

**ARKANSAS DEPARTMENT OF EDUCATION**  
**SPECIAL EDUCATION UNIT**

***** on behalf of ,	)	
	)	<b>PETITIONER</b>
***** Student	)	
	)	
vs.	)	<b>CASE No. H-2016-14</b>
	)	
<b>LITTLE ROCK SCHOOL DISTRICT</b>	)	<b>RESPONDENT</b>

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**NOW**, on this October 14<sup>th</sup>, 2015 came on for hearing Petitioner’s Request for a Due Process Hearing, Petitioner, \*\*\*\*\*, **PARENT** represented by Lawrence Walker, Esq., and Respondent, Little Rock School District, represented by Khayyam Eddings, Esq. This cause was submitted upon the pleadings, the testimony of witnesses, argument of Petitioner and Respondent, and other matters and things from all of which the Hearing Officer finds and Orders. Based upon the evidence presented and admitted into the record of this proceeding, I make the following findings of fact and conclusions of law:

**ISSUES FOR HEARING**

Student was a seventh grade student at Horace Mann, Little Rock School District:

Issues: Alleged denial of FAPE by:

- 1) Failing to provide an appropriate IEP for the student;
- 2) Failing to provide an appropriate goals and objectives;
- 3) Failing to provide related services; and
- 4) Failure to implement services on the student’s IEP;

Seeking:

- 1) Compensatory private education services,
- 2) Compensatory services for related missed speech and occupational therapy,

## **PROCEDURAL HISTORY**

On March 26<sup>th</sup>, 2015, a Due Process Complaint Notice was received by the Arkansas Department of Education from \*\*\*\*\*, **PARENT**, ("Parent") of **Student** ("Student"). The Parent requested the hearing because she believed that the Little Rock School District (hereinafter referred to as ("District")) failed to comply with the Individuals with Disabilities Education Act of 2004 (20 U.S.C. §§ 1400 - 1485, as amended) (IDEA) (also referred to as the "Act" and "Public Law 108-446") and the regulations set forth by the Department by not providing the Student with appropriate services as noted above in the issues as stated.

On September 20<sup>th</sup>, 2015 the District responded to the Notice with a copy to the Hearing Officer. The District was required to convene a resolution session to resolve the complaint to the satisfaction of the Parent. Because the issues were not resolved, Pre-Hearing briefs were required on October 12<sup>th</sup>, 2015 from the parties with a Pre-Hearing Conference scheduled for October 13<sup>th</sup>, 2015. The Due Process Hearing was convened and held October 14<sup>th</sup>, 2015. The attorney for the Petitioner Parent was Lawrence Walker, Esq., and Respondent, Little Rock School District, was represented by Khayyam Eddings, Esq.

## **FINDINGS OF FACT**

- a) Student was enrolled in the Fulton County (Alabama) School District until April 2014;
- b) Student moved to Little Rock School District (Arkansas) in July 2014;
- c) Student was enrolled in the Little Rock School District on September 15<sup>th</sup>, 2014 with the Fulton County IEP;
- d) Student was placed in a Special Education community-based classroom at Cloverdale Middle School;
- e) Student's teacher was Mr. Allison, a non-certified special education teacher;
- f) Student's teacher Mr. Allison developed a false IEP for Student including forged and non-attending persons' names; and
- g) Student received less than required minutes of service for Speech Therapy and Occupational Therapy.

## **ABSTRACT OF WITNESS TESTIMONY**

Parent (Mother) on behalf of Student;

Student, now age 14, attends Little Rock School District, re-enrolled there September 14, 2014 after

they moved back to the state in the Cloverdale Middle School.<sup>1</sup> First teacher there was Mr. Allison.<sup>2</sup> Mr. Allison was not certified in special education (per copy of his Certification from the AR Dept. of Special Education licensure, admitted as Petitioner's Exhibit 1.<sup>3</sup> Mr. Allison was removed from the classroom, and on November 16, 2014. Berthena Nunn became the Student's teacher.<sup>4</sup> Student had an IEP from Fulton County (Alabama), done February 28<sup>th</sup>, 2014, admitted as Petitioner's Exhibit 2.<sup>5</sup>

A "consent granted" form, dated November 12<sup>th</sup>, 2014, was admitted as Petitioner's Exhibit 3, which is what parents sign for the school to move forward with the plan and on which the Parent said the supposed signature of her father, who is not the students guardian, was a forgery by the classroom teacher, Mr. Allison.<sup>6</sup>

The parent identified IEP<sup>7</sup> dated November 12<sup>th</sup>, 2014 reflecting that a separate programming conference was held for Student, that classroom /home observation reports were reviewed, teacher reports school permanent records, student's current IEP, classroom-based assessment results and existing evaluation data were supposedly reviewed by the team.<sup>8</sup> Supposed IEP team attendees and signatures on this document were, Mr. Allison (CBI teacher), Ms. Hilliard (regular education teacher), Ms. Worsham (speech), and Ms. Catrice Tyus (occupational therapist for the school). According to Ms. Worsham at Cloverdale Middle School, she was not present, nor is the signature on the document hers.<sup>9</sup>

At the top of another November 12<sup>th</sup>, 2014 document is supposedly the signature of the parent's

