

Arkansas Department of Education
Special Education Unit

IN RE:

XXXXXXXXXXXXXXXXXXXXX
as Parents in behalf of
XXXXXXXXXXXXXXXXXXXXX, Student

PETITIONER

VS. NO. XXXXXXXX

Benton School District

RESPONDENT

HEARING OFFICER'S FINAL DECISION AND ORDER

Issues and Statement of the Case

Issues:

Did the Respondent deny the Student with a free and appropriate public education (FAPE) for school years 2008-09 and 2009-10 according to the Individuals with Disabilities Education Act (IDEA) by not:

1. Providing an appropriate individualized education program (IEP);
2. Educating the Student in the least restrictive environment (LRE);
3. Providing the Student with appropriate support services for language/communication and speech development:
4. Providing the Student with a behavior intervention plan (BIP);
5. Providing appropriately trained services providers;
6. Providing specialized instruction consistent with the Student's IEP;
7. Providing an appropriate curriculum;
8. Providing special education services based on the Student's unique needs;
9. Providing appropriate supplemental services; and
10. Not following due process procedures by:

- a. Unilaterally changing the Student’s educational placement;
 - b. Not providing the Parents with IEP conference decisions;
 - c. Conducting a functional behavior analysis without parental consent;
 - d. Unilaterally changing the Student’s IEP;
 - e. Not providing the Parents with meaningful information prior to an IEP meeting;
- and
- f. By not providing the Parents with periodic reports on progress of goals and objectives.

Issues raised by the Parents in their initial request for a hearing that were judged by the hearing officer as non-hearable issues under IDEA included allegations that: (a) the Respondent coerced, intimidated, or made threats of arrest and police intervention; and (b) claims of violations of Section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990, and the Fourteenth Amendment of the U.S. Constitution.

Procedural History:

On May 17, 2010, a request to initiate due process hearing procedures was received by the Arkansas Department of Education (hereinafter referred to as the “Department”) from XXXXXXXXXXXXXXXXXXXXXXXX (hereinafter referred to as “Parents”), the parents and legal guardians of XXXXXXXXXXXXXXXX (Petitioner) (hereinafter referred to as “Student”). The Parents requested the hearing because they believe that the XXXXXXX 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 special education services as noted above in the issues as stated.

The Department responded to the Parent's request by assigning the case to an impartial hearing officer and establishing the date of June 18, 2010, on which the hearing would commence should the parties fail to reach a resolution prior to that time. An order setting preliminary timelines and instructions for compliance with the order was issued on May 17, 2010. The District notified the hearing officer on May 27, 2010, that a resolution conference was conducted as ordered, but without resolution of the issues contained in the Petitioner's complaints. (See Hearing Officer Binder of Orders and Pleadings)

The hearing began as scheduled on June 18, 2010, and continued as requested on the record by the Petitioner, without objection, in order for the Petitioner to complete their presentation of testimony on June 29, 2010, and again on August 12, 2010, with a final day of hearing on August 19, 2010.

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, Robert B. Doyle, Ph.D., Hearing Officer for the Arkansas Department of Education, conducted a closed impartial hearing. The Parent was represented by Theresa Caldwell, attorney of Little Rock, Arkansas and the District was represented by Pamela Osment, Attorney of Conway, Arkansas.

At the time the hearing was requested the Student was a eight year-old male enrolled in the District, having completed school years 2008-09 and 2009-10 as a student with a disability as defined by 20 U.S.C. § 1401(3), XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX. Prior to entering the District's kindergarten in school year XXXXXXXX the Student had been receiving early childhood education services at age three through the XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX, Arkansas, but was not diagnosed as a child

with XXXXXX until age four years, six months.¹ The Parents moved into the District prior to the Student entering kindergarten in order for the Student and his XXXXXXXXXXXXXXXXXXXXXXXXXXXX, to receive a “proper education.”² They enrolled the Student and his brother into the local Civitan developmental center prior to enrolling them into the District’s kindergarten.

Prior to the start of school year XXXXXXXX, the Student’s kindergarten year, the Parents requested a kindergarten waiver; however, on September XXXXXXXX, they changed their minds and decided that they wanted the Student to attend the District’s school age program for students with disabilities. On September 24, XXXXX, a referral conference was held, at which time a temporary IEP was developed for the Student and arrangements were initiated to collect evaluation information in order to develop a permanent IEP. That meeting was conducted on November 30, XXXX, with Parental participation. Neither the development, nor the implementation of the Student’s IEP for school year XXXXXXX is in dispute.

Both parties provided the Hearing Officer with pre-hearing briefs which contained the necessary information on which to proceed and determine the burden of proof, which was to be born by the Petitioner. It was explained to both parties at the beginning and again at the conclusion of the hearing that the decision reached by the Hearing Officer would be based only on the testimony and evidence presented at the hearing. Both parties provided the Hearing Officer with post-hearing briefs as requested and both are included as exhibits in the Hearing Officer Binder of Orders and Pleadings.

Findings of Fact:

¹ District Binder, Vol I, Page 193-203

² Hearing Transcript, Vol IV, Page 8-9

School Year 2008-2009:

Did the District fail to provide an appropriate IEP?

The Student's IEP committee met to review and develop his IEP for school year 2008-09, on May 27, 2008, with the Parents participating as members of the committee. The record reflects that the action to be taken included the committee meeting at a later date to complete the Student's programming decisions. The Notice of Decision further stated that the committee discussed the Parent's desire for the Student to be retained and repeat his kindergarten year, but that the rest of the committee believed that he would benefit from staying with his same-age peer group by going with them into the first grade.³ On June 16, 2008, the committee met again to develop the IEP. His proposed schedule of services included Language Arts in both the regular first grade class and in a special education class. He would receive Math instruction and Speech in the special education class and would be with same age peers in the regular education class for Music, Physical Education, Library, Tech Lab, and Art. Additionally, he would receive related services for speech therapy in the speech therapy room, three times weekly for a total of ninety minutes; physical therapy in the physical therapy room, twice weekly for a total of sixty minutes; and occupational therapy in the occupational therapy room, twice weekly for a total of sixty minutes. The concerns of the Parents as expressed at the IEP meeting included their desire that he repeat Kindergarten and spend the majority of his day in the regular kindergarten classroom. The final decision of the committee was for him to be in the special education self-contained class less than sixty percent of the day, but when in the regular first grade education classroom and in other activities with his

³ District Binder, Vol I, Page 164

same-age non-disabled peers, he would have the support of a special education para professional.⁴

The Student's IEP contained special factors for consideration which included positive behavioral interventions; language and special communication; assistive technology devices and services; and the support of an aide for time spent in the regular classroom with Discrete Trial Training, as well as an adult being in close proximity during outside activities and transitions, as well as in the regular classroom setting.⁵

⁴ District Binder, Vol I, Page 75-98 and Parent Binder, Page 140-155

⁵ Ibid

The Student's IEP goals and objectives were developed based on the Student's level of educational performance as measured by the results of an evaluation using the Assessment of Basic Language and Learning Skills - Revised (ABLLS-R) and his performance on goals and objectives from the previous year.⁶ The Parent's challenged the appropriateness of developing the IEP without having an intelligent quotient for the Student since earlier testing was unable to produce one and there was no current attempts to obtain one for school year 2008-09. However, in using the results of the ABLLS-R the District's behavior specialist consultant explained that "the ABLLS is a task analysis that breaks down skills in a variety of domain areas...there are 25 domain areas...the assessment targets cooperation and reinforcer effectiveness, visual performance, receptive language, imitation, vocal imitation, requests, labeling, introverbals, spontaneous vocalizations, syntax and grammar, play and leisure, social interaction, group instruction, follow classroom routines, generalized responding, reading, math, writing, spelling, dress, eating, grooming, toileting, gross motor and fine motor." She further explained that the ABLLS "is a curriculum guide to identify where a child, especially with XXXXXXXX, who has splinter skills, where those ...deficits are...so, what the assessment does, it's a task analysis of a variety of these skills in order to target the holes in that repertoire, and target those specifically."⁷ She testified that "the function of the ABLLS is to strictly develop and provide guidance for a curriculum, so it is not anywhere similar to an IQ test or any of the other tests that are given by psych examiners."⁸

Additional evaluation data indicated as being used in developing the Student's IEP for school year 2008-09 included a psychological report completed by the school psychology specialist

⁶ Parent Binder, Page 520-639

⁷ Transcript, Vol II, Page 36-37

⁸ Transcript, Vol II, Page 37-38

in October 2007; a communication skills evaluation report conducted in September 2007; an occupational therapy re-evaluation conducted in August 2007; and a physical therapy evaluation also conducted in August 2007.⁹ The committee also had the results of a developmental pediatric evaluation provided by the Parents that was completed in June 2006.¹⁰ The present levels of academic and functional performance as noted on the Student's IEP for school year 2008-09 were consistent with the findings of all of the above noted assessments and evaluations.

