

ARKANSAS DEPARTMENT OF EDUCATION

Special Education Unit



PETITIONER

VS.

Case No. H-23-02

**GREENWOOD SCHOOL
DISTRICT**

RESPONDENT

HEARING OFFICERS FINAL DECISION AND ORDER

ISSUES PRESENTED:

Whether the Greenwood School District (hereinafter “District” or “Respondent”) denied [REDACTED] (hereinafter “Student”) a free, appropriate, public education (hereinafter “FAPE”), between July 3, 2021, and July 5, 2022, in violation of certain procedural and substantive requirements of the Individuals with Disabilities Education Act of 2004, 20 U.S.C. 1400-1485, as amended (hereinafter referred to as “IDEA”), by: (1) failing to provide Student a free appropriate public education during the 2021-2022 school year, and (2) whether the District’s proposed IEP for 2022-2023 school year provides the student with a free appropriate public education in the least restrictive environment.

Procedural History:

On July 5, 2022, the Arkansas Department of Education (hereinafter referred to as the “Department” or “ADE”) received a request to initiate a due process hearing from [REDACTED] (“Parent” or “Petitioner”, as the Parent of [REDACTED] (hereinafter referred to as “Student”), against the Greenwood School District (hereinafter referred to as “District” or “Respondent”). Parent requested the hearing because she 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

This is the second due process complaint filed by Parent. The first due process request filed by Parent was Arkansas Department of Education Due Process Hearing H-22-03. H-22-03 was filed on July 2, 2021. On August 20, 2021, this Hearing Officer received an email from

¹ See hearing officer File-Petitioner Complaint.

Theresa Caldwell, parent's attorney, with the subject line Settlement Reached. In the body of the email Ms. Caldwell, stated that she wanted to let everyone know that settlement had been reached and asked that the hearing scheduled for August 23-25, 2021, be cancelled. This hearing officer then sent an email out to the parties cancelling the Due Process Hearing scheduled for August 23-25, 2021, based on Ms. Caldwell's earlier email stating the case had been settled. After not hearing from any of the parties, nor receiving a motion to dismiss, this Hearing Officer sent an email to the parties on September 14, 2021, stating that if I did not receive a motion to dismiss by September 17, 2021, I would issue an order dismissing the case with prejudice. I received a response from the District's attorney stating they would take care of it. I did not receive a response from parent's attorney. At no point did either party notify this hearing officer that the case had not settled, or that the case needed to be rescheduled. On September 20, 2021, after not receiving any communication for thirty days and having been told the case was settled, I issued my order dismissing the case with prejudice. Neither party contacted this hearing officer after my order was issued. This Due Process case H-23-02 was not filed until almost a year after my dismissal of parent's first due process hearing H-22-03. The time to challenge this hearing officer's order dismissing H-22-03 with prejudice has long passed. However, there are no issues raised in H-23-02 affected by H-22-03's dismissal with prejudice.

At the time that Parent filed this request for a due process hearing, Student was a 6-year-old boy who had just finished kindergarten and would be starting first grade at Westwood elementary School within the Greenwood School District for the 2022-2023 school year.² Student was a student with a disability under 20 U.S.C. §1401(3). Student was diagnosed with a rare genetic condition involving the [REDACTED] gene associated with muscle weakness, language

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

delay, and intellectual problems. Additionally, Student has a diagnosis of Autism with Global Delay and profound speech language delay.³

In response to the Parent's request for a Due Process hearing, the Department assigned the case to an impartial hearing officer. Thereafter, Prehearing conference was scheduled for August 22, 2022 and the Due Process hearing was scheduled for August 24-26, 2022.⁴ On August 7, 2022, counsel for Greenwood School District filed a motion for a continuance stating that she and counsel for Petitioner had another Due Process Hearing scheduled for the week of August 22-26, 2022. On August 10, 2022, this Hearing Officer issued an order granting the District's motion for a continuance. The prehearing was rescheduled for September 19, 2022 and the Due Process Hearing was rescheduled for September 21-23, 2022.

The Prehearing conference was conducted via zoom on September 19, 2022.⁵ Counsel for both the Parent 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 21, 2022. Testimony was heard in this case on September 21, 22, and 23, 2022, November 3, 4, 2022, January 4, 5, 6, 2023, and January 13, 2023.⁷

Present for the Hearing were Theresa Caldwell, attorney for Petitioner, Sharon Streett, attorney for the District, Bridgette Work, Attorney for the District, John Streett, law clerk with

³ See Hearing officer file-Petitioner Complaint, pgs. 8-9.

⁴ See Hearing Officer file, Scheduling order.

⁵ Transcript, prehearing conference.

⁶ Id.

⁷ It is important to note that there were several delays in this case because of document issues, health issues etc. Several hearing days did not begin on time or ended early because of these issues. There were long breaks to address said issues throughout the hearing days.

Street Law Firm, [REDACTED] Parent, Audra Alumbaugh, Advocate, Demaris Barnett, special Education Director and Deann Denison, District Representative.

The following witnesses testified in this matter: DeMaris Barnett, Laura Anderson, Kallie Cooper, John Ciesla, [REDACTED] Sheila K. Barnes, Jasmine Wright, Deann Denison.⁸

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.⁹

Findings of Fact

1. Student [REDACTED] in the Greenwood School District. Student is a first-grade student at Westwood Elementary School within the Greenwood School District.¹⁰
2. In October of 2017, he was diagnosed with a [REDACTED] involving the [REDACTED] gene associated with muscle weakness, language delay and intellectual problems.¹¹
3. In May 2019 Student was three years and two months old. Mary Scott, Ph.D. with Schmieding Developmental Center completed a neuropsychological evaluation. This evaluation, found Student to be Severely Delayed in cognitive development; nonverbal and using hand leading and occasional use of Picture Exchange Communication System (PECS) with prompting as communication strategies; and delayed adaptive behavior

⁸ Transcripts, Vol. I-IX.

⁹ See Hearing Officer File-post hearing briefs.

¹⁰ See Hearing Officer File-Parent's Due Process Hearing Request.

¹¹ District Exhibits, pg. 276.

skills. The diagnoses made following this evaluation included Autism, Global Developmental Delay Profound Speech-Language Delay requiring very substantial support Level 3 as well as Global Developmental Delay. The examiner indicated that the evaluation was constantly modified, and behavioral intervention and therapeutic engagement was necessary to complete the tasks. The examiner indicated that Student's behavior negatively impacted his performance and thus the evaluation was thought to be an underestimation of Student's abilities. (Dist. Ex. 309). During this evaluation, Student was chewing and mouthing objects including a pacifier. Dr. James Cheshier, MD with Schmieding Developmental Center agreed with the findings of the evaluation of Autism Spectrum Disorder; Developmental Coordination; Mixed Receptive and Expressive Language Delay; and Global Developmental Delay.¹²

4. August 11, 2020, Amanda Chilton, Physical therapist with Learn.Play.Grow. Children's Therapy Services, found Student to have a functional range of motion but increased tightness and muscle tone bilaterally. Chilton noted that toe walking had decreased since beginning Botox injections [no date or provider specified]; but █████ continued to curl toes when walking. Student was found to have a significant delay in all gross motor skills. Parent and Chilton agreed to continue hippotherapy in addition to outpatient therapy to improve ambulation skills.¹³
5. December 1, 2020, Corkie Howard, MS, CCC-SLP, with Learn. Play. Grow. Children's Therapy Services, identified a profound expressive and receptive language delay. He was unable to complete formal evaluations of sound production but was observed to produce

¹² District Exhibits, pgs. 275-293.

