed.
5. Student's hearing was judged to be within normal limits.
6. Student's voice and fluency were informally judged to be within normal limits.
7. Student's Oral structure and function were found to be adequate for the production of speech and nutritional intake.

The Evaluator further opined:

“These kinds of delays 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, Speech and Language therapy services have been shown to be an effective service model to improve a child's social and functional communication abilities, especially in the areas of language articulation, and pragmatics. Participation in direct speech and language therapy will increase the client's functional communication skills and facilitate peer interactions across multiple settings. Children with a severe language delay are especially impacted socially therefore, helping XXXX to attain age-appropriate language, pragmatic, and articulation skills is vital to not only his functional communication skills, but also to his social skills and sense of self-esteem. Direct speech therapy services each week will help XXXXX meet the increased communication demands that are occurring both socially and personally. It is believed that without direct language therapy services, he will not be able to attain appropriate communication skills to participate fully with

⁹² Id., at 98.

his age-matched peers in social settings. Without direct and consistent speech language therapy services to address his delays, Xxxxx functional communication skills will not be commensurate with his age-matched peers.”⁹³

The Kidsource Occupational Therapy evaluation conducted April 12, 2021, regarding Student indicated that Student demonstrates delay in sensory processing, motor coordination as well as poor attention skills.⁹⁴ Based on the BOT-2⁹⁵, Student’s score indicates a delay in manual coordination skills as evidenced by a z-score of -2.0. His scores on the BRIEF⁹⁶ 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.⁹⁷

It is important to note that this is the third due process hearing involving this Student. We have had multiple witnesses, hundreds of pages of exhibits, multiple evaluations, and there is remarkable consistency across the entire record on fundamental aspects of Student’s strengths, challenges, and needs. Although the District’s testimony throughout all three due process hearings that the student is able to participate fine in the classroom and the school environment not one evaluation, including the District’s occupational therapy evaluation supports this finding.

In addition to the aforementioned Kidsource Speech evaluation conducted on April 15, 2021, Speech therapy evaluations conducted on March 3, 2019, by pediatric plus, and reviewed and accepted by District on May 21, 2019, on January 27, 2020 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.

⁹³ Parents’ Exhibits, pg. 101

⁹⁴ ADE H-22-05, Parent’s Exhibit’s pgs. 63-71.

⁹⁵ Bruininks-Oseretsky Test of Motor Proficiency-Second Edition (BOT-2)

⁹⁶ Behavior Rating Inventory of Executive Function (BRIEF)

⁹⁷ ADE H-22-05 Parents’ Exhibits, pgs. 290-298.

To date the District has not conducted one speech evaluation on student. Further, the District declined to accept the Kidsource Speech evaluation conducted on April 15, 2021, and although the team agreed at the December 8, 2021, IEP meeting that they needed a school based evaluations, the team declined to initiate said evaluations at the December 8, 2021 IEP team meeting or the February 28, 2022 IEP meeting.

Additionally Occupational Therapy evaluations conducted March 29, 2019, by pediatrics plus and reviewed and accepted by the Benton Public Schools on May 5, 2019; Occupational Therapy evaluation completed by the Benton School District on March 13, 2020; and the Occupational Therapy evaluation, outlined above completed by Kidsource Therapy on April 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, planning and ideas, and total sensory processing skills.⁹⁸ According to the District Occupational therapy evaluation completed on March 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.⁹⁹

In the December 8, 2021, IEP meeting the team discussed the April 12, 2021, Kidsource Occupational therapy evaluation and the April 15, 2021, Kidsource Speech therapy evaluation. The team decided not to accept the recommendations contained in either of these evaluations. The team then discussed the need for school-based evaluations, but the team agreed to reconsider

⁹⁸ Parents’ Exhibits, pgs. 302, 304, 311, 312.

⁹⁹ H-21-34, Parents’ Exhibits pg. 308.

that need at a later date.¹⁰⁰ However, at the annual review held on February 28, 2022, where a new IEP was developed there is no mention of school-based evaluations in any documents from that meeting. According to testimony, the team agreed at the February 28, 2022, meeting to not evaluate until the fall of 2022. The District in its post hearing brief makes note that Parent (mother) testified that she agreed to wait until the fall. Mom testified that at the December 8, 2021, meeting, the team agreed to evaluate in the Spring of 2022. And at the February 28, 2022, meeting, the District said they were going to do the evaluations in the fall of 2022.¹⁰¹ Mom further testified that she did not agree that Student just needed indirect services, and that she questioned that.¹⁰² And although there was testimony from the District personnel that they want a school based evaluation, nothing was initiated until the Parents filed for this Due Process Hearing.