⁹ District Binder, Vol I, Page 172-192

¹⁰ District Binder, Vol I, Page 193-203

The Parents requested that the IEP include the Student's need for a paraprofessional; that he receive one-on-one Discrete Trial Training; and that he be provided a sensory diet. Also listed on the IEP, not for the educational benefit of the Student, but for the benefit of the Parents, was a request that a strict classroom schedule be followed; that they be provided with a copy of the schedule; and that they wanted to see his work break system.¹¹ It was not clear from the testimony as to the need for a "strict" schedule by the Parents, other than their need to know where the Student would be during the day; that XXXXXXXX children often have difficulty with novel changes in their scheduled activities; or as to whether or not he was receiving the designated amount of time according to his IEP with his non-disabled peers in the regular education classroom. Assuming the later in context of the appropriateness of the IEP, the evidence and testimony presented was sufficient to indicate that the Student received an appropriate amount of time and exposure to non-disabled peers. His special education teacher testified that her "rule of thumb is, make sure that I'm not giving less Special Ed time as needed...and if we can increase a little more time in Regular Ed and he is successful – because he wasn't going to be able to do that every day, but we wanted to have it in the notes that he could stay longer if he was doing the work and sensory-wise he is able to handle it and he is able to stay [in the regular education classroom]...but there are some days that [it's] not going to happen, just due to his disability...I didn't want to get into a situation where today he couldn't go an extra 25 minutes so we violated the IEP...we were trying to base it on what [the Student] needed."¹² She testified that the alteration of the total time spent in the regular education classroom was made only after consulting with the Parents and without a formal IEP committee

¹¹ Parent Binder, Page 33

¹² Transcript, Vol II, Page 257

meeting.¹³ Such was identical to the testimony provided by his regular classroom teacher.¹⁴ With regard to the appropriateness of the amount of time spent in each location, it appears to be consistent with the Student's unique needs and that it was evaluated and responded to on a day by day basis by his teachers.

¹³ Ibid, Page 260

¹⁴ Transcript, Vol III, Page 54

One of the arguments made by the Parents as to the inappropriateness of the Student's 2008-09 IEP involved the failure for Discrete Trial Training (DTT) to be listed on the IEP as a related service; however, as explained by the District's special education supervisor "discrete trial training is a way of delivering instruction" and not a service in and of itself, even though counsel for the Parents continued to refer to it as a therapy, such as one would with speech, occupational, or physical therapies.¹⁵ The Student's special education teacher explained that discrete trial training "is a research-based strategy that teachers are using to help kids with XXXXXXXX to progress."¹⁶ The District's behavior specialist consultant explained that "discrete trial training is a system in which you provide an instruction and the student responds either correctly or incorrectly and feedback is given...and the teachers and the paraprofessionals that worked with [the Student] do that in every situation, they do it on the playground, they do it during transitions, they do it during toileting, they do it during the – regular ed classroom, in the special ed classroom...and so, to say that – whether there is an hour's worth of data or not, I can validate that [the Student was] getting discrete trial [training] at least an hour every day."¹⁷ When asked if there was a difference between the discrete trial "therapy" as listed on the Student's IEP and discrete trial training that was provided, her response was that there was no difference.¹⁸

¹⁵ Transcript, Vol I, Page 52-54

¹⁶ Transcript, Vol I, Page 221

¹⁷ Transcript, Vol II, Page 23-24

¹⁸ Ibid, Page 25

The Parents not only challenged the amount of time given to the Student, but also the accuracy of the implementation of the discrete trial training. The District's behavior specialist consultant explained that she was responsible for oversight and training of the staff who implemented the training, which included "the teacher and/or the aides that were with him all day."¹⁹ She explained that she "would watch them run through the rotation session that [she] had set up, and then provide feedback at that point, or say, 'You're right on track, good job, I will be here, either in two days, five days, or next week.'"²⁰

His self-contained classroom teacher for school year 2008-09 testified that the "focus that year was integrating [the Student] into the first grade classroom" and that "we did not put as much focus on the discrete trial training."²¹ She also referred to discrete trial training not as being implemented at a set time, for set time limit such as in occupation, physical, and speech therapies, but that "it was implemented in part of his daily routine...as a way to implement his goals." For her "the purpose of discrete trial training is not that they can just do it in a one-on-one setting, it is that they can do it in other settings, small group, large group, cafeteria..and the fact that he could do it outside of that setting, that is more than actually reaching that goal."²²

The evidence provided in the District's exhibit binder at pages 1050-52, dated May 2009, contains the record of the behavior specialist's visits to the Student's classroom, with her observations/actions, with recommendations and follow up. These included written plans for the Parents as well as recommendations for problematic behaviors exhibited by the Student in the

¹⁹ Transcript, Vol II, Page 14

²⁰ Ibid, Page 15

²¹ Transcript, Vol II, Page 226

²² Ibid, Page 227-229

classroom.

A Functional Assessment Analysis of Problem Behaviors was conducted on August 31, 2008, resulting in a Behavior Support Plan being developed on the same date.²³ The same exhibit also included a Functional Analysis Screening Tool (FAST) and Motivation Assessment Scale developed on November 30, 2008. His special education teacher testified that she observed a decrease in behavior problems in the classroom setting when the subject matter being taught was on his academic level and in doing individual hands-on work; however, that he had more problems in group activities and when the level of work was above his academic level.²⁴ She further testified that she saw impressive growth in behaviors, as well as his academics, during school year 2008-09.²⁵ At the annual review conference in May 2009, it was noted that he had achieved mastery on eight of his eighteen goals for the school year and had shown progress on all goals except for one which was not attempted during the 2008-09 school year.²⁶

The testimony and the evidence presented by the Petitioner do not support the allegation that the IEP developed for the Student for school year 2008-09 failed to be an appropriate IEP for the Student. In fact it would appear that the IEP met the IDEA obligation of providing the Student with an opportunity to advance both academically, emotionally, and socially during his XXXXXX grade year, even with the extreme limitations of his disabilities.

Did the District fail to educate the Student in the least restrictive environment?