¹³ Id., pg. 265-269

a small number of sounds /b, d, g, p, n, h/. According to the evaluation, Student did not possess many words and would be observed further as his language developed.¹⁴

6. December 3, 2020, Jennifer Marley, OTR/L with Learn. Play.Grow. Children's Therapy Services found Student had a significant delay in Activities of Daily Living (ADL) in areas of eating, grooming, bathing, dressing, and toileting. Additionally, he presented with difficulty processing sensory information.¹⁵
7. February 1, 2021, and February 8, 2021, Parent was provided two Notices of Conference to consider a referral for special education and related services.¹⁶ Parent requested a conference be rescheduled to March 8, 2021. At the referral conference the parent provided the neuropsychological evaluation from May 2019 as a summary of Student's abilities. The referral indicated that Student's delays in academics, development and behavior substantially impaired his daily activities and academic learning.¹⁷ The referral conference decision was to conduct evaluations for IQ, achievement, autism observations, classroom based assessments, adaptive behavior rating scale, social history, hearing and vision, PT, OT, and speech evaluations.¹⁸ The option to not evaluate was considered but the committee determined that updated information was needed.¹⁹ Parent agreed to the immediate implementation of the committee decision and provided consent to complete these evaluations.²⁰ During the referral conference, Parent requested that [REDACTED] be provided ABA therapy at school and that Dr. Barnes' RBT and BCBA be

¹⁴ District Exhibits, pgs. 270-273.

¹⁵ Id., pgs. 261-264.

¹⁶ Id., pg. 507.

¹⁷ Parent's Exhibits, pg. 124, District Exhibits, pg. 8

¹⁸ District's Exhibits, pg. 10.

¹⁹ Id., pg. 11.

²⁰ Id., pgs. 10-11.

allowed to come to school with [REDACTED] so he could be placed in the general education classroom. The District's Special Education Director, Demaris Barnett, told Parent this could be discussed at a later meeting, but she needed to first talk to the Superintendent, John Ciesla.²¹

8. On March 9, 2021, Parent emailed the Superintendent expressing her concern about the lack of ABA therapy and a BCBA at school. She asked that Dr. Barnes' RBT and BCBA be allowed to attend school with [REDACTED] so [REDACTED] could be placed in the general education because of the peer modeling and socialization benefits from exposure to nondisabled peers.²²
9. March 11, 2021, Parent provided Student's most recent vision evaluation completed on 10/19/2020 by Brita S. Rook, MD with ACH Eye Clinic which indicated diagnoses of alternating esotropia; hypermetropia of both eyes; and developmental delay. Student is prescribed glasses for daily wear.²³
10. April 7, 2021, Jodi Kurstin, PT, DPT with Pediatric Therapy Connections completed the physical therapy evaluation for the Greenwood School District.²⁴ Evaluation determined that Student had severe gross motor deficits with limited range of motion; Ankle Dorsiflexion; and Knee Extension.²⁵ Student also presented with deficits that impact the efficiency of his movement and overall independence.²⁶
11. April 9, 2021, Sue Featherston, School Psychology Specialist for the Greenwood School District completed the psychoeducational evaluation including ratings of adaptive

²¹ Parent's Exhibits, pg. 139.

²² Id., at pg. 342.

²³ District Exhibits, pgs. 294-300.

²⁴ Id., pgs. 301-305.

²⁵ Id., pg. 303.

²⁶ Id.

behavior and social history.²⁷ A behavioral observation was pulled from the May 2019 Schmieding evaluation which indicated that the evaluation was constantly modified and behavioral intervention and therapeutic engagement was necessary to complete the tasks. The examiner indicated that Student's behavior negatively impacted his performance and thus the evaluation was thought to be an underestimation of Student's abilities.²⁸ A nonverbal assessment was used to assess Student's intellectual abilities because of the Student's weak fine motor skills, attention difficulties, and frequent distractibility. Student obtained a Nonverbal IQ of 47 which the examiner felt was not a valid assessment due to his inattention to tasks.²⁹ Two standardized assessments of academics were attempted but Student was not able to complete any of the tasks.³⁰ The examiner used observation, parent reports and informal assessment measures which indicated limited academic skills. He was observed to respond to his name being called and noises within his immediate environment but could not follow multistep directions.³¹ Student was in beginning stages of using his AAC device to request snacks primarily.³² Student continued to display significant delays in ADLs as per parent report.³³ Student displayed Severe Symptoms of an Autism Spectrum Disorder.³⁴ The conclusion of the evaluation gave recommendations that the committee consider the categories of Multiple Disabilities and Autism.³⁵

²⁷ District Exhibits, pgs. 306-322.

²⁸ Id., at pg. 309.

²⁹ Id., at pg. 309.

³⁰ Id., at pg. 310.

³¹ Id.

³² Id., at pg. 311.

³³ Id., at pg. 312.

³⁴ Id., at pg. 313.

³⁵ District Exhibits, pgs. 302-322.

12. April 16, 2021, Deann Denison, M.S., CCC-SLP for the Greenwood School District completed a speech-language evaluation.³⁶ Hearing was screened informally through observation and found to be functional for the purposes of the evaluations.³⁷ Speech evaluation indicates delayed expressive and receptive language abilities which are directly impacted by a limited phonetic inventory. Additionally, Student presents with pragmatic skills which are below average.³⁸
13. April 16, 2021, Chelsea Percy, OTR/L with A Plus Therapist, Inc. completed the occupational therapy evaluation for the Greenwood School District.³⁹ The evaluation revealed strengths as being sweet; motivated with rewards or preferred toy; redirected well; and supportive family.⁴⁰ Limitations identified include grasping; visual motor integration; visual perception; motor coordination; self-care; upper extremity and core strength; and sensory processing all of which are severely delayed.⁴¹
14. May 4, 2021 and May 11, 2021, Parent was given notice of conference scheduled for May 18, 2021 for committee review of the evaluations completed by the district and assist the committee in making programming and placement decisions for Student.⁴²
15. Parent requested a change of conference date to June 7, 2021.⁴³
16. On June 7, 2021, an evaluation conference was held. After initial introductions of all committee members, the physical therapist reviewed the evaluation with the committee.⁴⁴

The recommendation made to the committee was for Student to receive 90 minutes

³⁶ Id., at pgs. 331-337.

³⁷ Id., at pg. 337.

³⁸ Id.

³⁹ District Exhibits, pgs. 323-330.

⁴⁰ District Exhibits, pgs. 323-330.

⁴¹ Id., at pg. 329.

⁴² Id., at pgs. 12-18.

⁴³ Id., at pg. 14.

⁴⁴ Evaluation Recording June 21, 2021, minutes 2:00 – 8:23.

weekly of physical therapy at school because Student needs extra support with mobility and his age equivalency.⁴⁵ Goals recommended addressed both increasing strength of core muscles, more efficient and accurate movements as well as increasing flexibility.⁴⁶ Student's occupational therapy evaluation was reviewed with committee.⁴⁷ The recommendation made to the committee was for the Student to receive 90 minutes weekly occupational therapy at school.⁴⁸ Goals recommended address upper extremity and core strength, fine motor strength, and sensory integration.⁴⁹ Student's speech-language evaluation was reviewed with committee.⁵⁰ The recommendation made to the committee was for 120 minutes weekly of speech therapy at school.⁵¹ Goals for speech therapy would incorporate increasing functional vocabulary through the use of LAMP device or sign, using functional word approximations, following directions, making requests, improving self-regulation, taking turns in joint activities.⁵² Student's psychoeducational evaluation that was completed by Sue Featherston was reviewed with the committee by Carley Sykes school psychology specialist for the district.⁵³ Sykes points out that a large portion of the evaluation is from previous evaluations and via parent interviews.⁵⁴ Sykes reports that the evaluator did not feel that the evaluation was a valid measure of Student's abilities.⁵⁵ After completing a review of all the evaluations

⁴⁵ Evaluation Conference recording June 21, 2021. Minute 8:08.

⁴⁶ Id., at minutes 6:65-8:06.

⁴⁷ Id., at minutes 8:28-15:03.

⁴⁸ Id., at minute 13:43.

⁴⁹ Id., at minutes 8:28-15:03.