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1	17	15-25
2	18	1-9
	18	10-11
3	20	13
4	21	1-5
5	23	24-25
	24	1
	24	8-10
6	24	12-24
7	26	5-10
8	26	19-25
9	27	1-5

father, initials JLW, but he was neither present nor did he sign this document.<sup>10</sup> Neither the parent nor her father even knew of this supposed meeting on November 12<sup>th</sup>, 2014.<sup>11</sup> There is also a Ms. Fowler's name listed on one page, who was another speech therapist in addition to Ms. Worsham, as being present at the supposed November 12<sup>th</sup>, 2014 meeting.<sup>12</sup>

The parent identified a document as Little Rock School District "record of access", which is what school personnel are required to sign if they check out a student's IEP folder, saying Ms. Plant, school compliance officer, checked out this child's folder October 22<sup>nd</sup>, 2014, approximately a month after child's enrollment, to review to make sure accommodations were in place and child was in appropriate setting.<sup>13</sup>

Next entry on that document was December 19<sup>th</sup>, 2014 as folder checked out by Ms. Worsham, speech therapist, but she began therapy October 15<sup>th</sup>, 2014, so she did not even review folder until some two months after beginning therapy.<sup>14</sup> Next entry on that document was 12/09/14, by Berthena Nunn (Note, this parent says same date as Ms. Worsham supposedly checked it out, but they are not same dates\*\*).<sup>15</sup>

Rest of check outs of this folder were shown March 20<sup>th</sup>, 2015 and April 15<sup>th</sup>, 2015, when the parent met with Ms. Nunn, but Ms. Papineau, the supervisor for Cloverdale, did not show up for the meeting.<sup>16</sup> No one from the District ever reviewed this file.<sup>17</sup>

The document identified by parent as least restrictive environment document created by Mr. Allison, the classroom teacher, on November 12<sup>th</sup>, 2014, saying placement in a higher academic setting is being considered and more consultation with Ms. Papineau should be consulted, but parent was told by Ms. Ruffins, the Cloverdale Principal, they did not have an academic classroom at that time.<sup>18</sup>

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<sup>10</sup>	27	15-25
<sup>11</sup>	27	25
	28	1
<sup>12</sup>	28	2-16
<sup>13</sup>	29	1-15
<sup>14</sup>	29	16-23
<sup>15</sup>	30	3-6
<sup>16</sup>	30	19-25
<sup>17</sup>	31	10-15
<sup>18</sup>	32	1-16

Parent read the impact statement at bottom of the November 12<sup>th</sup>, 2014 document which said student had significant cognitive deficit in reading, but then in two separate places refers to this child as being named “Christian,” and said child had difficulty in writing independently and recalling detailed information, impacting “his” ability to read, spell and write on grade level, which is the IEP on which the school was operating for this parents’ child, but whose name is \*\*\*\*\*, so the name Christian could not mean Student.<sup>19</sup>

This document also says child receives Occupational Therapy and has difficulty in movements, but refers to “he” and “his” and is dated November 12<sup>th</sup>, 2014, when the child in this case did not begin receiving Occupational Therapy until May of 2015.<sup>20</sup> Parent stated as the child’s mother she was not informed of the meeting, even though the IEP says Ms. Allison called and sent a letter.<sup>21</sup> This teacher forged the form and the teachers’ names from the school district on the form, and resigned after this was found out.<sup>22</sup> This parent worked for this District for over a decade, and worked with special ed students, so knows they are required to both call and send certified mailing to parent for meeting.<sup>23</sup>

There was not, nor is there now, a certified teacher in the classroom for this child, so this parent does not believe the child has been provided a fair and appropriate free public education.<sup>24</sup> This parent does not believe the District is competent to provide this child a fair and appropriate public education for this child, having forged documents, overlooking accountability measures and not having a certified teacher in the classroom even as of this hearing.<sup>25</sup> Relief sought in this case is that child attend a private school.<sup>26</sup>

This parent also says the District offered June 24, 2015 for the child to receive therapies they did not

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19	33	15-25
	34	1-22
20	34	22-25
21	36	11-15
22	37	4-6
23	37	7-21
24	37	22-25
	38	1-21
25	43	25
	44	1-7
26	39	9-15

have in place at that time.<sup>27</sup> On cross-examination, this parent identified a letter to this parent's counsel dated June 24<sup>th</sup>, 2015 (Respondent's #4) from the District's counsel.<sup>28</sup> Looking at bottom of paragraph one of that letter, the parent agreed Student's most recent occupational evaluation was November 19<sup>th</sup>, 2013.<sup>29</sup> The parent agreed the child's most recent psychological achievement testing was November 18<sup>th</sup>, 2013.<sup>30</sup> Parent agreed the child's most recent speech and language evaluation was conducted November 8<sup>th</sup>, 2013.<sup>31</sup>

The parent testified the letter said the District would agree to have Student undergo independent educational evaluations for Occupational Therapy, Speech Therapy and Psychological Achievement testing at Access Schools or a comparable agency at no cost to the parent for the summer.<sup>32</sup> When questioned as to whether her counsel ever responded to the District's letter, the parent said she was not sure.<sup>33</sup>