²³ Parent Binder, Page 168-171e

²⁴ Transcript, Vol II, Page 270-271

²⁵ Transcript, Vol I, Page 210

²⁶ Parent Binder, Page 175

The argument that he was not educated in the least restrictive environment for school year XXXXXX, according to the evidence and testimony elicited from the witnesses, centered around the amount of time allotted on the Student's IEP for him to be in his regular education classroom and the actual amount of time he was in that setting. Prior to entering the XXXXX grade class his XXXXXXXXX IEP had designated him to receive some or no instruction in the regular education classroom, with a minimum of sixty percent of his instructional day in the District's "CBI" or self-contained class.²⁷ As noted above under the question as to whether or not he was provided with an appropriate IEP, his 2008-09 IEP stipulated that he would receive specialized instruction in the special education class 1,080 minutes per week and 700 minutes per week in the general education classroom; with speech therapy for 90 minutes per week and physical and occupational therapies to be 60 minutes per week for each therapy. With regard to LRE designation on the IEP, the document presented as evidence placed him in the regular education class with twenty-one to sixty percent of the instructional day in a resource setting. The same document also noted that his time in the self-contained classroom was to be less than sixty percent, but when he was in the regular classroom and participating in regular education activities he had to have the support of a special education para professional.²⁸

The arguments presented by the Parents as to whether or not he was actually being educated in the least restrictive environment also centered around their request for an exact daily schedule that the Student's teachers would be following, with designated times spent in each activity of the day. When the Student's XXXXXXXXXXXX and XXXXXXXXXXXXspecial education special education teacher was questioned as to why the amount of designated time in a regular classroom setting was

²⁷ Parent Binder, Page 103

decreased on his IEP and the amount of time in the more restrictive environment of the self-contained classroom, she stated:

The Parents “wanted him in the [regular education classroom] as much as possible” and “I did everything I could as far as trying to help in be successful. I didn’t want to just put him in there and set him up for failure of being there for too long an amount of time and possibly having a melt-down. Because he needed to work on some other skills that they are not necessarily working on in the regular classroom.”²⁹

She further testified on being asked specifically why there was a decrease in regular education time on his XXXXXXXXX IEP when compared to his XXXXXXXXX IEP that:

“What we had tried to do in XXXXXXXXX [was] for him to go to the [regular education] classroom independently, that was where the extra time worked, and he was not successful during that time to be in there independently.”³⁰

She also testified that the teaching staff played it by ear on how the Student was reacting each day as to whether or not to extend his time in the regular education classroom. She stated that “If he was having a good morning and enjoyed the activities they were doing [in the regular education classroom], we would continue until – it wasn’t ‘oh, his 45 minutes is up, we have to go back to the [self-contained] classroom.’ If he was enjoying the activity, then we allowed him to stay for success.”³¹

²⁹ Transcript, Vol II, Page 249

³⁰ Transcript, Vol II, Page 251

³¹ Transcript, Vol II, Page 253

His regular education XXXXXXXX grade teacher testified that the maximum amount of time that she noticed the Student being able to tolerate activities in her class without a sensory break was twenty minutes. “If he is sitting at his seat, as the other first grade students are, completing independent work, completing spelling work, completing morning work, after a certain period of time, I’m saying a maximum of 20 minutes, [the Student] is going to begin to get fidgety.”³² In response as to whether or not she was aware of the Student having a specific schedule for his day, she replied that she provided the special education teacher with her schedule as to when she would be teaching classes to which the Student was assigned according to his IEP.³³ The Student’s mother testified that she understood the reason for the reduction in regular classroom time from XXXXXXXX class to XXXXXXXX grade class was because XXXXXXXX grade was “tougher.”³⁴

The evidence and testimony as presented with regard to whether or not the District educated the Student in the least restrictive environment for school year 2008-09 shows that the Student’s teachers, both regular education and special education, made every effort to afford him the opportunity to be in the least restrictive environment, not simply based on the time designated on his IEP, but according to his daily need as manifested by his disability.

Did the District fail to provide the Student with the appropriate support services for language/communication and speech development?

³² Transcript, Vol III, Page 32

³³ Transcript, Vol III, Page 34-35

³⁴ Transcript, Vol IV, Page 19

The Student’s IEP for school year 2008-09 designated him to receive ninety minutes per week in thirty-minute sessions for speech therapy. Additionally, the IEP designated him to receive language arts and math in both the regular education and special education classrooms.³⁵ When the District’s School Psychology Specialist evaluated him in October 2007, his cognitive/communication/language scores using the Callier-Azusa Scale were as follows:

Cognition	13 months attained, emerging up to 84 months
Receptive Language	16 months attained, emerging up to 20 months
Expressive Language	4 months attained, emerging up to 34 months
Speech	24 months attained ³⁶

A communications skills evaluation report also conducted in October 2007, by the District’s speech-language pathologist indicated that he presented with severe receptive and expressive language delay and a mild articulation disorder, with his oral mechanism, hearing, fluency, and voice appearing to be adequate.³⁷ Sixteen months earlier an evaluation requested by the Parents revealed that his “speech milestones were delayed” where he was using “repetitive speech or echolalia; using jargon-like speech; pointing with his index finger; and using single words, and some phrases to get his needs met.”³⁸ On entering the District’s XXXXXXXXXXXX the IEP developed in September 2007 indicated that the student was “delayed in speech and does not always gesture for help” and that “he does not answer basic personal identification questions and

³⁵ Parent Binder, Page 75

³⁶ District Binder, Vol I, Page 172-179

³⁷ District Binder, Vol I, Page 181-185

³⁸ District Binder, Vol I, Page 194

tends to [be] anxious when there is a change in routine.”³⁹ In testimony the Student’s mother did not disagree with this assessment.

³⁹ Parent Binder, Page 91

Prior to entering his XXXXXXXX grade year the IEP developed in June 2008, indicated that his “intentional communication [was] somewhat limited.... that he [echoed] much of what he [heard], but [would] make verbal requests for reinforcing items” and that it was “difficult to understand his speech at times [because] he speaks on inspiration rather than expiration, and [in so doing] he runs out of incoming air, his pitch rises... and further that “his overall articulation skills appear to be age appropriate.”⁴⁰ At the end of school year 2008-09 it was noted that he was “emerging in his ability to communicate his needs and wants in phrases up to 5 words and [could] spontaneously ask for help” and that he could “identify all letters and is beginning to match the letter sounds.”⁴¹

The Student’s mother testified that she was aware of the Student’s speech goals as reflected in his IEP; that, although not mastered, he had made progress with each goal; and that she also understood which goals would be continuing into his next school year.⁴²

From the evidence presented and testimony elicited from witnesses there is nothing that would substantiate the findings that the District failed to provide the Student with appropriate language/communication and speech development opportunities during school year 2008-09.

Did the District fail to provide the Student with a behavior intervention plan?

⁴⁰ Parent Binder, Page 76

⁴¹ Parent Binder, Page 33

⁴² Transcript, Vol IV, Page 75

The Student's 2008-09 IEP did not reflect the need for a behavior intervention plan; however, it did indicate that he would not be following the regular discipline policies of the District. Rather that he would be provided with accommodations including "quiet voice," "ask...what do you want," "immediate reinforcement," "counting to obtain object," and "time out with defined amount of time, using a visual timer or counting."⁴³ Some of the Student's behaviors listed on his IEP that needed to be addressed included pinching other students to get their attention and sometimes yelling, as well as needing to learn how to share with other students.⁴⁴ In her testimony the Student's mother was not certain as to how the District's use of a behavior specialist's recommendations were to be used in the school setting because there was no behavior intervention plan.⁴⁵ In August 2008 a functional assessment analysis of problem behaviors resulted in developing a behavior support plan with specific recommendations for the District personnel to follow in addressing the Student's behaviors that were considered disruptive to his and others' learning.⁴⁶

⁴³ Parent Binder, Page 75-86

⁴⁴ Ibid, Page 76

⁴⁵ Transcript, Vol IV, Page 45

⁴⁶ Parent Binder, Page 171a

In October 2008 the District conducted a separate programming conference, with the Parents present, along with the Student's regular education classroom teacher, his special education teacher, his speech/language therapist, his occupational therapist, and the District's behavior consultant. In addition to reviewing the Student's progress the committee reviewed a functional assessment of the Student's behavior to assist them in developing a behavior plan if needed.⁴⁷ The result was a modification of the Student's IEP to add additional measures of accommodations to manage his problem behaviors by all individuals involved in his education, rather than developing a BIP. They decided that instead he would be prompted with use of "your" words, what do you want, first...then...' with immediate reinforcement for correct behavior; time out, as long as it [was] not an escape, with five minutes or less, and if the behavior [appeared] to be exhibited for escape, he would be redirected to stay on task but to shorten the task; to use a sensory diet to prevent inappropriate behavior; if he pinches a student, he would lose seating privileges from the child for a day and redirected with tomorrow; and for the staff to use a picture schedule.⁴⁸

Based on the evidence presented through testimony by his special education and regular classroom teachers the Student did not exhibit behaviors beyond what was described above which were not being addressed with the modified special accommodations. Although a specific Behavior Management Plan was not developed the Parents have failed to show that the Student needed anything more than what was provided to address his behavior needs for school year XXXXX.