⁵⁰ Id., at minutes 15:04-22:39.

⁵¹ Id., at minute 22:35.

⁵² Id., at minutes 22:35-23:27.

⁵³ Id., at minutes 23:34-28:53.

⁵⁴ Id., at minutes 23:46 and 28:04.

⁵⁵ Id., at minute 24:23.

and recommendations from the evaluators, the committee first discussed the disability category for eligibility.⁵⁶

17. The committee, including the Parent, agreed that Student had multiple areas of deficit and that the most appropriate category for eligibility was Multiple Disabilities.⁵⁷
18. Committee discussed the provision of special education services with Mrs. Stenhouse presenting the option for some time in special education and general education.⁵⁸ Stenhouse explained that students who need to develop the soft-skills for a classroom (e.g., walking in a line with peers, sitting at a desk or table for group instruction, transitioning in the building with students of all ages) usually receive special education and general education for a few weeks.⁵⁹ Barnett shared that the goal is for a smooth transition to general education and to decrease time in special education as soon as possible.⁶⁰ The recommendation of Stenhouse was based upon the evaluations, observations reported during testing, and Stenhouse's years of experience and educational training in working with children - not his disability nor Student's measured intelligence. Mrs. Stenhouse acknowledged that was, "hard to . . . know what we should and shouldn't do without being able to see him in a classroom setting".⁶¹ The District made a recommendation of direct special education instruction to include 90 minutes of reading instruction, 60 minutes of written expression, and 90 minutes of math.⁶² A paraprofessional was suggested to help the Student navigate through the school. District

⁵⁶ Id., at minute 22:35.

⁵⁷ Id., at minute 30:13. Parent's Exhibits, pg. 142.

⁵⁸ Id., at minute 30:34.

⁵⁹ Evaluation Conference recording June 21, 2021, minute 30:34.

⁶⁰ Id., at minutes 31:21, 31:49.

⁶¹ Id., at 32:20.

⁶² Id., at minutes 30:43, 32:35-32:46.

asked if Student could attend the Summer School program at school in order to observe his behavior in the classroom setting with peers and working on a routine and have a more informed opinion.⁶³ Parent did not want to agree to summer school without first addressing the issue of the Registered Behavior Technician (RBT). Once Parent understood that the summer school was only special education and not a general education summer program, she did not want Student to participate.⁶⁴

19. Dr. Sheila Barnes a BCBA-D attended the June 7, 2021 evaluation conference with Parent. Dr. Barnes stated that Parent wanted the Student in the general education classroom with his nondisabled peers and that she didn't want special education services for academics. Parent reiterated her position several times throughout the evaluation conference. Additionally, mom stated that she wanted Student to be accompanied by a Registered Behavior Technician supervised by Dr. Barnes as part of his Applied Behavior Analysis (ABA) program.⁶⁵ Demaris Barnett, the District special education coordinator stated in the evaluation conference that the RBT was not going to come to school with Student and made it known that the RBT was not up for discussion because she had contacted other school districts and the state department and was told that ABA was not a related service and therefore the District wasn't require to provide it.⁶⁶
20. Parent explains that Autism is a disability, and ABA is a therapy for that disability. She said Student can receive physical therapy, occupational therapy and speech therapy for disabling conditions but cannot have a behavior therapist to address his Autism diagnosis.

⁶³ Id., at minute 32:55.

⁶⁴ Id., at minute 33:48.

⁶⁵ Id., at minutes 37:16, 52:28, 54:34, 100.02

⁶⁶ Id., at minutes 37:45, 39:44.

Parent reiterated that she wanted general education classroom with supplemental aids and services, with an RBT under the supervision of Dr. Barnes, paid for by Medicaid.⁶⁷

21. Parent also stated that she wanted general education instruction for Student and no special education instruction for academics.⁶⁸

22. There is extensive discussion about Parent providing a stroller for safety.⁶⁹

23. The District discussed a paraprofessional for Student and that the paraprofessional would be there to assist student around the campus, but would not be helping with academics.⁷⁰

The District discussed having Student in the general education classroom with pullouts to address deficits. Parent once again stated that she wanted Student to start school in the general education classroom without special education pullouts for academics.⁷¹

24. Parent states that her goal is for Student to start in the general education classroom with the RBT and to phase that out once Student is comfortable. Parent doesn't know how long that will take, but she wants to try the general education classroom first. District says they would like to work up to that and Parent reiterates that she wants to start there with supplemental aids and services.⁷²

25. The issue of compromise is discussed during the evaluation conference and the Parent offers for the District to try Student in the general classroom with an RBT and if they believed it wasn't successful they could come back to the table and discuss their

⁶⁷ Id., at minutes 37:55-39:44.

⁶⁸ Id., at minutes 41:03-41:15.

⁶⁹ Id., at minutes 47:14-48:10.

⁷⁰ Id., at minutes 49:51-51:00.

⁷¹ Id., at minute 54:10.

⁷² Id., at minutes 59:07-101:10.

concerns.⁷³ The District states that parent could take child out early from school daily to receive his ABA therapy and it will not be counted against Student.⁷⁴

26. The District explains that they haven't seen ABA be generalized in the educational setting and that Parent is asking them to let someone in who doesn't work for the school district.⁷⁵ Dr. Barnes explains that her program generalizes across settings. She explains that they program for generalization across people, settings and behaviors. The District then explains that they don't think ABA is beneficial because they don't see it generalized across settings.⁷⁶
27. Parent offers to start Student in general education class with support and services (no RBT) and if Student isn't successful return to the table to discuss concerns. The District then states that they believe Student should start in the special education classroom and then move out. Student will still receive some general education classes. District believes this is the best road to success for Student.⁷⁷
28. District then proposes reducing time in special education. Parent states that a compromise would be to start in general education with an RBT and meet back in a month and if the District felt the RBT wasn't helping take it away.⁷⁸
29. Parent states that she will agree to special education if the District will allow the RBT. If Student thrives better in special education class than general education Parent is willing to revisit it. The District once again said no to the RBT, and declined to compromise.⁷⁹

⁷³ Id., at minutes 102:15-103:05.

⁷⁴ Id., at minute 105:34.

⁷⁵ Id., at minutes 109:03-109:42.

⁷⁶ Id., at minutes 1:08.32-1:10.28.

⁷⁷ Id., at minute 1:13.52.

⁷⁸ Id., at minute 1:16.05.

⁷⁹ Id., at minute 1:20.15.

30. The evaluation conference ends with Parent stating that the District should draft a purposed IEP and provide it to Parent. After that the team could reconvene and discuss the proposed plan.⁸⁰ There was no discussion about what would happen if Parent refused for Student to be placed in special education during the evaluation conference. Nor was there discussion that Parent could accept some items in the IEP and decline other services contained in the IEP.

31. On June 10, 2021, a Notice of Action was sent to parent. The Notice stated:

“The committee met and reviewed all available evaluation data including parent reports and concerns. The committee determined that does require some time in special education in order to address his educational and behavior needs. The IEP committee determined that [REDACTED] qualifies for special education and related services including the following: physical therapy 90 minutes weekly (2X45 minutes), occupational therapy 90 minutes weekly (3X30 minutes), speech/language therapy 120 minutes weekly (4X30 minutes), special education Reading 45 minutes daily, special education math 45 minutes daily, and special education written expression 45 minutes daily. Behavior goals will be addressed across all settings. The committee determined that [REDACTED] needs adult 1:1 supervision for all the time that he is on campus for safety and for academic support. Special education staff members will be cross-trained in order to cover absences and breaks of staff members. He will have a dedicated paraprofessional for 6 hours a day with a paraprofessional to be with [REDACTED] when his dedicated paraprofessional is at lunch and on breaks.