When questioned as to whether she made the child available for testing at the district office, the parent said she had been available, but not during summer, nor did she ever give the district dates when she and the child would be available, nor did she believe her attorney notified the District as to availability for testing.<sup>34</sup>

The District's letter also said after the independent evaluations were completed, the district would reconvene the child's IEP team and review and reconsider recommendations in the evaluations and make changes to the proposed IEP for the school year if necessary, but that never occurred said the parent, her reasoning being that there was not a current IEP because it was forged by Mr. Alison, and something that had never happened could not be reviewed, so therefore no conference for the 2015-

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27	40	9-11
28	45	1-6
29	45	19-24
30	45	25
	46	1-3
31	46	4-7
32	46	8-16, 20
33	46	21-23
34	47	2-15
	48	22-25
	49	1-4

2016 school year was ever held.<sup>35</sup> However, when questioned as to whether or not she was in the 2015-2016 IEP meeting, the parent said she was present at the June 16, 2015 annual review meeting.<sup>36</sup>

The parent testified she had calculated the number of therapy hours her daughter had missed during the 2014-2015 school year, already submitted into evidence, and had no quarrel with Number Four, then said she did, that it said “12 additional hours of compensatory Occupational Therapy so that is a total of 42 hours of Occupational Therapy, but she was to receive 12 hours of Speech Therapy; this parent testified her calculation was 26.5 hours missed, which was provided to the district during that meeting, and that she was told the child would be given about 5 additional hours.<sup>37</sup> This parent also agreed that the child missed 7.5 hours of Speech Therapy during 2014-2015, 30 minutes twice a week, and that the child missed 30 hours of Occupational Therapy during that school year.<sup>38</sup>

The parent testified they had already made plans for the summer and she stuck with those plans (instead of having the child make up these therapies during the summer).<sup>39</sup> The District’s letter said the services may begin this summer or during the 2015-2016 school year, at the option of the parent/parent, yet the parent testified she never responded to the offer as to when they would take place.<sup>40</sup>

The parent also testified her attorney never responded to the letter from the District.<sup>41</sup> The parent’s response to the District’s letter was to file for the due process hearing.<sup>42</sup> The child was not transferred to Horace Mann at mother’s request<sup>43</sup> during the 2014-2015 school year, but she is there this year since mother asked for child to move to a school with an academic setting, and the child had to be

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<sup>35</sup>	49	8-25
<sup>36</sup>	52	22-25
	53	1-4
<sup>37</sup>	53	5-25
	54	1-13
<sup>38</sup>	54	14-24
<sup>39</sup>	55	6-14
<sup>40</sup>	55	23-25
	56	1-9
<sup>41</sup>	57	17-22
<sup>42</sup>	58	1-4
<sup>43</sup>	58	5-18

placed at a school where a slot was open. Referring to Exhibit 8, the parent identified it as listing common core standards in Arkansas, but could not say her child was working toward them because of the forgery.<sup>44</sup>

Assuming any name of this document, the parent testified that the common core standards on this document would be standards toward which a student would be working for the 2014-2015 school for reading.<sup>45</sup> The document saying that Student should be able to read and comprehend literature, including stories, dramas and poems by the end of the school year, which is an academic standard.<sup>46</sup> The document, under strengths, says Student can perform all mathematical calculations with assistance of a calculator looks like an academic strength.<sup>47</sup> The rest of the strengths listed were also academic strengths.<sup>48</sup> Under Needs, when questioned about the statements, the parent did not agree that having another child's name in the IEP and making references to "him" in the document could possibly be a typo, and testified it looked as if someone cut and pasted from another child's IEP.<sup>49</sup>

As to Exhibit 7, the parent testified it was her understanding that Mr. Allison was working on an ALP, which is an additional licensure plan for persons to hold meetings with the parent and act as classroom teacher for a subject area until they became certified in that subject, but the parent did not agree there was nothing wrong with Mr. Allison being the child's classroom teacher until he was certified, since he was removed.<sup>50</sup> From what the parent was told by Ms. Ruffins (the school principal), as soon as Mr. Allison was confronted with forging the IEP he resigned.<sup>51</sup>

The parent identified Respondent's exhibit three, the documents created during the June 16 or 17,

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44	58	19-25
	59	1-18
45	59	23-25
	60	1-5
46	60	11-17
47	61	9-17
48	61	18-20
49	61	22-15
	62	1-25
50	63	11-25
	64	1-5
51	65	1-7

2015 annual review conference, with her signature.<sup>52</sup> Looking at page 20, the parent testified it was her position the child was not placed in an academic setting.<sup>53</sup> When going over this document, the parent testified that the child had made academic progress instead of doing functional activities.<sup>54</sup> The only functional skill listed on the document identified by the parent was where it said (by the teacher, Ms. Nunn) “The occupational therapist and I have discussed ways we can incorporate strategies to work on her gait and body lean into her academics.”<sup>55</sup> There are goals and objectives on the child’s current IEP, academic vs. functional goals, and she is now in an academic classroom.<sup>56</sup>