The District also argues in its post hearing brief and district witnesses testified during all three hearings that Student has a clinical need for Speech therapy services and occupational therapy services but does not have an educational need for direct therapy services because Student can access his education. Ms. Bass testified that the District does not determine which services to provide solely on clinical standardized tests. Ms. Bass further opined that the District also uses classroom observations, check-ins with classroom teachers, curriculum-based assessments, participation, etc., to determine which services to provide a student.¹⁰³ This Hearing Officer acknowledges that the Arkansas Department of Education has provided guidance to school districts on the difference between Educational Model and Clinical/Medical Model in deciding the appropriateness and extent of related services such as occupational therapy and

¹⁰⁰ Parents' exhibits, pg. 36.

¹⁰¹ Transcript Vol. II, pg. 153

¹⁰² Id., pg. 154.

¹⁰³ Transcript. Vol. 1, pgs. 196, 203, 215, 242.

speech therapy. However, in this case every evaluation the District has, including its own occupational therapy evaluation, shows Student has severe deficits and has a need for both direct speech therapy and direct occupational therapy. Additionally, these evaluations note that Student's deficits affect him across all environments, including school.

Ms. Coleman, Student's previous speech therapist at Kidsource and the evaluator during the April 15, 2021 Kidsource speech evaluation, testified that she had experience in both a clinical setting and school settings.¹⁰⁴ Ms. Coleman further testified that without direct instruction, she didn't see Student self-correcting any of his articulation errors. Further she said that "as kiddos get older, it gets harder to correct them".¹⁰⁵ Ms. Coleman explained that Student has difficulty formulating sentences, using grammar, using appropriate pronouns, repeating sentences, answering "why" and "how" questions, combining two sentences and recognizing errors in sentences.¹⁰⁶ Coleman went further stating that Student has trouble initiating and holding conversations with people, maintaining a topic, respecting others' personal space, making social inferences, understanding cause and effect, transitioning, organizing his work, initiating and staying on task, controlling impulses, and regulating emotions.¹⁰⁷ This Hearing Officer found Ms. Coleman to be credible and knowledgeable about Student's abilities and needs. However, the one thing that was lacking in Ms. Coleman's evaluation was a school assessment. Ms. Coleman has not seen or observed Student in his school setting.

Based on the evidence presented I find Parents have met their burden by a preponderance of the evidence that student is eligible for direct speech and occupational therapy services. Parents have raised sufficient evidence that Student at a minimum has significant

¹⁰⁴ H-21-35 Transcript Vol. II, pgs. 229-231.

¹⁰⁵ *Id.*, at 235.

¹⁰⁶ *Id.* at 236-237.

¹⁰⁷ *Id.* at 237-239.

deficits in language, articulation, pragmatic skills, and executive functioning skills. Student has moderate delays in visual motor coordination, fine motor precision and fine manual control. The evidence supports that these deficits interfere with Students education and that Student qualifies for Direct Occupational therapy services and Speech therapy Services to address these deficits.¹⁰⁸ However, Parents have not given this Hearing Officer sufficient evidence as to the amount and duration of Direct occupational therapy and Direct Speech Therapy Services Student is entitled. Therefore, no compensatory services are awarded.

Conclusion and Order

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 December 8, 2021, and February 28, 2022,

1. The District is ordered to conduct a complete occupational therapy evaluation, to include an assessment of Student in his school environment, and how his deficits interfere with his education. This evaluation is to be conducted by an independent evaluator agreeable to the parents and completed within 30 days from the start of the 2022-2023 school year.
2. The District is ordered to conduct a complete speech therapy evaluation, to include an assessment of Student in his school environment, and how his deficits interfere with his education. This evaluation is to be conducted by an independent evaluator

¹⁰⁸ Direct therapy services are including in Student's 2021-2022 IEP. However, those services are compensatory services, and will only be provided until the compensatory services minutes awarded in H-21-34 have been completed.

agreeable to the parents and completed within 30 days from the start of the 2022-2023 school year.

3. The District is to hold an IEP meeting within 15 days of the completion of both speech and occupational therapy evaluations to discuss the evaluations and amend the IEP as appropriate.

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

6/30/2022

DATE