The committee offered specialized transportation with additional adult supervision; however, [REDACTED] said she will bring him to school. [REDACTED] had a Nonverbal IQ of 47. He was not able to complete the Brigance or the WIAT-IV due to verbal language limitations. Mrs. Featherston observed that he did not point to any numbers, but pointed to some letters. He is able to let you know what he wants, like more mac and cheese, a specific toy to play with, etc.”⁸¹

Further, the Action contained, “The Greenwood School District and [REDACTED] could not come to an agreement on services for [REDACTED] Ms. [REDACTED] did not sign any of the special education paperwork (Evaluation/Programming Conference Decision Form, and Notice of Action) at this meeting. The IEP was in the process of being developed at this meeting and was not completed. A draft IEP was completed and the draft version will be sent to [REDACTED] email - per her request. An additional conference will be held after the draft document has been reviewed and the parent's feedback has been provided.”⁸²

⁸⁰ Id., at minutes 1:30.29-1:33.04.

⁸¹ District Exhibits, pg. 174.

⁸² Id., at 176.

32. On July 2, 2021 the Parent filed her first due process complaint claiming that the proposed IEP would not provide the student with a free appropriate public education because it did not include ABA therapy.⁸³
33. On July 8, 2021 a notice of conference was sent to the Parent for a Resolution conference.⁸⁴
34. July 9, 2021 Parent's counsel requested a change to the conference date to July 15 but needed to ensure that the Parent was available.⁸⁵
35. July 14, 2021, Parent's counsel was contacted regarding clarification of the issues in the complaint as they were different than those expressed during the conference.⁸⁶
36. July 22, 2021 Hearing officer reset hearing for August 4-6. District counsel requested a continuance for cause and the hearing was reset for August 23-25. July 23, 2021, District contacted Parent to offer LAMP training for Student's device on August 5 to which Parent initially indicated agreement.⁸⁷ However, Parent realized that her first due process hearing (H-22-03), had been set for August 4-6, 2021, therefore she stated she would have to wait and train later.⁸⁸
37. July 26, 2021 District offered to pay for the Parent's LAMP training on an alternate date or notification that she would be available on the August 5th date to which Parent responded she would be available.⁸⁹ August 3, 2021 District confirmed the Parent's registration for the LAMP training.⁹⁰

⁸³ Id., at pgs. 19-38.

⁸⁴ Id., at pgs. 49-51.

⁸⁵ Id., at pg. 352.

⁸⁶ Id., at pg. 50.

⁸⁷ Id., at pgs. 353-354.

⁸⁸ District Exhibits, pgs. 353-354.

⁸⁹ Id., at pg. 354.

⁹⁰ Id., at pg. 355.

38. On August 14, 2021, District counsel on behalf of the District made an Offer of Settlement designed around what Barnes proposed during the evaluation conference.⁹¹ Mrs. Streett, counsel for the District, provided the following as a settlement offer: Identification under the category of Multiple Disabilities; 90 day IEP as a diagnostic placement with Dr. Barnes's proposal that Student be in general education with a paraprofessional; Occupational therapy; Physical therapy; Speech therapy; and no other direct special education. A written agreement with a description of how school, BCBA, and RBT will plan collaboratively for the student's competing needs for ABA therapy and educational instruction, what information will be shared and how they will share information. The outside RBT from Barnes' clinic would be allowed into the school under the District's existing policy for outside providers including copies of insurance, clear background checks, confidentiality agreements, notification of absence of RBT, daily check-in with the front office and most important a written agreement. District offer included payment of reasonable attorney's fees with the settlement and that the District would be released of claims.⁹²
39. August 20, 2021, this Hearing Officer was notified by Mrs. Caldwell that a settlement had been reached and a motion to dismiss would be forthcoming to dismiss.⁹³
40. August 30, 2021, Barnett emailed Parent to determine if the date of September 17 was agreeable for a meeting to write an IEP for the Student. On the same date and ten days after Petitioner's attorney had notified IHO that a resolution had been reached,

⁹¹ Parent Exhibits, pg. 422, District Exhibits, pg. 52.

⁹² District Exhibits, pgs. 52-53.

⁹³ Id., pgs. 59-60.

Petitioner's attorney, directed the parent "Don't respond" to the request to set a date for the IEP meeting.⁹⁴

41. On September 3, 2021, the District sent a notice of conference to Parent attempting to set up a time for IEP meeting to establish consent for placement and to develop an IEP for Student.⁹⁵
42. On September 10, 2021, the District sent a second notice of conference to Parent attempting to set up a time for an IEP meeting to establish consent for placement and develop an IEP for Student.⁹⁶
43. Parent never responded to the District's request for an IEP meeting. There was no IEP developed (only a purposed IEP) and the Parent did not sign a Notice of Action providing consent for placement and programming at this time. The District did allow the BCBAs and RBTs to attend school with Student. The kindergarten classroom teacher provided additional space in the classroom to accommodate the Student's RBT to sit near him. The kindergarten teacher pulled the Student for extra intervention small group time to work on reading skills. The District allowed the Parent to check the student out of classes early without penalty in order for him to access his private occupational, physical, and speech therapies.⁹⁷ The District provided support and accommodations as appropriate to Student without the provision of any special education services. In addition to the RBT, a paraprofessional was assigned to work with Student on academics in the classroom, provide direction for transitions, and encourage social interaction during appropriate times. A licensed teacher was assigned to do Student's campus based general education

⁹⁴ Id., pg. 54.

⁹⁵ Id., pgs. 55-56.

⁹⁶ Id., at 57-58.

⁹⁷ Id., at 800.

intervention “What I Need” WIN Time, one on one with Student.⁹⁸ Assessments and assignments were modified by the classroom teacher, and the interventionist in both mode of presentation and accepted response to accommodate the use of the Student’s communication device. Materials from the classroom reading program, Foundations, were provided to the parent to inform any outside providers of order and method that the letters and sounds would be taught in the classroom. The materials used for intervention (WIN) time were copied and provided to the Parent as well, however, she returned them saying that they were not needed. When the teacher became concerned about Student’s rate of progress in the general education classroom without special education services, the kindergarten teacher discussed her concerns with the Parent during midterm conferences. The teacher requested to increase his individual intervention time to address his deficit areas. However, the Parent denied the teacher from increasing intervention supports in general education.

44. Progress during the What I Need intervention time (WIN Time) August 2021 – March 2022, was based on accuracy with the level of prompting. The levels of prompting used from highest level of prompting to lowest: 1) Full physical prompt; 2) partial physical prompt; 3) modeling; 4) gesture; 5) verbal prompt; 6) positional prompt; 7) independent.

School Intervention Data	Level of Prompting and Percent Correct			
Labeling of colors	100% Modeling	95% Gesture	38% Independent	90% Positional
Imitating Lines and Curves	100% Full Physical	100% Partial Physical	58% Gesture	
Receptive Id. Capital Letters	100% Partial Physical	97% Gesture	50% Independent	89% Positional
Receptive Id. Lowercase Letters	20% Independent	70% Positional		

⁹⁸ District’s Exhibits, 499-637.

Capital Letter Sounds	33% Independent	70% Positional		
Numbers	100% Partial Physical	26% Gesture	86% Positional	
10 Frame Numbers	72% Gesture	90% Positional		
Receptive Id. of Sight Words	50% Gesture	87% Positional		

45. In February of 2022, after a call with Suzy Wilson, assistant superintendent, who had spoken with Parent about having an IEP meeting, Mrs. Barnett, the LEA supervisor, sent Parent a Notice of Conference for an IEP meeting regarding Student.⁹⁹ Parent responded with an email requesting the IEP meeting be held on February 18, 2022, stating that they needed to discuss his IEP, phasing out the RBT, training the paraprofessional as well as the behavior specialist and teachers. Parent waived all timelines in favor of meeting quickly and stated that if they couldn't get these issues resolved she would need to file for a second due process hearing.¹⁰⁰
46. February 21, 2022, an IEP meeting was held, and Parent attended. Parent emphasized the importance of teaching ██████ to communicate using his LAMP device. The IEP team agreed to allow Dr. Barnes to provide staff training.¹⁰¹ The District, as it had done previously, brought a draft IEP to the meeting.¹⁰² The committee went through each page of the IEP getting the input of the parent on each page. Parent took out some of the goals and objectives that she felt were not needed at this time of the school year.¹⁰³ Parent stated she wanted to look at them again at the end of the school year. Parent did not think Student would benefit from any direct special education instruction. The committee

⁹⁹ Id., at pgs. 57, 360.