When asked if there was anything inappropriate about these goals, the parent said she believed they were based on her previous IEP so was not sure if they are wholly appropriate, which was why she did not sign the document.<sup>57</sup> The parent testified she objected to these goals, and on page 15 it says “The parent rejected,” it says “Options Considered and Reasons Rejected.” It also said because she felt updated testing should be completed before programming can be done.<sup>58</sup> Within 10 days of the conference, the District extended the offer for this testing, but it was never completed.<sup>59</sup>

The private schools the parent has looked at are Riverdale and Access Schools, and the parent denied there were no non-disabled students in those schools.<sup>60</sup> Both schools are designed for students with special needs, and to the parent’ knowledge, the Academy at Riverdale has no students who do not have some sort of special needs.<sup>61</sup> Access has some students who would be considered normal by academic standards, but a large segment of their student population has special needs who will need

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52	65	8-22
53	65	23-25
	66	1-9
54	66	15-25
	67	1-25
55	68	1-7
56	69	23-25
	70	1-5
57	70	6-11
58	70	12-21
59	70	24-25
	71	1-15
60	72	10-22
61	73	1-9

extra remediation in their core work, and they provide Speech therapy, Occupational Therapy and other therapies there as well.<sup>62</sup>

The child is now in a special ed classroom, but the parent is not sure how it is reported to the State, since she says it is an academic classroom falling under the special ed spectrum for the District.<sup>63</sup> The child does go out of her classroom with other students, general ed students, for electives: keyboarding, Arkansas history, and goes out for PE alone; The child's core instruction for history, math, science and English, she gets in the classroom.<sup>64</sup> There are certified instructors for the child's electives, but not for her core subjects in the classroom.<sup>65</sup> While at Cloverdale, the child was not able to move unrestricted to other classrooms, because students in the CBI (Community based instruction she testified to earlier) always have to have someone with them.<sup>66</sup> The child was never assisted by a paraprofessional to go to elective courses, nor does anyone assist her off the bus mornings.<sup>67</sup> When Student goes to electives at Horace Mann, she is able to interact with non-disabled students.<sup>68</sup>

As an educator, this parent has participated in some 30-40 special ed conferences.<sup>69</sup> This parent/parent has worked as an educator for 13 years, working in the Little Rock School District for a little over 10 years; she is licensed and certified to teach English 7-12, national board certification, early adolescence, and administrator P-12.<sup>70</sup>

Between September 15, 2014 and April 15, 2015, this parent believed the IEP from which Student was being educated was the one she (the mother/parent) had sent to the school from the Fulton

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<sup>62</sup>	73	12-19
<sup>63</sup>	74	1-8
<sup>64</sup>	74	12-17
	74	20-25
	75	1-2
<sup>65</sup>	75	4-9
<sup>66</sup>	75	10-19
<sup>67</sup>	76	4-5
<sup>68</sup>	76	14-17
<sup>69</sup>	78	6-11
<sup>70</sup>	78	18-25
	79	1-3

County School District.<sup>71</sup> The Fulton County School District IEP was created February 28<sup>th</sup>, 2014.<sup>72</sup>

The parent believed the Fulton County School District IEP was appropriate because it was a decision to move the child to an academic contained classroom.<sup>73</sup> The Fulton County IEP indicated that based on the level of performance taken from recent evaluations, the child would be best served in a small and a variety of instructional strategies are developed based on her needs, with which the mother/parent agreed.<sup>74</sup> When Student was enrolled at Cloverdale in September of 2014, there were approximately 7 other students in her class.<sup>75</sup> The last time this parent/parent taught in a classroom was maybe five years ago, and it was a general ed setting.<sup>76</sup>

This parent/parent had contact with Ms. Nunn, Student's teacher at Cloverdale, almost daily, discussing the child's daily activities, and the parent said the teacher and she agreed the setting for Student was not appropriate, that they also discussed Ms. Nunn's efforts to implement Student's IEP.<sup>77</sup> They did not specifically discuss the goals and objectives on the IEP, as the parent was under the assumption that everything on the Fulton IEP was in place until there was a new meeting.<sup>78</sup>

Ms. Nunn was under the assumption the mother had met with the previous teacher, Mr. Allison, because he had forged the signatures.<sup>79</sup> Ms. Nunn told this parent she was having to find extra supports for Student because the other children in the classroom were very severe, and she would have to try to accommodate Student, as well as those other students' learning goals, which were more community based instructional goals than academic, so though there was a paraprofessional in the classroom, Student could not be placed with the other students there because they could not

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<sup>71</sup>	80	19-25
<sup>72</sup>	81	2-10
<sup>73</sup>	81	20-25
	82	1-2
<sup>74</sup>	82	14-24
<sup>75</sup>	83	3-7
<sup>76</sup>	83	15-24
<sup>77</sup>	86	2-23
<sup>78</sup>	86	24-25
	87	1-6
<sup>79</sup>	87	9-11

do anything with her.<sup>80</sup>

This parent expected the child to be placed in an academic classroom, but not necessarily a general ed classroom.<sup>81</sup> When the child went to school in Fulton County, not all her classes were in a special ed setting, but her core subjects were in a special ed classroom.<sup>82</sup> The parent testified she learned there was a placement problem when, after she enrolled the child at school, Ms. Cokeley told the mother they did not have an academic classroom for the child, but that as soon as a child left from one of the schools, there would be room.<sup>83</sup> The mother had little communication with the first teacher, Mr. Allison, the mother saying he never came outside when the mother picked up the child, nor did the parent have much interaction with the Little Rock School District central office, Ms. Papineau not returning phone calls.<sup>84</sup> To this parent's knowledge, the only discipline coming out of the forged IEP by Mr. Allison was that he was allowed to resign.<sup>85</sup>