Did the District fail to provide the Student with appropriately trained service providers?

The record shows that the direct providers of instructional and related services for the Student during school year 208-09 included two special education teachers, his regular education

⁴⁷ District Binder, Vol I, Page 130-131

classroom teacher, his speech therapist, his occupational therapist, his physical therapist, and a special education para professional. Overall supervision of his special education program was the responsibility of the District's director of special education services. Additionally the District had the expertise of their behavior consultant.

The special education teacher in charge of the special education resource room testified that she “has a degree in early childhood education, and then ...the required 24 hours for Special Education, plus six other Masters hours. She attended the TEACCH training program in 2006, a program specifically designed for children with XXXXXXXXX. She attended a six-hour training course in the summer of 2008 on Discrete Trial Training. She has been teaching special education students for the past five years.⁴⁹ The special education teacher in charge of the CBI or self-contained classroom testified that she received a bachelors degree in early childhood education in 1998, a master’s degree in special education in 1999, and an administration degree in 1999. She was recently certified in English as a second language teacher. Of the past ten years of teaching seven of those have been in special education, with the last two being in the District’s CBI classroom.⁵⁰

The regular education classroom teacher testified that she has a bachelors degree in education and eighteen hours completed towards a masters in reading. The 2008-09 school year was her twentieth year as a classroom teacher; however, it was her first year to teach a XXXXXXXXXclass and the first time she has had a child diagnosed with XXXXXXXXX in her classroom.⁵¹ She emphasized in her testimony that she was aided in the regular classroom by the Student’s special education para professional. The para professional was not called to testify, nor were her credentials entered as evidence.

The Student’s speech therapist was not called to testify. The documents entered as evidence included her credentials listed as having a masters degree as well as being a certified “CCC-SLP”

⁴⁹ Transcript, Vol II, Page 221-222

⁵⁰ Transcript, Vol I, Page 165

⁵¹ Transcript, Vol III, Page 7

speech-Language Pathologist.⁵² The Student's occupational therapist was also not called to testify. The documents entered as evidence included her credentials as "OTR/L Occupational Therapist."⁵³ The Student's physical therapist was not called as a witness. The documents entered as evidence with her report of August 2007, simply indicate "PT Physical Therapist."⁵⁴

⁵² District Binder, Vol I, Page 185

⁵³ District Binder, Vol I, Page 289

⁵⁴ District Binder, Vol I, Page 190-192

The District's behavior consultant worked under an independent contract status during school year 2008-09. She testified that she received a bachelors degree in behavior analysis, with a minor in psychology. In 2001 she was certified and boarded as an Associate Behavior Analyst by the American Behavior Analysts Certification Board.⁵⁵ She further testified that she was not only qualified to administer, but was qualified to provide training in all of the behavior programs to which the Student has been involved since entering the District.

The District's supervisor for special education services testified that she has a bachelors of art in liberal studies; a graduate degree in severe, profound with an emphasis on behavioral psychology, a masters degree in special education, and a doctorate in educational administration. In 2008-09 she had thirty years of teaching experience with fifteen years as a classroom teacher primarily a CBI type of classroom; and experience as a special education supervisor in another district for five years before coming to the District in 2005.

Even a cursive review of the credentials of the individuals listed as providers of services for the Student during school year 2008-09 does not support the allegation of the Parents that they are not qualified to provide the services listed on the Student's IEP.

Did the District fail to provide specialized instruction consistent with the Student's IEP?

⁵⁵ Transcript, Vol II, Page 6-8

The specialized instruction indicated on the Student's IEP for school year 2008-09 consisted of language arts, math, and speech; as well as speech therapy, physical therapy, and occupational therapy.⁵⁶ The Student's CBI self-contained classroom teacher testified that her CBI instruction concentrated on functional skills such as dressing, bathroom, and eating behaviors and his resource special education teacher concentrated on his academics.⁵⁷ She testified that she and the special education para professional assigned to the Student used discrete trial training to implement his CBI instructions "in the classroom as well as a place outside the classroom."⁵⁸ She testified that "at first he needed [the] discrete trial room, but then it got to where he could actually do it in the least restrictive environment, more in the classroom setting instead of having to take him out on that one-on-one."⁵⁹ Sixteen of the goals and objectives listed on the Student's IEP required the use of discrete trial training. They included not only the functional behaviors as noted above, but also language arts activities. His other special education resource teacher testified that she used discrete trial training "when we were in a small group setting, he was getting over-stimulated, we would pull back and work on one-on-one skills..and that was one of the ways that we could not miss instruction but continue on with his learning..but a lot of his focus that year was just trying to integrate him into the XXXXX grade classroom."⁶⁰ His regular education classroom teacher testified that it was his special education para professional who used an Alpha Smart typewriter "when he needed to type out spelling words or if he needed to work with her on sentences that he might be trying to

⁵⁶ Parent Binder, Page 75

⁵⁷ Transcript, Vol I, Page 172

⁵⁸ Transcript, Vol I, Page 221

⁵⁹ Ibid

⁶⁰ Transcript, Vol II, Page 225-226

compose, himself, they would try to type that out.”⁶¹

The Parents apparently preferred a different specialized approach to teaching the Student in developing his language arts skills. This was emphasized by the introduction with his regular classroom teacher with regard to questioning about the ELLA program. She testified that she was acquainted with the program and that she used it in her classroom; however, it was the Student’s special education teachers who would be responsible for use of the program, if in fact it was or was not to be used as a means of instructing the Student.

While a strong emphasis was also placed in testimony on the failure of the District’s personnel charged with developing and implementing the Student’s specialized instruction and the lack of data available to show whether or not it was implemented, there is not sufficient evidence to indicate that for school year 2008-09 that specialized instruction was not developed and implemented according to his IEP.

Did the District fail to provide an appropriate curriculum?

This question encompasses both the first question as to whether or not the District failed to provide an appropriate IEP and the previous question as to whether or not the District failed to provide specialized instruction consistent with the IEP.

⁶¹ Transcript, Vol III, Page 8

The District's behavior consultant testified that she was responsible for assisting and training his teaching staff in developing and implementing a curriculum for the Student. For school year 2008-09 she used the results of the ABLLS which she testified "is to strictly develop and provide guidance for a curriculum."⁶² The results of the ABLLS obtained from the Student's evaluation prior to her coming to the District was used in developing his curriculum for school year 2008-09; however, the copy provided as evidence did not contain a date administered, to whom it was administered, or who administered the inventory.⁶³ She further testified that the Parents were provided with a copy of the score sheet developed from the ABLLS that was used to develop the Student's curriculum, stating that "this is something that we reviewed to each other, across – at the meeting, and [the Parents were] completely fine with that..and this is what the teacher uses to guide her curriculum."⁶⁴ She also explained that "when [the ABLLS was] reviewed with the parents in the annual review meeting, then they [could], at that point, identify the targets that they want to specifically target..but this is a curriculum guide to run a child's individual program...and so, if it is within the boundaries of parents to develop a child's curriculum for the school, then I would have said that she could have used this information to guide the curriculum....if the parent is the one developing the entire curriculum for the student, then I would explain to her in detail this – and we did talk about what areas I suggested to be targeted, and then at that point, she had opportunities to discuss or say that, 'I would like these areas to be worked on, as well.'"⁶⁵

The special education teacher responsible for implementing the Student's IEP for school

⁶² Transcript, Vol II, Page 37-38

⁶³ Parent Binder, Page 639-757

⁶⁴ Transcript, Vol II, Page 46

⁶⁵ Transcript, Vol II, Page 80-81

year 2008-09 testified that his functional “goals were linked to the general [education] curriculum in the areas of behaviors.”⁶⁶ She also testified that not only was the functional curriculum followed in the special education classroom, but also was implemented in his regular education class by his special education para professional.⁶⁷

Based on the evidence and testimony there is no reason to suggest that the Parents were not involved in developing the curriculum to be followed and that no objections were raised either during the development of the Student’s IEP for school year 2008-09 or immediately following during the development of his IEP for the following year. Consequently, the judgment on whether or not the Student’s IEP curriculum was appropriate for school year 2008-09 would have to be in favor of the District.