¹⁰⁰ Id., at pg. 361.

¹⁰¹ Parent Exhibits, pg. 148.

¹⁰² Id., at pgs. 138-167.

¹⁰³ Id., at pg. 68.

discussed Student working on his letters, sight words, speech goals, and numbers for his goals until the end of this school year.¹⁰⁴ The committee determined that Student will receive speech/language therapy 60 minutes weekly in the general education classroom, special education reading 75 minutes weekly in the general education classroom, special education written expression 75 minutes weekly in the general education classroom, and special education math 225 minutes weekly in the general education classroom.

Occupational therapy and physical therapy were considered, but Parent denied services at this time and felt his outside services were adequate. Parent did ask about Student's school therapies and the committee discussed that the school district will not bill Medicaid for related services. The team added a cool down room as an accommodation on the Student's IEP.¹⁰⁵ Parent did not want Student removed from the room for the cool down room unless it was a last resort. The committee determined that Student would be tested on state assessment individually. District agreed to Parent's request that Student be accompanied by a private RBT under the direction of a private BCBA and this will be faded out after instruction from the private BCBA (Dr. Barnes) to the school staff (teacher, paraprofessional, and behavior consultant).¹⁰⁶ The RBT will not be responsible for creating curriculum during the school day, will follow all school guidelines and expectations (such as signing in at the office daily, etc.) while on school grounds, and will follow the confidentiality agreement. Barnes stated she would come to the school and provide training for the staff and do modeling and coaching with the staff.¹⁰⁷ Barnes stated she will begin to fade out the RBT on week two or four after she begins her

¹⁰⁴ Id., at pgs. 144-163.

¹⁰⁵ District Exhibits, pg. 142.

¹⁰⁶ Id., at pg. 140.

¹⁰⁷ Id., at pgs. 196-205.

training.¹⁰⁸ The committee decided to do an annual review in May to look at new goals for the next school year. Parent signed the consent for placement in special education on March 4, 2022.¹⁰⁹

47. May 20, 2022 an annual review was held.¹¹⁰ Parent attended the meeting to review the student's progress for the IEP March – May 2022 period. During a review of factors associated with extended school year services, Mrs. Cooper, special education teacher reported that the District did not have any concerns about Student's behavior problems, there was no regression in behavior; however, Parent reported that "everyones seeing it" outside of school.¹¹¹ She contributed it to his overstimulation and need for movement based upon comments from his occupational therapist.¹¹² The District suggested allowing more sensory breaks during the day with access to a swing or trampoline in an effort to provide him with feedback and help to reduce the overload experienced during the day, yet the parent declined this offer for sensory breaks or sensory diet.¹¹³ The Special Education teacher reported that Student had made progress in special education as well as general education, but she felt that he could make more progress if he had some direct specialized instruction in a smaller group with decreased distractions, yet the Parent refused to allow this instruction for placement in general education.¹¹⁴ The District OT and Special Education teacher explained the benefits of a sensory diet to the Student's success and attention in the classroom and after school. The descriptions

¹⁰⁸ Id., at pg. 196.

¹⁰⁹ Id., at pg. 67.

¹¹⁰ District Exhibit's, pgs., 231-256.

¹¹¹ Annual review conference 5-2-22, at minute 42:00.

¹¹² Id., at minutes 45:00-50:00.

¹¹³ Id., at minute 54:00.

¹¹⁴ Id., at minutes 54:00-1:02:00.

included the use of a swing, bodysock, balance board, heaving lifting, and other activities to provide proprioceptive feedback which could be provided across the day; however, when the Parent heard that the swing, balance boards, trampolines were located inside a special education classroom and that the Student would have to leave the general education classroom in order to access those items, she refused to allow him to access these for his sensory needs. Parent stated, “I would do it... I’ll just deal with it when I get to do it... at home.”¹¹⁵ The District expressed concerns about the rate of progress in all areas of academics and considered extended year services; however, the Parent declined instruction from certified classroom teachers to continue time at Dr. Barnes’ clinic. She requested that a list of weekly skills be sent home so that she could work more one on one at home.¹¹⁶ Parent along with Dr. Barnes had no objections to the recommended time in special education nor the goal areas to be addressed. Dr. Barnes indicated that the RBT was beginning to fade out at school and that the goal would be for the RBT to begin the first week of school and if everything went well to fade out completely.¹¹⁷ Parent did not sign the IEP created during the meeting but instead requested to take a copy and review it at home and “breathe” as it was a lengthy meeting with a lot of different information.¹¹⁸

48. Parent provided written feedback on the IEP for the 2022-23 school year.¹¹⁹ On May 24, 2022, Parent emailed the District to confirm changes from the District’s “Draft” IEP that were agreed to at the May 20, 2022 IEP team meeting. First, the District had removed

¹¹⁵ Id., at minute 1:04.00

¹¹⁶ Id., at minutes 1:04-1:08.

¹¹⁷ Id., at minutes 1:23-1:25.

¹¹⁸ Id., at minute 1:31.

¹¹⁹ District Exhibits, pgs. 72-74, 230-260, 405.

█████ RBT from the IEP, but the IEP team agreed that the RBT was needed for the beginning of the school year and may be needed throughout the school year, and the IEP should allow for that.¹²⁰ Second, Parent noted the “Draft” IEP did not reflect the agreement reached during kindergarten to split equally special education minutes and general education minutes in reading, math, and writing. Thus, the “Draft” IEP minutes -- 30 minutes per day of reading, 90 minutes per day of math, and 30 minutes per day of writing -- needed to be cut in half.¹²¹ Third, Parent reiterated her concern that █████ language goals were not appropriate because █████ cannot differentiate between similar letter sounds, known as auditory discrimination. As a result, “█████ spent most of his school year learning the same few letters . . .”¹²² Fourth, Parent complained that, despite the IEP requiring everyone working with █████ to be trained on the LAMP device, she knew that not everyone was trained and asked that everyone be trained before the start of first grade. Parent also reminded the District that if anyone needs to add an icon to the LAMP device, they should text or email her to add it.¹²³ And lastly, Parent reported that in two weeks Dr. Barnes taught █████ the sound of all letters and numbers. Even so, the District refused to update his goals telling Parent they had to wait until he was reevaluated. Parent asked, “How long into the school year will it take to have that reevaluation and form a new goal?”¹²⁴

49. On May 27, 2022, the District responded to Parent’s email regarding changes to the IEP. The District agreed to Parent’s changes. In the email the District did state that “we have

¹²⁰ Parent’s exhibits, pg. 2.

¹²¹ Id.

¹²² Id.

¹²³ Id.

¹²⁴ Id.

everyone signed up for the LAMP training who we anticipate will work with [REDACTED] Most of the people working with him this year will be the same as last year, with the exception of the gen ed teacher.”¹²⁵

50. Student spent 2 years in Dr. Barnes Clinic receiving ABA therapy. In her Hope 4 Autism Clinic - Dr. Sheila Barnes, a doctoral level BCBA (“BCBA-B?”), provided [REDACTED] with therapeutic level ABA services.

51. Prior to Student starting kindergarten, Dr. Barnes had gotten approval and developed a treatment plan for Student beginning March 13, 2021.¹²⁶

52. Dr Barnes’ treatment plan states that the rationale for services requested are:

“[REDACTED] is a young male with significant deficits in social communication and social interaction. These deficits adversely affect his ability to use language to interact with his family within his home environment and in other settings. His mother reports that he bites others and has broken the skin. Currently he has no means of functional communication.”¹²⁷

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

¹²⁵ Parent’s Exhibits, pg. 4.