### Cassandra Steele

Ms. Steele is the Special Education coordinator for the Little Rock School District, employed by the District 29 years, all 29 years in special education.<sup>86</sup> Ms. Steele has worked 15 years in administration, 3 on the leadership team there.<sup>87</sup> Ms. Steele is certified in Special Education, pre-K-12, has a Master's degree in speech/language pathology, and all but test for specialist degree, curriculum specialist, and administrative certification.<sup>88</sup>

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80	88	6-19
81	92	1-9
82	94	1-25
	95	25
	96	1-9
83	96	24-25
	97	1-13
84	98	12-25
85	104	17-23
86	115	18-25
87	115	24-25
	116	1-5
88	116	12-15
	116	7-11

August 17, 2014 was the first day of school for the 2014-2015 school year, and Ms. Steele testified she had seen this Student's special education file.<sup>89</sup>

Looking at Petitioner's Exhibit 5, the Record of Access, Ms. Steele testified they are kept in every student's file, and any time anyone reviews information in it or typically when there is a conference and information in the file is discussed or reviewed, the persons who had access to the file have to sign this sheet, but it is not a check-out. There is a different form inside the due process file that people check out, but this would show if anyone reviewed it.<sup>90</sup>

Students' special ed files are maintained in the building, there are two copies: there is a school copy and a central office copy. The school copies are kept in the locked files, depending on the school, at a central location where everyone who has a right to have access can access it. Central files are kept at Garland, which is a different building from this one, in a file room, and they all have access electronically to the files in SEAS (Special Education Automated Services) via computer.<sup>91</sup> When this process started, Ms. Steele had a copy of the Student's file brought up to central.<sup>92</sup> If someone in the central office reviews a special ed file, it would not be reflected in Exhibit 5 unless it was reviewed at the school.<sup>93</sup>

As to the meeting in April that Ms. Papineau was requested to attend but did not, Ms. Steele testified she was with Ms. Papineau at the office when she was called to that conference the same afternoon she has another conference previously scheduled at a different school, and according to her, she had no notice prior to that afternoon as to this one.<sup>94</sup>

As to the child's teacher Berthena Nunn, this parent testified Ms. Nunn is curriculum specialist certified, administrator certified, Special Education certified, she had about district level administrative certification, that she has about 8 or 9 certifications in different areas.<sup>95</sup>

As to how the District delivers compensatory education, looking at Respondent's Exhibit 4, the

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<sup>89</sup> 116 12-18

<sup>90</sup> 116 19-20  
117 5-21

<sup>91</sup> 117 24-25  
118 1-13

<sup>92</sup> 118 20-25.

<sup>93</sup> 119 2-12

<sup>94</sup> 119 16-25

<sup>95</sup> 120 17-23

letter from the District's counsel to the Parent's counsel, Ms. Steele testified that typically they add time onto what is already on the IEP if it is during the school year, that they offer summer compensatory services, and typically do whatever is convenient for the child and the parent. It depends on what is needed and could either be during the school year or the summer.<sup>96</sup> Sometimes the compensatory education is during the school day, sometimes after school. This particular Student is going somewhere after school. The District also provides transportation even if a child needs to go to a clinic after school, and the parents pick them up. Ms. Steele assumed that if a child did have transportation home, that would also be discussed.<sup>97</sup>

Looking at Respondent's Exhibit 3, page 20, Ms. Nunn's Annual Review/Notice of Decision, this is an annual review the teacher creates. It is a summary of the child's progress toward the IEP implemented during the school year. It is used to document progress, to note evaluation or re-evaluation done, make recommendations for next year based on the services addressed on this annual review form, and any other relevant information needed to help program appropriately for the student on the form for the following school year.<sup>98</sup>

From reading this form, Ms. Steele said it looks like the progress notes on Ms. Nunn's annual review form for this Student are more directly related to the goals and objectives included on the IEP the Parent brought from Fulton County as opposed to the one in question. The parent said she says this because the Fulton County IEP had academic goals, and Ms. Nunn, who worked with the Student for the longest during the past school year, has progress made toward comprehension and math goals listed.<sup>99</sup>

The Student had math and reading goals, and Ms. Nunn also worked on reading skills that are different, an adaptation for the Student's needs.<sup>100</sup> Focusing on Ms. Nunn's statement of annual achievement of goals and objectives, Ms. Steele heard the Parent assert the Student was placed in

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<sup>96</sup> 120 24-25  
121 1-25  
122 1-5

<sup>97</sup> 122 7-20

<sup>98</sup> 122 21-25  
123 1-16

<sup>99</sup> 123 25  
124 1-16

<sup>100</sup> 124 24-25  
127, 20-25  
128 1, 8-17, 24-25  
129 1

a non-academic environment, but Ms. Nunn's statement of achievement of annual goals and objectives indicated an academic environment, an academic IEP, and the IEP drives what is being taught.<sup>101</sup>