Did the District fail to provide special education services based on the Student’s unique needs?

⁶⁶ Transcript, Vol I, Page 240

⁶⁷ Ibid, Page 241

The earliest evaluation information presented as evidence was conducted in XXXXXXXXX by a team of specialists at the UAMS College of Medicine, Department of Pediatrics, when he was four and a half years old. The diagnostic impressions at that time were “XXXXXXXXXXXX, mild to Moderate, as substantiated by developmental history, observed behaviors, number of identified symptoms, and the presence of XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX.”⁶⁸

The Student’s presenting disabilities which were considered to have a negative affect on his education during school year 2008-09 included:

“...delayed speech and does not always gesture for help.

“...does not answer basic personal identification questions and tends to get anxious when there is a change in routine.

“...finishes work very quickly without paying attention to detail and will move to an activity of his choice without verbally asking the teacher.

“...needs consistent redirection in whole group and small group activities in the self-contained classroom and needs support of an aid in the regular classroom.

“...needs observation and redirection during playtime with other students because he is learning how to appropriately interact.

“...will pinch a student to get their attention and sometimes yell.

“...likes to take ownership of items in the room and is learning how to share. These items can be distracting to him during small group and large group activities.

“...needs one on one discrete trial training to increase language, social, and academic skills.

“...typically echos what he hears, and does not always make spontaneous utterances.

“...speaks as he inhales which often makes his speech difficult to understand. While he may

⁶⁸ Parent Binder, Page 199

have a fairly good vocabulary, most utterances are limited to the ‘here and now’ comments he makes.

“...does not readily interact with his peers or with adults, and typically does not seek out interaction with others.”⁶⁹

⁶⁹ Parent Binder, Page 76

For the Parents the ultimate goal for the Student was in their belief that he could “succeed beyond the self-contained classroom” during school year 2008-09, which led them to request that he be retained in XXXXXXXXXXXX so that he could “spend the majority of his day in the regular classroom.”⁷⁰ The concept of “unique abilities” was never addressed in the testimony elicited from witnesses. His mother’s testimony was that at age three and prior to his enteringXXXXXXXX (school year XXXXXXXXX) that “he was pretty much nonverbal” and that he “went through several years of pre-school” where “he progressed some in his speech” as a result of home training with flash cards.⁷¹ She further noted that prior to kindergarten he “could speak a little bit” with “one word” such as “cookie” or “drink” and that he “couldn’t describe..what he was feeling” and that “he basically just described what he needs..physical needs.”⁷² She also stated that when he entered kindergarten he “was able to play on the playground” even though “he might not have known how to do certain things or how to interact with his peers all that well..he was able to play on the playground with supervision.”⁷³ She also stated that when he entered kindergarten that he was fairly well potty-trained, but still needed some prompting to go to the bathroom.

On moving into school year 2008-09 his mother testified that in her opinion his reading abilities had improved, in that “like if we walked by a store and the sign said ‘open,’ he looks at it and says, ‘open’....more like visual words that we had taught him in books, small words.”⁷⁴

Based on the appropriateness of the Student’s IEP for school year 2008-09 as determined

⁷⁰ Parent Binder, Page 76

⁷¹ Transcript, Vol IV, Page 8

⁷² Ibid, Page 11

⁷³ Ibid, Page 12

⁷⁴ Ibid, Page 40

above by the evidence and testimony presented, including that of the Student's mother, it becomes evident that the District did consider the Student's unique needs as outlined above when developing his IEP.

Did the District fail to provide appropriate supplemental services?

As with the word "unique," the word "supplemental" was never addressed in testimony during the hearing. Neither was it addressed in the opening statement by counsel for the Petitioners, nor in their post-hearing brief. If what was intended was referring to supplemental educational services, then the Student most likely did not qualify for such services. Supplemental educational services as defined by the Code of Federal Regulations (CFR) governing the implementation of the IDEA, includes "tutoring and other supplemental academic enrichment services that are (1) in addition to instruction provided during the school day; (2) specifically designed to – (I) increase the academic achievement of eligible students as measured by the State's assessment system; and (ii) enable these children to attain proficiency in meeting State academic achievement standards; and (3) of high quality and research-based."⁷⁵ Further the CFR requires an eligibility standard which states "(1) only students from low-income families are eligible for supplemental educational services" and (2) the LEA must determine family income on the same basis that the LEA uses to make allocations to schools under subpart A of this part." From all indications the Student did not qualify for supplemental services during school year 2008-09, thus the District cannot be found to be non-compliant with the IDEA in the provision of supplemental services for the Student.

The record does reflect that the behavior consultant contracted by the District provided not only training for the teachers and para professional staff who were providing direct services to the Student in the school setting, but also provided training to the Parents for implementation in the

⁷⁵ 34 CFR 200.45

home.⁷⁶

Did the District fail to follow due process procedures by:

- (1) Unilaterally changing the Student's educational placement;**
- (2) Not providing the Parents with IEP conference decisions;**
- (3) Conducting a functional behavior analysis without parental consent;**
- (4) Unilaterally changing the Student's IEP;**
- (5) Not providing the Parents with meaningful information prior to an IEP meeting;**

and,

(6) by not providing the Parents with periodic reports on progress of goals and objectives?

The evidence and testimony as presented in the allegation that the Student was not provided educational services in the least restrictive environment was responded to above. The information quoted above also demonstrated how the Student's teachers responded to his unique needs in altering the amount of time and the place where services were being provided. There was no evidence presented, nor testimony elicited that would justify the allegation that the District unilaterally altered the Student's educational placement without Parental knowledge during school year 2008-09.

There was testimony by multiple witnesses that the IEP conferences held with regard to the Student were extremely lengthy and often confrontational, there was no evidence that reflected a failure on the part of the District to provide the Parents with copies of the decisions within a reasonable amount of time.

⁷⁶ District Binder, Page 1047-1048

The only functional analysis of behavior conducted during school year 2008-09 was conducted on May 29, 2009.⁷⁷ The decision to conduct the analysis was made in October 2008 with both Parents being present.⁷⁸ Why the District delayed conducting the assessment was never addressed in testimony. Council for the Parents contended that the assessment was conducted following the Student's annual review conference held earlier that month and that there was no indication on the annual review conference decision form that such an assessment would be completed; however, it did indicate that the Student's behavior plan would be discussed.⁷⁹ Consequently, it is easy to see how the Parents would assume that an assessment would have been conducted without their knowledge. At the same time, such a delay in conducting an assessment in and of itself cannot be considered a failure to follow due process in not notifying the Parents.

⁷⁷ District Binder, Vol I, Page 126-129

⁷⁸ District Binder, Vol I, Page 132-134

⁷⁹ District Binder, Vol I, Page 100

The only changes noted in the evidence for the Student's IEP of 2008-09 took place following a separate programming conference held on October 1, 2008. Both Parents were present when the decision was made that "the committee determined that [the Student] needed a visual schedule, independent work area, emotions cards, and social cue cards, and a sensory diet" and that his "time in the regular classroom [would] be increased during morning activities."⁸⁰ The testimony elicited from the witnesses did not cover alterations to the Student's IEP for school year 2008-09. Thus it cannot be said that the allegations of his IEP for school year 2008-09 being altered without parental knowledge has any validity based on the evidence and testimony presented at the hearing.

The term "meaningful information" was never defined by the Parents with regard to what it meant to them prior to entering into an IEP team meeting. The Student's mother testified that they were not provided with documentation and data on how it was determined as to whether or not the Student met the goals and objectives on his IEP prior to, during, or even after an IEP meeting.⁸¹ The reason given for asking for the data was because they believed that the Student's discrete trial training "was not being implemented, and because stuff was left blank" and because "there were never any notes sent home about where his progress was with those goals."⁸² However, this testimony was elicited, not for school year 2008-09, but for school year 2009-10. It can only be assumed that the complaint pertained to the previous school year. However, without sufficient evidence to review or testimony to assess, it cannot be determined if in fact the Parents were or were not provided with what might have determined to be "meaningful information" prior to the two IEP meetings conducted during school year 2008-09.