¹²⁶ Parent’s Exhibits, pg. 243.

¹²⁷ Id.

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 Parent.

In the role of factfinders, special education hearing officers are charged with the responsibility of making credibility determinations of the witnesses who testify. *Albright ex rel. Doe v. Mountain Home Sch. Dist.* 926 F.3d 943 (8th Cir. 2019), *J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008). This hearing officer found each of the witnesses who testified to be credible in that they all testified to the facts to the best of their recollection; minor discrepancies in the testimony were not material to the issues to be determined and, in any event, were not deemed to be intentionally deceptive.

The weight accorded the testimony, however, is not the same as its credibility. Some evidence, including testimony, was more persuasive and reliable concerning the issues to be decided, discussed as necessary below. The documentation and testimony were sometimes conflicting, although the hearing officer does not necessarily find that any one witness was intentionally untruthful, these inconsistencies did play a role in the hearing officer's decisions. In reviewing the record, the testimony of all witnesses and each admitted exhibit's content were thoroughly considered in issuing this decision, as were the parties' post hearing briefs.

Applicable Legal Principles

The IDEA requires the provision of a "free appropriate public education" (FAPE) to children who are eligible for special education services. 20 U.S.C. § 1412. FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. Decades ago, in *Hendrick Hudson Central School District Board of Education v. Rowley*, 458 U.S. 176 (1982),

the U.S. Supreme Court addressed these statutory requirements, holding the FAPE mandates are met by providing personalized instruction and support services that are reasonably calculated to benefit educationally from the instruction, provided that the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase “free appropriate public education” to require “significant learning” and “meaningful benefit” under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999).

Districts meet the obligation of providing FAPE to eligible students through development implementation of an IEP that is “ ‘reasonably calculated’ to enable the child to receive ‘meaningful educational benefits’ in light of the student’s individual circumstance”. 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*, 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). 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 352.¹²⁸

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 free appropriate public education (FAPE), 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.* The IDEA further provides that if a parent refuses to consent to the receipt of special education and related services, or fails to respond to a request to provide such consent, "the local educational agency shall not be considered to be in violation of the requirement to make available a free appropriate public education to the child for the failure to provide such child with the special education and related services for which the local educational agency request such consent." 20 U.S.C.

1414(a)(1)(D)(ii)(III)(aa). Although a parent always retains the right to withhold consent, after consent is withheld, the school district cannot be held liable for denying a FAPE. Additionally when parents waive their children's rights to services, school district may not override their wishes. *Fitzgerald ex rel. S.F. v. Camdenon R-II School District*, 439 F.3d 773 (8th Cir. 2006); *Schoenfeld v. Parkway School District*, 138 F.3d 379 (8th Cir. 1998).

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. *Andrew F.*

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 Petitioner does not allege any procedural violations in her 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.

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 Petitioner.

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

integration in the regular classroom and individualized special education calculated to achieve advancement from grade to grade.” *Id.* However, in the event that this is not possible, the education of a disabled child still needs to be “appropriately ambitious” in light of a student’s individual circumstances. *Id.*

Under the IDEA, an IEP must include “a statement of measurable annual goals, including academic and functional goals” that is “designed to” meet the needs resulting from the child's disability so that the child can “be involved in and make progress in the general education curriculum” and “meet each of the child's other educational needs that result from the child's disability.” 20 U.S.C. § 1414(d)(1)(A)(i)(II). A school district also must revise an IEP as is “appropriate to address ... any lack of expected progress toward the annual goals and in the general education curriculum,” “the results of any reevaluation,” or information about the child provided by the parents. *Id.* at § 1414(d)(4)(A)(ii). *K.E. v. Independent School Dist. No. 15*, 647 F.3d 795 (8th Cir. 2011).

I. Whether the District failed to provide Student a free appropriate public education during the 2021-2022 school year?

a. Start of Kindergarten in August of 2021 through March of 2022.

In February of 2021 Parent was provided two Notices of Conference to consider a referral for special education and related services for Student. This was some six months before Student was to begin kindergarten at Westwood Elementary School within the Greenwood School District. A referral conference was held on March 8, 2021, the option not to evaluate was considered but the committee determined that updated information was needed and determined

that evaluations were needed in areas of IQ, achievement, autism observations, classroom based assessments, adaptive behavior rating scale, social history, hearing and vision, PT, OT, and speech evaluations.¹²⁹ Parent agreed to the immediate implementation of the committee decision and provided consent to complete these evaluations.¹³⁰ March 11, 2021, Parent provided Student's most recent vision evaluation.¹³¹ On April 7, 2021, a physical therapy evaluation was completed on Student.¹³² On April 9, 2021, a psychoeducational evaluation was completed on Student.¹³³ On April 16, 2021 a speech and language evaluation was completed on Student.¹³⁴ Also on April 16, 2021, an occupational therapy evaluation was completed on Student.¹³⁵

After the evaluations were completed an evaluation conference was held on June 7, 2021. At this conference the evaluations results were discussed. The committee, including the Parent, agreed that Student had multiple areas of deficit and that the most appropriate category for eligibility was Multiple Disabilities.¹³⁶ Parent stated numerous times during the meeting that she wanted general education instruction and no special education instruction for Student in academics. Further, Parent stated that she wanted an RBT supervised by Dr. Sheila Barnes to attend school with Student. The committee members discussed their reasons as to why they felt that Student should start his kindergarten year in special education class and transition into the general education classroom when ready. The District stated that the RBT would not be attending school with Student and that was not negotiable because the RBT was not a district employee and the District believed it should be given a chance to provide services to Student.

¹²⁹ District Exhibits, pg. 10.

¹³⁰ Id., pgs. 10-11.

¹³¹ Id., pgs. 294-300.

¹³² Id., pg. 303.

¹³³ Id., pgs. 306-322.

¹³⁴ Id., pgs. 331-337.

¹³⁵ Id., pgs. 323-330.

¹³⁶ Id., at minute 30:13. Parent's Exhibits, pg. 142.

Disagreement continued and the meeting ended with parent telling the District to finish developing the IEP and send it to her for review. On June 10, 2021, a Notice of Action and the draft IEP was sent to parent.¹³⁷ On July 2, 2021 the Parent filed her first due process complaint (H-22-03) claiming that the proposed IEP would not provide the student with a free appropriate public education because it did not include ABA therapy.¹³⁸ August 20, 2021, this Hearing Officer was notified by Mrs. Caldwell that a settlement had been reached and a motion to dismiss would be forthcoming to dismiss.

August 30, 2021, Mrs. Barnett emailed Parent to determine if the date of September 17, 2021 was agreeable for a meeting to write an IEP for the Student. On the same date and ten days after Petitioner's attorney had notified this Hearing Officer that a resolution had been reached, Petitioner's attorney, directed the parent in an email, "Don't respond" to the request to set a date for the IEP meeting. On September 3, 2021, the District sent a notice of conference to Parent attempting to set up a time for IEP meeting to establish consent for placement and to develop an IEP for Student. On September 10, 2021, the District sent a second notice of conference to Parent attempting to set up a time for an IEP meeting to establish consent for placement and develop an IEP for Student.

Parent never responded to the District's requests for an IEP meeting. There was no IEP developed (only a purposed IEP) and the Parent did not sign a Notice of Action providing consent for placement and programming at that time. The District did allow the BCBA's and RBT's to attend school with Student. The kindergarten classroom teacher provided additional space in the classroom to accommodate the Student's RBT to sit near him. The kindergarten teacher pulled Student for extra intervention small group time to work on reading skills. The

¹³⁷ District Exhibits, pg. 176.

¹³⁸ Id., at pgs. 49-51.