The classroom in which the Student was placed was primarily students with curriculum-based instruction or functional IEP's, but the Student was not taught a functional IEP (daily living skills, domestic skills, those four areas typically on a functional IEP); this Student came in with an academic IEP and academic goals and objectives were addressed with her throughout her time in that class.<sup>102</sup>

When a child comes in after school starts, sometimes it is finding a special education classroom that best meets their needs, but it might not be an all academic class or all functional curriculum class, but the IEP drives the instruction so the special ed teacher is able to implement the IEP. It does not matter where the classroom is. Special education is a service, not a place.<sup>103</sup> At Cloverdale the Student was one of seven to start, as children move in and out. There was one teacher and two paras, and sometimes there are up to three additional adults in the classroom.<sup>104</sup> The Student was able to have interaction with non-disabled students also, for art, PE and music as pull-outs for the 2014-2015 school year (extracurricular classes outside the special ed classroom).<sup>105</sup>

Looking at Exhibit 6, Ms. Steele testified this IEP has a statement of the Student's present levels of educational performance, a statement of measurable annual goals, short-term instructional objectives, student supports, and accommodations, a statement of related services that will be provided to the Student, and projected dates for initiation and duration of services.<sup>106</sup>

Exhibit 6 says the IEP ending date is May 9, 2014, and an IEP is typically valid for one calendar year unless on a 12-month schedule. The District has moved to annual IEP's where they are 12 months, so unless the IEP teams thinks a child needs to be evaluated and a new IEP created before then, it

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<sup>101</sup> 129 20-25  
130 1-7

<sup>102</sup> 130 13-21

<sup>103</sup> 131 5-12

<sup>104</sup> 132 8-25

<sup>105</sup> 133 6-11, 18-20  
134 9-11

<sup>106</sup> 134 8-25  
135 1-25  
136 1-2

is typically good for a year.<sup>107</sup> The Student exited Fulton County School District before the end of the school year, around April, and since the Student returned to the Little Rock School District from Fulton County she has not been reevaluated.<sup>108</sup>

As to whether there was any difference in the IEP in Exhibit 6 and the one the Student had before she left Little Rock School District in December 2013 (Respondent's Exhibit 8), Ms. Steele stated Fulton County did not put minutes per week of special ed in their IEP, and the one the Student had before she left Little Rock, she was re-evaluated at that time, and was already receiving resource services for language arts and math. Little Rock District changed the Student's placement for receiving services, and she went to 600 minutes a week instead of getting it from the resource teacher to getting it from the self-contained teacher. The only thing they changed was the delivery method for getting services. The Student went to the self-contained classroom for language arts and math and still received her Occupational Therapy and Speech Therapy.<sup>109</sup> The Parent agreed with the implementation of the action being proposed (Exhibit 8, page 97).<sup>110</sup> As to the Fulton County IEP, it indicates the Student was in a special education setting, with no regular classroom instruction, general education classroom instruction, it looks as if the team rejected all the general ed settings.<sup>111</sup>

Ms. Steele agreed it looked like December 3, 2013, that the Student was in a less-restrictive environment in Little Rock than she was when she got to Fulton County, based on the continuum, as the continuum from the Little Rock IEP states the Student would do 40 to 79 percent of her instructional day in the general ed classroom.<sup>112</sup>

Looking at Respondent's Exhibit 10, Ms. Steele identified it as the Student's Occupational Therapy re-evaluation done at the time of the re-evaluation in 2013, which has not expired and is still valid, as it is good for three years.<sup>113</sup> Ms. Steele identified Respondent's page 121, Exhibit 11

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<sup>107</sup> 136 6-17

<sup>108</sup> 136 18-25  
137 1-4

<sup>109</sup> 141 4-25  
142 1-13

<sup>110</sup> 142 18-25

<sup>111</sup> 143 10-12  
144 3-14

<sup>112</sup> 144 23-25  
145 1-10

<sup>113</sup> 146 1-22

as the Student's speech/language evaluation of 11/08/13, which is still valid.<sup>114</sup> Ms. Steele identified Respondent's Exhibit 12 as the psycho educational evaluation of the Student, done November 8<sup>th</sup>, 2013, also still valid.<sup>115</sup>

Looking at Respondent's Exhibit 16, the Student's enrollment history as of August 26<sup>th</sup>, 2015, Ms. Steele testified the Student moved from Fulbright to Georgia January 21, 2014, and enrolled in Cloverdale Middle School in Little Rock on September 15, 2014, staying until the end of the school year.<sup>116</sup> Ms. Steele had no personal knowledge as to whether Mr. Allison, the Student's first teacher at Cloverdale, received any training for how a proper IEP conference is to take place.<sup>117</sup>

With this Student coming in with an IEP, there was no necessity to have conducted a conference. They were obligated implement the Fulton County IEP immediately unless they saw a need to change something or a need for re-evaluation. They had prior consent from the Parent to provide services to the Student from when she was with them in December of the year before. The only change from the IEP in Fulton County was goals; placement stayed the same. They did not get an annual review from Fulton County, possibly because the Student left before the end of the school year.<sup>118</sup>