⁸⁰ District Binder, Vol I, Page 133-134

⁸¹ Transcript, Vol IV, Page 58

⁸² Ibid

As to whether or not the Parents were provided with periodic progress of goals and objectives appears to also be related to the paragraph above regarding meaningful information. The evidence shows that the Parents received 224 pages of information dated between August 18, 2008 and May 29, 2009. These data sheets contained daily information about his speech, occupational, and physical therapies; his special education and regular education classroom; his art, music, library, tech, and physical education activities; his lunch time activities; his toilet training; and his rest time.⁸³ This evidence leaves little doubt that the District did in fact provide not only a lot of information on the Student's progress, but also very meaningful information to which the Parents could respond.

There was insufficient evidence and testimony presented to justify the allegation that the District failed to follow the due process procedures as outlined above and as alleged by the Parents for school year 2008-09.

School Year 2009-2010:**Did the District fail to provide an appropriate IEP?**

It became evident during the hearing from the testimony regarding the Student's third school year in the District (2009-10) that the relationship between the Parents and the District had become more acrimonious than in the previous two years. The disagreements began at the Student's IEP annual review conference in May 2009 and culminated in a major display of discontent in April 2010.

⁸³ District Binder, Vol II, Page 449-673

The Student's IEP committee met to review and develop his IEP for school year 2009-10, on May 19, 2009, with the Parents, accompanied by an advocate and a family friend, participating as members of the committee. The record reflects that the proposed action for the meeting included a discussion of the Student's current IEP, his need for extended school year services, his transition into theXXXXXXXXX grade, his sensory schedule, his behavior plan, and a discussion of the supports needed for playground safety and supports needed in the regular classroom along with his progress in speech therapy and other related services.⁸⁴ It was decided on that date that he needed extended school year services and that the services would take place during two weeks in June and two weeks in July.⁸⁵ It was reported that although he had mastered only eight of his eighteen goals and objectives for the XXXXXX grade year, that he had made progress on all goals except for one which was not attempted during the 2008-09 school year. It was decided that he was able to follow the routine of his regular classroom with an aide being present, but only for up to an hour and a half before needing a sensory break. It was also decided that he was able to attend all non-academic classes with the support of an aide. The record indicated that he had shown improvement in both speech and language therapies, which would be continued. The committee decided that for school year 2009-10 that he would attend the regular classroom for 700 minutes per week and that he would be in the self-contained classroom for 1,080 minutes per week; that he would continue to receive speech therapy for 90 minutes per week, occupational therapy for 60 minutes per week, and physical therapy for 60 minutes per week.⁸⁶

⁸⁴ District Binder, Vol I, Page 100

⁸⁵ District Binder, Vol I, Page 104-109

⁸⁶ District Binder, Vol I, Page 110

As noted above the Parents actively participated in the development of the 2009-10 IEP. The record shows that the Parents discussed their preference for the Student's placement of services. They preferred that his placement remain in the XXXXXX grade classroom rather than the District's proposed XXXXXXXX grade classroom. They also requested more information from the Student's regular education classroom teacher. They wanted to see the Student's alpha-smart machine incorporated into the regular classroom routine. They requested a Circuit referral to be completed by Easter Seals and for an XXXXXXXXX specialist to come to the school and observe the Student in the classroom. They expressed concern about the Student's behavior and requested daily notifications. Although not expressed in writing, it was noted that they were concerned about the Student's need for a one-on-one para professional; they believed he needed to receive one-on-one discrete trial training; they wanted to see his work-break system; they wanted the District to follow a strict classroom schedule; they wanted to see a schedule for his day (therapy schedule); and they wanted him to be provided with a sensory diet.⁸⁷

The Student's IEP as written in May 2009, contained special factors for consideration which included the need for a behavior plan with immediate positive reinforcement for correct behavior and that the alpha-smart machine would be used as assistive technology. He would not be expected to follow the regular discipline policy because he would have a behavior plan. He would not be expected to participate in XXXXXXXX grade testing. Additionally he would have an aide within 25 feet while on the playground and he would be provided with one-on-one assistance during transitions and in the regular classroom.⁸⁸

⁸⁷ District Binder, Vol I, Page 112

⁸⁸ Ibid, Page 113

According to the documents presented as evidence the Student's IEP goals and objectives were developed based on his level of educational performance as measured by the results of an evaluation with the Assessment of Basic Language and Learning Skills - Revised (ABLLS-R) and his performance on goals and objectives from the previous year.⁸⁹ The Parent's again challenged the appropriateness of developing the IEP without having an intelligence quotient for the Student since earlier testing was unable to produce one and alleged that the District made no attempt to obtain one during school year 2008-09. However, in using the results of the ABLLS-R the District's consulting behavior specialist explained that "the ABLLS is a task analysis that breaks down skills in a variety of domain areas...[with] 25 domain areas.. [and that] the assessment targets cooperation and reinforcer effectiveness, visual performance, receptive language, imitation, vocal imitation, requests, labeling, introverbals, spontaneous vocalizations, syntax and grammar, play and leisure, social interaction, group instruction, follow classroom routines, generalized responding, reading, math, writing, spelling, dress, eating, grooming, toileting, gross motor and fine motor." She further explained that the ABLLS is a curriculum guide to identify where a child, especially with autism, who has splinter skills, [to identify] where those ...deficits are...so, [therefore] what the assessment does, [is] a task analysis of a variety of these skills in order to target the holes in that repertoire, and target those specifically.⁹⁰ She testified that "the function of the ABLLS is to strictly develop and provide guidance for a curriculum, so it is not anywhere similar to an IQ test."⁹¹

Although she agreed on direct examination that an IQ score is often needed for determination of eligibility; however, it is not needed as a means of developing goals and objectives for a student

⁸⁹ Parent Binder, Page 520-639

⁹⁰ Transcript, Vol II, Page 36-37

⁹¹ Transcript, Vol II, Page 37-38

whose eligibility has already been determined.⁹² The Petitioner's expert witness also testified that the ABBLs "is an assessment instrument that is not a standardized measure, it's used very much like this profile is used...it's where you try to gather information on the student to figure out where to start your teaching."⁹³ She further testified that the information obtained from the ABBLs "help us with programming" and "helps us teach skills...so it would guide the program."⁹⁴

⁹² Transcript, Vol IV, Page 284

⁹³ Transcript, Vol III, Page 145

⁹⁴ Ibid, Page 155

The Student's IEP for school year 2009-10, no longer listed discrete trial training as an "area" of concentration for implementing his goals and objectives as it was listed on his 2008-09 IEP. The IEP goals and objectives were to be implemented with the use of discrete trial training when appropriate according to the Student's special education teacher. He was at a point in his development that he no longer needed to be in the "discrete trial room" where students received intensive one-on-one training.⁹⁵ His goals and objectives remained geared toward his assessment and performance results; however, later in the school year the manner in which they were to be delivered by the teaching staff would be modified when they were directed to implement the STAR (Strategies for Teaching Based on Autism Research) program. At the time of the development of the Student's IEP in May 2009, however, the plan called for a continuation of the use of the discrete trial training method. The Petitioner's expert witness explained that the STAR program began in the State of Oregon and has been implemented in varying degrees in a few districts and only fully implemented in two school districts in Arkansas, with Easter Seals of Arkansas providing the training for teachers and parents throughout the State.⁹⁶ When the Student began his 2009-10 school year the District's teaching staff had yet to be fully trained in the STAR program and would not begin implementing the program in part until November 2009. Even then it was not to be fully implemented but would be done so in steps. For this record what is to be noted, and agreed to by all who expressed knowledge of the various programs of instructing autistic children, all of the programs are based on the ABA (Applied Behavioral Analysis) model. Consequently, even though the term discrete trial training would eventually no longer be used in the instruction program for the Student, the basic model of instruction remained unchanged.