District allowed the Parent to check the student out of classes early without penalty in order for him to access his private occupational, physical, and speech therapies. The District provided support and accommodations as appropriate to Student without the provision of any special education services. In addition to the RBT, a paraprofessional was assigned to work with Student on academics in the classroom, provide direction for transitions, and encourage social interaction during appropriate times. A licensed teacher was assigned to do Student's campus based general education.

The IDEA provides that if a parent refuses to consent to the receipt of special education and related services, or fails to respond to a request to provide such consent, "the local educational agency shall not be considered to be in violation of the requirement to make available a free appropriate public education to the child for the failure to provide such child with the special education and related services for which the local educational agency request such consent." 20 U.S.C. §1414(a)(1)(D)(ii)(III)(aa). Although a parent always retains the right to withhold consent, after consent is withheld, the school district cannot be held liable for denying a FAPE. Additionally, when parents waive their children's rights to services, school district may not override their wishes. *Fitzgerald ex rel. S.F. v. Camdenon R-II School District*, 439 F.3d 773 (8th Cir. 2006); *Schoenfeld v. Parkway School District*, 138 F.3d 379 (8th Cir. 1998). Here, at the June 7, 2021, evaluation conference, there was disagreement about placement and services. However, even after the District allowed the RBT to attend school with Student and Student was in the general education classroom, Parent still refused to communicate with the District and respond to their request for a meeting to develop an IEP for Student. The District had no opportunity to provide a FAPE to Student and thus, cannot be held liable for a denial of a FAPE to Student.

Parent argues in her post hearing brief that the District should be estopped from contending that Parent refused all services, because the District knew parent had the right to consent to some services and refuse others. 34 C.F.R §300.300(d)(3), ADE spec. Ed. Rules 9.06.5.2. At the evaluation conference on June 7, 2021, the District did not explain to Parent that she could consent to some services and refuse others. Sometime after the June 7, 2021 evaluation conference and July 2, 2021, Parent obtained counsel. After the procurement of counsel and after the District agreed to place Student in the regular classroom with the RBT, the District attempted at least twice to hold an IEP conference to develop an IEP and get Parent's consent for placement in special education. Parent ignored these requests. I find Parent's argument that the District should be estopped from contending that Parent refused all services without merit.

Conclusion

Having considered Parent's argument that the District denied Student a FAPE at the beginning of kindergarten through February, 2022, and in light of the findings and conclusions *supra*, it is the conclusion of this Hearing Officer that Parent refused to consent to the receipt of special education and related services, and failed to respond to a request to provide such consent and therefore the District cannot be held liable for denying a FAPE. The District did not substantively violate the requirements of IDEA.

b. Whether the IEP developed on February 21, 2022 provided Student a FAPE?

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 free appropriate public education (FAPE), 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). Parent asserts that the District failed to develop an appropriate IEP at the February 21, 2022 IEP meeting. 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 the IEP developed for Student was necessary, appropriate, and reasonably calculated to enable Student to make progress appropriate in light of the child's circumstances.¹³⁹ As stated above in the findings of fact, the IEP developed on February 21, 2022 provided services from March 7, 2022-May 27, 2022, contains Student's present levels of academic achievement and functional performance, how his disability affects his involvement and progress in the general education curriculum, annual goals that are measurable and a description of special education and related services provided to Student.¹⁴⁰

¹³⁹ Endrew F., 2017 WL 1066260, at *1000

¹⁴⁰ District's Exhibits, pgs. 208-229.

At the annual review held on May 20, 2022, Student's progress on his IEP was discussed. Statutory and regulatory provisions confirm that an IEP is intended to be implemented and measured with reference to a given academic year. For example, an IEP itself is usually developed for and pertains to an academic year as a whole, with the educational program recommended by the IEP designed to be implemented and monitored over the period of a full year. See 20 USC § 1414(d)(1)(A)(i)(II) (IEP as "statement of measurable annual goals, including academic and functional goals"); 34 CFR § 300.320(a)(2) (same) ; see also 20 USC § 1414(d)(2)(A) (IEP to be in effect at "beginning of each school year"); 34 CFR § 300.323(a) (same). Indeed, the Supreme Court explains that a student's IEP sets out "annual goals designed to enable the child to be involved in and make progress in the general education curriculum." *Endrew F.*, 137 S. Ct. at 1000 (emphasis added). As such, academic and non-academic benefits must be weighed by considering the entirety of a given academic year. Here because parent refused to give consent for Student to be placed in special education from August of 2021-February of 2022, the IEP in question was only in place from March 7, 2022-May 27, 2022, some nine weeks. At the annual review, Student's progress was discussed as follows:

“In literacy, [REDACTED] has made progress in mastering letter identification through his LAMP device. He has master letters a,b,c,m,t in randomization with distractors over a two period trial. When identifying sight words, [REDACTED] is able to recognize “T”, “see” and “the” in randomization over a two period trial. When using his device, [REDACTED] is able to request items by using the “I want ____.” Phrase with a prompt. He is able to lightly grasp writing utensils with the correct grasp and draw horizontal and vertical lines. He is able to trace the letter “T” and “t” with his pointer finger when using a textured base to trace on such as tape or sandpaper. He understands a very abundant vocabulary and learns new vocabulary quickly.

In mathematics, [REDACTED] is able to identify numbers 1,2,3,4 in randomization over two trials. He is also able to identify 1,2,3 subitizing cards in randomization over two trials to improve counting skills. He accurately identifies circle when it is presented and will match blue, green, red, and yellow object to object in a 1:4 correspondence.”¹⁴¹

Although Student was only receiving special education services for approximately 9 weeks, Student made progress in several areas.

Parent argues in her brief that the IEP developed on February 21, 2022, was not reasonably calculated to enable Student to make progress appropriate in light of his individual circumstances because it did not include ABA therapy as special education or a related service and the academic goals were not appropriate for Student. Although ABA therapy wasn’t listed as a related service, it was included in the IEP. Parent, as far back as March of 2021, had told the District that she wanted an RBT, supervised by Dr. Sheila Barnes a BCBA-D, to attend school with Student. Even when the District explained that they had a BCBA who would work with them regarding appropriate planning for Student, Parent explained that wasn’t what she wanted. There was no evidence presented that Parent wanted the District to provide ABA. To the contrary as stated previously, the Parent wanted an RBT supervised by Dr. Sheila Barnes, and paid for by her insurance. Neither the RBT nor Dr. Barnes was an employee of the District. Whereby the District had no ability to help determine what services the RBT would provide in the school setting. With all of this, the District still included the RBT on the IEP developed on February 21, 2022. Under other factors that need consideration the team states:

“An RBT under the direction of an outside provider, as requested by the parent, will be with [REDACTED] throughout the school day until she is faded out. The RBT is

¹⁴¹ District Exhibits, pg. 232.

not responsible for creating curriculum during the school day, will follow all school guidelines and expectations (such as signing in at the office daily, etc.) while on school grounds, and will follow the confidentiality agreement.”¹⁴²

It is undisputed that as early as that February 21, 2022 IEP meeting, the RBT was needed less, and was going to be faded out. Dr. Barnes testified that “We got to the point that the RBT was rarely coming.”¹⁴³ There was no evidence presented that would support a finding that at the time of the February 21, 2022 IEP Applied behavioral analysis should have been added as a related service. It is long established that Districts choose methodology. Requiring the District to change methodologies-based on Parents preferences "would be creating the potential that a school district could be required to provide more than one method . . . for different students whose parents had differing preferences." *Petersen v. Hastings Pub. Sch.*, 31 F.3d 705, 708 (8th Cir. 1994). Additionally, even with the RBT rarely coming there was no evidence that Student was having issues that needed to be addressed through ABA.

Parent further argues that the academic goals developed in the February 21, 2022 IEP were not appropriate for Student. The February 21, 2022 IEP contained four English language goals, one math goal and one behavior/affective goal.¹⁴⁴ As written there is no indication that the goals and objectives are not appropriate for Student. Most of the goals and objectives include the collection of data. This IEP was in place for only a nine-week period and still as mentioned above Student did show some progress.