It appears Ms. Nunn implemented the Fulton County IEP, and looking at her annual review and the progress she noted, it does not appear she even used Mr. Allison's IEP, which did not affect the Student's academic IEP.<sup>119</sup> Ms. Nunn having told the Parent the Student did not need to be in that classroom did not mean the teacher could not meet the Student's needs, and she did meet the Student's needs.<sup>120</sup> Ms. Steele testified the Student's curriculum was still being taught according to her IEP, regardless of the classroom she was in.<sup>121</sup>

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<sup>114</sup> 147 1, 24  
148 2-10

<sup>115</sup> 148 18-25  
149 1-6

<sup>116</sup> 149 16-20  
150 22-25  
151 1-7

<sup>117</sup> 168 3-5

<sup>118</sup> 170 2-25

<sup>119</sup> 172 13-24

<sup>120</sup> 174 5-9

<sup>121</sup> 175 7-10

When the Student came to Little Rock, she was placed where there was a vacancy. They could not overload a class that had an academic IEP as the Parent wanted (the parent asked for Mann, which was full), so they implemented the Student's IEP<sup>122</sup>.

Ms. Steele testified this hearing came about because of services not rendered to the Student according to her IEP, but the District determined where the Student was lacking, what she did not receive, documented it, the Parent agreed, and the District made an attempt to compensate for that and developed a plan and presented it to the Parent, but she did not respond.<sup>123</sup> The Student now attends Mann Magnet School.<sup>124</sup> When asked if the District had somewhere the Student can be placed to obtain a fair and appropriate public education now by someone in compliance and certified for the Student's level of disability, Ms. Steele testified yes, the Student could move tomorrow to Pulaski Heights Middle School.<sup>125</sup>

## CONCLUSIONS OF LAW and DISCUSSION

A threshold issue in this Hearing is which party bears the burden of proof. Current case law holds that "the burden of proof absent a State Statute to the contrary in an administrative hearing challenging an IEP is properly placed upon the party seeking relief, whether that is the disabled child or the school district."<sup>126</sup> It is settled that staff shortages, even unexpected ones, will not excuse a district from implementing IEPs. *Mesabi East Independent School District #2711 v. Minnesota State Educational Agency*, 110 LRP 15180.

Compensatory education is a proper method to provide FAPE to children with disabilities who were entitled to, but were denied, FAPE. *Letter to Kohn v. Office of Special Education and Rehabilitative Services*, 17 LRP 1319. If an Independent Hearing Officer finds denial of FAPE which affects a student's ability to meet objectives, even though not a willful denial, the Independent Hearing Officer may take into account equitable considerations in determining the amount of compensatory education and the type of services to be provided. *Ipswich Public Schools v. Massachusetts State Educational Agency*, 104 LRP 29571.

FAPE as defined for the purposes of this part are:

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<sup>122</sup> 176 5-11

<sup>123</sup> 194 8-15  
195 20-22

<sup>124</sup> 197 10-11

<sup>125</sup> 201 7-18

<sup>126</sup> *Schaffer v. Weast*, 44 IDELR 150 (U.S.2005)

- a) To ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment an independent living;
- b) To ensure that the rights of children with disabilities and their parents are protected;
- c) To assist States, localities, educational service agencies and Federal agencies to provide for the education of all children with disabilities; and
- d) To assess and ensure the effectiveness of efforts to educate children with disabilities.

Case law is well settled that, while IEP's are subject to considerable procedural and substantive requirements, IEP's are not required to "furnish[ ] ... every special service necessary to maximize each handicapped child's potential,"<sup>127</sup> What the IDEA requires is that IEP's provide a "basic floor of opportunity," consisting of services which are "individually designed to provide educational benefit"<sup>128</sup> to a child with a disability.

Pursuant to Part B of the IDEA, States are required to provide FAPE for all children with disabilities between the ages of three (3) and twenty one (21).<sup>129</sup> In 1982. In *Hendrick Hudson Dist. Bd. Of Educ. V. Rowley*, the U.S. Supreme Court addressed the meaning of FAPE and set fourth a two part analysis that must be made by Courts and Hearing Officers in determining whether or not a school district has failed to provide FAPE as required by Federal law.<sup>130</sup> Pursuant to *Rowley*, the first inquiry a Court or Hearing Officer must make is that whether the State, i.e., the local educational agency or district, has complied with the procedures and regulations as set out in the IDEA. Therefore, it must determine whether the IEP developed pursuant to the IDEA procedures was reasonably calculated to enable the student to receive educational benefits.<sup>131</sup> From the initial contact with the district, there has always been an IEP in place for the student because the District implemented the IEP accompanying the Student from the Fulton County Alabama School District, place of last enrollment.