⁹⁵ Transcript, Vol I, Page 221-222

⁹⁶ Transcript, Vol III, Page 98-102

As with the previous school year the Parents challenged the amount of time given to the Student in one-on-one training, as well as the accuracy of the implementation of the discrete trial training and subsequently the STAR program. Consistent with the previous school year the District's behavior consultant explained that she was responsible for oversight and training of the individuals who implemented the training program for the Student, which included "the teacher and/or the aides that were with him all day."⁹⁷

His self-contained classroom teacher who participated in developing the Student's IEP in May 2009, was asked by the Parent's for the data that she used to assess the Student' progress, but she did not bring any data collections with her to the meeting.⁹⁸ It was apparently from this lack of data that the Parents alleged that the Student's IEP for the previous year was not implemented appropriately, and that such data was necessary to make decisions for school year 2009-10

The evidence provided in the District's exhibit binder at pages 1050-52, dated May 2009, contains the record of the behavior specialist's visits to the Student's classroom, with her observations/actions, with recommendations and follow up. These included written plans for the Parents as well as recommendations for problematic behaviors exhibited by the Student in the classroom.

⁹⁷ Transcript, Vol II, Page 14

⁹⁸ Transcript, Vol II, Page 224

According to the District's behavior consultant a Functional Assessment Analysis of Problem Behavior was conducted on May 28, 2009, following the May 19, 2009, annual review conference, but the form entered as evidence is dated May 29, 2009. The behavior consultant explained that there was a separate meeting after the annual review with the Student's mother and that changes in the Student's behavior plan were made subsequent to that discussion.⁹⁹ She further explained that they developed a behavior plan for the next school year (2009-10) by using the "old behavior plan and summarized the parts, because we didn't know how his behavior would manifest differently from the end of this school year to the next school year..so, we had just a basic intervention plan in place to see – to identify those behaviors that may occur."¹⁰⁰

⁹⁹ Transcript, Vol II, Page 179

¹⁰⁰ Transcript, Vol II, Page 183

On September 14, 2009, once school year 2009-10 had begun, the Student's IEP committee met to discuss the Behavior Specialist evaluating him and to review his progress with the use of the discrete trial training method.¹⁰¹ Even though such an assessment does not require an informed consent according to the IDEA, one was obtained from the Student's mother to permit the District to conduct yet another ABLLS-R. At some point in time later, and according to the Student's mother, without her knowledge, the consent form also included an evaluation of the STAR program.¹⁰² It was the testimony of the Behavior Specialist that the Student's special education teacher called the Parents and informed them of adding a STAR evaluation to the consent.¹⁰³ The teacher who made the addition was never questioned in examination as to whether or not she added the STAR program as a need for evaluation to the Parent's consent form, nor was she asked as to whether or not she discussed the issue with the Parents. The Behavior Specialist on the other hand, stated that to the best of her recollection the special education teacher not only discussed it with the Student's mother, but that on "the last day before the Thanksgiving holiday [she] provided [the Parent] with a copy of the outcome and discussed that with her briefly."¹⁰⁴ This meeting was confirmed in testimony by the Student's mother, where she initially stated it was not until Christmas time that she was told about the STAR program, but later changed her testimony which coincided with that of the Behavior Specialist.¹⁰⁵

The evidence shows that a separate programming conference was conducted on October 7,

¹⁰¹ Parent Binder, Page 165

¹⁰² Parent Binder, Page 164 and Transcript, Vol IV, Page 146

¹⁰³ Transcript, Vol II, Page 105

¹⁰⁴ Transcript, Vol II, Page 107

¹⁰⁵ Transcript, Vol IV, Page 146

2009, at which time it was decided that the Student would continue to attend the regular grade class as requested by the Parents with additional modifications.¹⁰⁶ The documents do not contain any reference to the STAR program and the Parents allege that the method of instruction was changed from the discrete trial training to the STAR method without their knowledge or permission. As noted above, it definitely was not without their knowledge, and most likely the proposed STAR assessment was also not without their knowledge, even though the District altered the consent form. However, there was no direct testimony of the teacher who was alleged to have altered it, as to whether or she did, nor when it was altered. The Student's mother testified that she also received training in the STAR program in April 2010 and was informed by the District's special education coordinator that the training was available and that she was invited to any training that was available.¹⁰⁷

¹⁰⁶ Parent Binder, Page 158

¹⁰⁷ Transcript, Vol IV, Page 142

The District's request for the annual review included a draft for the Student's proposed IEP for the next school year, which contained statements of his progress during school year 2008-09.¹⁰⁸

It was noted that he had made progress on all goals and objectives with the exception of having regressed in toileting. There was no substantial evidence or testimony presented that was contrary to these findings.

The testimony and the evidence presented by the Petitioner do not support the allegation that the IEP developed for the Student for school year 2009-10 failed to be appropriate for the Student. In fact it would appear that the IEP met the IDEA obligation of providing the Student with an opportunity to advance both academically, emotionally, and socially during his XXXXXX grade year, even though he was placed in a XXXXXX grade regular education classroom for academics as the request of the Parents.

Did the District fail to educate the Student in the least restrictive environment?

¹⁰⁸ District Binder, Vol I, Page 37

The argument that he was not educated in the least restrictive environment for school year 2009-10, as with the previous school year's allegation, and according to the evidence and testimony elicited from the witnesses, centered around the amount of time allotted on the Student's IEP for him to be in his regular education classroom and the actual amount of time he was in that setting. The Student's original IEP indicated that he would receive special education services in the second-third grade CBI classroom and that he would have the support of an aide trained in the delivery of services with discrete trial training in the regular XXXXX grade education classroom.¹⁰⁹ On the continuum of least restrictive environments the IEP developed in May 2009 reflected 700 minutes per week for the Student in the general education environment and 1100 minutes per week in special education services.¹¹⁰ The District's special education coordinator testified that at the May 2009 meeting where the Student's IEP was initially developed that the committee developed a program for the receipt of services based on a compromise with what the Parents had requested. She stated that:

“What we did have in that discussion was to compromise, I guess you could say compromise on the retention issue. Mom and Dad wanted him to stay in the XXXXXXt grade, but the school wanted him to go to XXXXX. So, what the committee tried to do is make a blend...to split his schedule. They gave him what they considered the academics in that XXXXX grade classroom with his [XXXXXX grade teacher], which gave him [the same teacher] two years in a row. And then, he took his pull-outs, music, PE, library, tech, and art with the XXXXXX grade class, so he could stay with his peers. It was rather convoluted. This was a split decision,

¹⁰⁹ Parent Binder, Page 14

¹¹⁰ Parent Binder, Page 16

I guess, which wasn't exactly appropriate."¹¹¹

Such action by the Student's IEP committee reflects the active involvement of the Parents in the decision making process even when the outcome may not have been considered as appropriate by the District's director of special education services.

¹¹¹ Transcript, Vol I, Page 128

The Parents further alleged that without their awareness, and without conducting an IEP committee meeting, his time in special education was altered from 1100 to 1525 minutes per week. The special education teacher testified that in October 2009 under a directive from the Department in how to account for educational minutes of the day, that the Student's time in special education was increased, but the time in the regular education classroom was not altered. The Department had directed all school districts to document educational time based on a "bell to bell" accounting method rather than time spent in a class setting.¹¹² She did acknowledge that this calculation in the total amount of time for the Student's day did alter the IEP's measurement of the least restrictive environment from 40 to 79 percent of his day in the regular education classroom to less than 40 percent of his day being in the regular education environment. However, as she so testified it did not alter the actual amount of time he would be in the regular education setting with non-disabled peers. It only increased the amount of time he would receive special education services.¹¹³ According to the evidence this alteration did actually not change the Student's IEP in how much educational instruction he would receive; however, as noted by the special education teacher it did alter the LRE as specified in the IEP. She also stated that she did not alter the IEP without discussing the change with the Student's mother.¹¹⁴ This was not disputed by the Parents in testimony.