Having considered Parent’s argument that the February 21, 2022, IEP was not reasonably

¹⁴² District Exhibits, pg. 212.

¹⁴³ Transcripts, Vol. V, pg. 22.

¹⁴⁴ District Exhibits, pgs. 214-225.

calculated to enable Student to make progress appropriate in light of Student’s individual circumstances because it did not include ABA therapy as special education or related service and the academic goals were not appropriate for Student, and in light of the findings and conclusions *supra*, it is the conclusion of this Hearing Officer the February 21, 2022 IEP was reasonably calculated to enable Student to make progress appropriate in light of the child’s circumstances”, and thus the District did not substantively violate the requirements of IDEA.

II. Whether the District’s IEP for 2022-2023 school year provides the student with a free appropriate public education in the least restrictive environment.

On May 20, 2022, an annual review was held and an IEP developed for Student’s 2022-2023 school year.¹⁴⁵ Parent argues that the 2022-2023 IEP was not reasonably calculated to enable Student to make progress appropriate in light of Student’s individual circumstances, because it did not include ABA therapy as special education or related services and the academic goals were not appropriate for Student.¹⁴⁶ The record shows that the IEP developed for Student on May 20, 2022 contains Student’s present levels of academic achievement and functional performance, how his disability affects his involvement and progress in the general education curriculum, annual goals that are measurable and a description of special education and related services provided to Student.¹⁴⁷ On May 24, 2022, Parent emailed the District to confirm the changes she thought should be made to the draft IEP after her review. Specifically, Parent asked:

1. “The District had removed [REDACTED] RBT from the IEP, but the

¹⁴⁵ Recording of May 20, 2022 annual review.

¹⁴⁶ Parent’s post hearing brief pg. 31.

¹⁴⁷ District’s Exhibits, pgs. 231-256.

IEP team agreed that the RBT was needed for the beginning of the school year and may be needed throughout the school year, and the IEP should allow for that.

2. Parent noted the “Draft” IEP did not reflect the agreement reached during kindergarten to split equally special education minutes and general education minutes in reading, math, and writing. Thus, the “Draft” IEP minutes -- 30 minutes per day of reading, 90 minutes per day of math, and 30 minutes per day of writing – needed to be cut in half.
3. Parent reiterated her concern that [REDACTED] language goals were not appropriate because [REDACTED] cannot differentiate between similar letter sounds, known as auditory discrimination. As a result, “[REDACTED] spent most of his school year learning the same few letters . . .”
4. Parent complained that, despite the IEP requiring everyone working with [REDACTED] to be trained on the LAMP device, she knew that not everyone was trained and asked that everyone be trained before the start of first grade. Parent also reminded the District that if anyone needs to add an icon to the LAMP device, they should text or email her to add it”.¹⁴⁸

On May 27, 2022, the District emailed Parent and agreed to Parent’s changes to the draft IEP.¹⁴⁹ Because the IEP developed on February 22, 2022 was for only a nine week period, there were few changes made for Student’s 2022-2023 school year. There were adjustments to

¹⁴⁸ Parent’s Exhibits, pg. 2.

¹⁴⁹ Id., pg. 4.

Student's goals and objectives. In the 2022-2023 IEP, there are six language arts goals and two math goals.¹⁵⁰

There was no evidence presented that ABA therapy was necessary for Student during the 2022-2023 school year, with the exception of testimony by Dr. Barnes indicating that the RBT might need to attend the first few weeks with student to transfer power to a person at the district. Dr. Barnes provided a training schedule to the District on March 3, 2022 that covered a 5 week period and provided 5 hours of training on the first day.¹⁵¹ By email the LEA Supervisor advised that the District would be ready for training the next day at 8:00 a.m.¹⁵² Training began on March 4, 2022. Late in the day on March 4, 2022 Dr. Barnes notified the team that the training went well and five hours training was not needed.¹⁵³ She provided a modified schedule for the remaining five weeks. None of the additional training - the guided practice - following the initial day of training on March 4, 2022, ever occurred. Further, the District stated they didn't have any behavior concerns but mom stated that "everyone was seeing it outside of school".¹⁵⁴ Mom further stated that she contributed it to his overstimulation and need for movement based upon comments from his occupational therapist.¹⁵⁵ The District suggested allowing more sensory breaks during the day with access to a swing or trampoline in an effort to provide him with feedback and help to reduce the overload experienced during the day, yet the parent declined this offer for sensory breaks or sensory diet.¹⁵⁶ The Special Education teacher reported that Student had made progress in special education as well as general education, but she felt that he could

¹⁵⁰ District Exhibits, pgs. 237-252.

¹⁵¹ District Exhibits, pg.196.

¹⁵² Id., at pg. 198.

¹⁵³ District Exhibits, pg. 203.

¹⁵⁴ Annual review conference 5/20/2022, at minute 42:00

¹⁵⁵ Id., at minutes 45:00-50:00.

¹⁵⁶ Id., at minute 54:00.

make more progress if he had some direct specialized instruction in a smaller group with decreased distractions. The Parent refused to allow this instruction because she wanted Student's placement in the general education classroom.¹⁵⁷

Parent is correct that the IDEA requires that students with disabilities be educated in the "least restrictive environment." 20 U.S.C. § 1412(a)(5). Congress expressed a "strong preference in favor of disabled children attending regular classes with children who are not disabled," creating a "presumption in favor of public school placement." *CJN v. Minneapolis Pub. Schs.*, 323 F.3d 630, 641 (8th Cir.2003). But the requirement is not absolute. The IDEA "significantly qualifies the mainstreaming requirement by stating that it should be implemented 'to the maximum extent appropriate.'" *Pachl v. Seagren*, 453 F.3d 1064, 1067 (8th Cir.2006) (emphasis in *Pachl*) (citations omitted). The mainstreaming requirement is inapplicable if it "cannot be achieved satisfactorily." *Id.* at 1068 (emphasis in *Pachl*); *Bradley ex Rel. Bradley v. Ar. Dept. of Educ.*, 443 F.3d 965 (8th Cir. 2006); *Indep. Sch. Dist. No. 283 v. S.D.*, 88 F.3d 556, 561 (8th Cir. 1996) ("IDEA enacted a strong preference that handicapped children attend regular classes with children who are not handicapped," giving rise to a presumption in favor of placement in a public school.). Parent's desire to have Student in the general classroom without any pull outs for special education services is understandable. However, here, Student is in a general education class with his nondisabled peers, with minimal pull outs to address significant academic deficits. I find this is the "least restrictive environment" for Student to receive special education services at this current time.

Having considered Parent's argument that Student's 2022-2023 IEP was not reasonably

¹⁵⁷ *Id.*, at minutes 54:00-1:02.00.

calculated to enable Student to make progress appropriate in light of Student's individual circumstances because it did not include ABA therapy as special education or a related service and the academic goals were not appropriate for Student, and in light of the findings and conclusions *supra*, it is the conclusion of this Hearing Officer the 2022-2023 IEP developed for Student on May 21, 2022 was reasonably calculated to enable Student to make progress appropriate in light of the child's circumstances", and thus the District did not substantively violate the requirements of IDEA.

Conclusion

The results of the testimony and evidence warrant a finding for the District. Specifically, Parent failed to introduce sufficient evidence in the record to establish by preponderance of the evidence that District denied Student a FAPE between July 2, 2021- July 5, 2022.

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

Finality of Order and Right to Appeal:

The decision of this Hearing Officer is final. A party aggrieved by this decision has the right to file a civil action in either Federal District Court or a State Court of competent

jurisdiction, pursuant to the Individuals with Disabilities Education Act, within ninety (90) days after the date on which the Hearing Officer's Decision is filed with the Arkansas Department of Education.

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

IT IS SO ORDERED.

Dana McClain

HEARING OFFICER

2/24/2023

DATE