Regardless of the first inquiry, that of whether to District has complied with the procedures set forth in the IDEA, the Hearing Officer notes that Counsel for the Petitioner in this case did not raise any

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<sup>127</sup> *Board of Education v. Rowley*, 458 U.S. 176, 199 (1982)

<sup>128</sup> *Board of Education v. Rowley*, 458 U.S. 176, 199 (1982)

<sup>129</sup> 20 U.S.C. 1412(a); 34 C.F.R. 300.300A(a)

<sup>130</sup> 458 U.S. 176, 206-07 (1982)

<sup>131</sup> *Id*

procedural violations of the IDEA and as such, this Hearing Officer hereby finds that the District did not deny FAPE to the student on account of any violation of any procedural issues.

Having analyzed the first prong of the FAPE analysis, it is now necessary to consider whether or not the District substantively denied FAPE to the student *i.e.*, whether the district failed to provide an IEP that was reasonably calculated to enable the student to receive educational benefits.<sup>132</sup> Pursuant to *Rowley*, the goal of the IDEA is “more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.”<sup>133</sup> Essentially, an IEP is not required to be designed to “maximize the student’s potential commensurate with the opportunity provided to other children” thus making the standard that the District must meet very minimal.<sup>134</sup> However, what constitutes educational benefit when dealing with a disabled student must be determined on a case by case basis. Specifically, “the IDEA requires Public School Districts to educate ‘a wide spectrum of handicapped children,’ and the benefits obtained by children at different ends of the spectrum will ‘differ dramatically.’”<sup>135</sup>

After hearing each parent and evaluating their credibility and reviewing the evidence presented in the transcript of the Due Process Hearing, the hearing officer finds the following:

The Student was not provided FAPE under the IEP which she transferred into the Little Rock School District from Fulton County School District (Alabama). While her IEP was reasonably calculated to provide an educational benefit, services mandated by the IEP for Speech Therapy and Occupational Therapy were not delivered. The lack of these services constitute a denial for FAPE.

Having determined that the District did not provide FAPE to the student 2014-15 school year, the issue now becomes whether or not to Order tuition reimbursement for a private non-school placement for the student as requested by the mother. It is noted that there is no requirement in the IDEA that a student shall be provided with the specific educational placement that his or her parents prefer.<sup>136</sup> Additionally, nothing in the IDEA requires that a school district maximize a student’s

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<sup>132</sup> 34 C.F.R. 300.511(d); 20 U.S.C. 1415(f)(3)(B)

<sup>133</sup> *Rowley*, 458 U.S. 176, 206-07 (1982)

<sup>134</sup> *CJN v. Minneapolis Public Sch.*, 323 F.3rd 630, 63-68 (8<sup>th</sup> Cir.), cert denied, 540 U.S. 984 2003

<sup>135</sup> *C.B. by and through his parents, B.B. and C.V. v. Special School District No. 1, Minneapolis MN*, , 262 F. 3<sup>rd</sup> 981 (8<sup>th</sup> Cir. 2011) (quoting *Rowley*, 458 U.S. 176, at 202 (1982)

<sup>136</sup> *Rowley*, 458 U.S. 176, at 203 (1982)

potential or provide the best possible education at the expense of the public.<sup>137</sup> Pursuant to *Rowley*, a districts obligations under the IDEA are satisfied when a student receives FAPE, i.e., “personalized instruction with sufficient support services to permit the student to benefit educationally from that instruction.”<sup>138</sup> As addressed previously, a public school district has a responsibility under the IDEA to offer eligible students instruction and programming reasonably calculated to provide some educational benefits.<sup>139</sup> In addition, the IDEA requires that disabled students be educated in the “least restrictive environment.”<sup>140</sup> In this regard, the IDEA reflects a “strong preference” that students with disabilities attend regular classes with non-disabled students.<sup>141</sup> No such tuition reimbursement is ordered.

## ORDER

After due consideration of the record, the foregoing Findings of Fact and Conclusions of Law, it is hereby found that partial relief sought by Petitioner is Ordered.

**IT IS HEREBY ORDERED** that compensatory Occupational Therapy services in the amount of sixty (60) hours, or three-thousand six hundred (3,600) minutes, over and above the minutes of instruction mandated by the current IEP are to be provided by District to Student within eighteen (18) months of the issuance of this Order.

**IT IS FURTHER ORDERED** that District provide Student an additional fifteen (15) hours, or nine hundred (900) minutes, of Speech Therapy over those called for by the current IEP within one hundred twenty (120) days of the issuance of this Order.

## FINALITY OF ORDER AND RIGHT TO APPEAL

The decision of this Hearing Officer is final and shall be implemented unless a party aggrieved by it shall 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

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<sup>137</sup> T. F. v. Special School District St. Louis Co., 449F 3<sup>rd</sup> 816, 821(8<sup>th</sup> Cir. 2006)

<sup>138</sup> Fort Zumwalt Sch. Dist. v. Clynes, 119 F. 3<sup>rd</sup> 607 612 (8<sup>th</sup> Cir. 1997)

<sup>139</sup> *Rowley*, 458 U.S. 176, at 203 (1982)

<sup>140</sup> Blackmon v. Springfield, 358 F. 3<sup>rd</sup> 999, (8<sup>th</sup> Cir. 1998)

<sup>141</sup> 20 U.S.C. 1412 (a)(5)(A)

further jurisdiction over the parties to the hearing.

**It is so Ordered.**

*Michael McCauley*

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Michael McCauley  
Due Process Hearing Officer  
November 19, 2015