¹¹² Transcript, Vol I, Page 179

¹¹³ Ibid, Page 178

¹¹⁴ Transcript, Vol I, Page 174

Consistent with the previous school year, the arguments presented by the Parents as to whether or not he was actually being educated in the least restrictive environment also centered around their continued request for an exact daily schedule that the Student's teachers would be following, with designated times spent in each activity of the day. They were alleging that the District was not following a strict schedule for providing services, or at least one that they could count on for knowing where, when, and what the Student was receiving in terms of educational services. The Parents were eventually provided with a class schedule; however, as his teachers testified it had to be modified almost daily depending on what his regular classroom peers were doing and how he was reacting to the activities of the day.¹¹⁵ One of the concerns of the Parents was that as an XXXXXXXX child the Student had difficulty in responding positively to sudden changes in his routine. At the same time they wanted him to be in a regular classroom setting for both academics as well as being with his same age peers. The difficulty in providing the least restrictive environment based solely on the unique needs of the Student becomes complicated with such opposing parental aspirations.

As previously noted during his 2008-09 school year his special education teacher testified that his teachers had to play it by ear on how the Student was reacting each day as to whether or not to extend his time in the regular education classroom. She stated that "If he was having a good morning and enjoyed the activities they were doing [in the regular education classroom], we would continue until – it wasn't 'oh, his 45 minutes is up, we have to go back to the [self-contained] classroom.' If he was enjoying the activity, then we allowed him to stay for success."¹¹⁶

Also as previously noted his regular education teacher testified that the maximum amount of

¹¹⁵ Parent Binder, Page 668 and Transcript, Vol III, Page 11-21

¹¹⁶ Transcript, Vol II, Page 253

time that she noticed the Student being able to tolerate activities in her classroom without a sensory break was twenty minutes. “If he is sitting at his seat, as the other first grade students are, completing independent work, completing spelling work, completing morning work, after a certain period of time, I’m saying a maximum of 20 minutes, [the Student] is going to begin to get fidgety.”¹¹⁷

¹¹⁷ Transcript, Vol III, Page 32

At the request of the Parents a separate programming conference was held on April 21, 2010, to discuss their concerns that the Student was not receiving enough of his educational program in the regular education classroom; however, no resolution was reached and the District requested a mediator to resolve the issues raised by the Parents.¹¹⁸ On May 17, 2010, the District notified the Parents of their intent to conduct the annual review for the Student's upcoming school year; however, on receiving the notice the Parents informed the District that they had filed a request for a due process hearing.¹¹⁹

The evidence and testimony as presented with regard to whether or not the District educated the Student in the least restrictive environment for school year 2009-10, as with the previous year's efforts, shows that the Student's teachers, both regular education and special education, made every effort to afford him the opportunity to be in the least restrictive environment, not simply based on the time designated on his IEP or the class schedule needed by the Parents, but according to his daily need as manifested by his disability.

Did the District fail to provide the Student with the appropriate support services for language/communication and speech development?

The Student's IEP for school year 2009-10 that was developed in May 2009 continued his previous years related services with ninety minutes per week in thirty-minute sessions for speech therapy and 60 minutes per week in thirty-minute sessions for both his physical therapy and occupational therapy. Also consistent with the previous year's IEP it was decided that he would continue to receive language arts and math in both his regular education and special education

¹¹⁸ District Binder, Vol I, Page 84

¹¹⁹ District Binder, Vol I, Page 15

classrooms.¹²⁰ The record is absent of any evaluation results from the speech, occupational, or physical therapists that may have been conducted prior to the annual review conference in May 2009 at which time his IEP for school year 2009-10 was developed. However, all of these individuals were invited to participate in the meeting.¹²¹

¹²⁰ Parent Binder, Page 1

¹²¹ Parent Binder, Page 117

It was noted in the notice of decision following the committee meeting that “there were not any reevaluations this school year.”¹²² That same decision form contained relevant parental information where they stated that the Student had improved in speech and language and that he will begin hippo therapy. The Student’s private therapist from Kid Source and a child advocate were also present at the annual review conference and participated in the discussion as to what the Student would need for the next school year. As previously noted, the Student’s mother testified that she was aware of the Student’s speech goals as reflected in his IEP for school year 2008-09 and that, although not mastered, he had made progress with each goal, and that the goals would be continuing into his next school year.¹²³

The District’s behavior consultant testified and presented documentation that she not only trained the District personnel in the delivery of environmental supports and interventions, but that she also went into the Student’s home and provided training for the Parents during the summer prior to his entering school year 2009-10.¹²⁴

From the evidence presented and testimony elicited from witnesses there is nothing that would substantiate the findings that the District failed to provide the Student with appropriate support services in his language/communication and speech development prior to or during school year 2009-10.

Did the District fail to provide the Student with a behavior intervention plan?

¹²² Parent Binder, Page 172

¹²³ Transcript, Vol IV, Page 75

¹²⁴ District Binder, Page 1048

As previously noted the Student's 2008-09 IEP did not reflect the need for a behavior intervention plan; however, it became obvious during that year that some of the Student's behavior needed to be addressed. Those included pinching other students to get their attention and sometimes yelling, as well as needing to learn how to share with other students.¹²⁵ Also as previously noted the Student's mother was not certain as to how the District's use of a behavior specialist's recommendations were to be used in the school setting because there was no behavior intervention plan in place.¹²⁶

¹²⁵ Ibid, Page 76

¹²⁶ Transcript, Vol IV, Page 45

In September 2009 the District conducted a separate programming conference. Those in attendance included the Student's mother and an advocate who was a behavior specialist, along with the Student's regular education classroom teacher, his special education teacher, his speech/language therapist, his occupational therapist, and the District's behavior consultant.¹²⁷ The decision was made to reevaluate the Student's behavior and to measure his progress by updating the ABLLS-R.¹²⁸ How the ABLLS-R was to be used for a behavior assessment was never challenged in testimony. As noted in the previous year and as testified to in the current school year, the District's behavior consultant addressed the results of the inventory, with very little emphasis on the Student's behavior issues as noted above. She compared the results of the ABLLS-R that was conducted in September 2008 to the one she conducted in September 2009. Her comparison noted that "in every domain – virtually every domain area, you saw a tremendous amount of improvement, especially in his receptive language area, the labeling, and his intraverbals....the pre-academic skills, again, syntax and grammar, significant improvement across all domain areas, because we saw such progress across all areas except for the classroom routines...[in] the writing, spelling, dressing, eating, grooming, toileting, gross motor and fine motor [skills].¹²⁹ Again, how this evaluation was to be used in modifying the Student's behavior intervention plan was never addressed; however, how the information was to be used by his teachers was addressed. She stated that even though changes in his IEP may not have occurred following her evaluation, she met with his teachers and the Student's mother to discuss the results. She stated that her role "was to identify the areas [where] we saw progress, and then [provide] some suggested targets, or some suggested

¹²⁷ District Binder, Vol I, Page 99

¹²⁸ Parent Binder, Page 161 and 163

¹²⁹ Transcript, Vol II, Page 48-50 and District Binder, Vol II, Page 1033

goals.”¹³⁰ Her suggestions were to be implemented with the use of discrete trial training directed towards assisting the Student in developing appropriate behaviors associated with the problem areas noted by his classroom and special education teachers. On October 7, 2009 the Student’s IEP was modified to include shortened assignments, the use of a timer to show the beginning and ending of each educational event, and the use of manipulatives to address the Student’s behavior as noted by his teachers and the behavior consultant.¹³¹ The behavior consultant testified on cross examination that to her knowledge the Parents never raised the question to her in their concern about developing a separate behavior intervention plan for the Student.¹³²

Even though the District failed to develop a specific separate document such as a behavior intervention plan (BIP) to address the Student’s behaviors, the testimony and evidence shows that his problem behaviors were targeted by the use of discrete trial training by all of the professionals and the para professional involved in the delivery of services. The District personnel consistently testified that they also used the instructional modifications, supplemental aids, and supports as outlined on the IEP for school year 2009-10.

Consequently, based on the evidence presented through testimony by his special education and regular classroom teachers the Student did not exhibit behaviors beyond what was described above and none which were not being addressed with modified special accommodations and in his discrete trial training exercises. The District’s failure to include a behavior intervention plan as a separate document in his IEP does not in and of itself warrant a conclusion that the District failed to appropriately address the behaviors that needed to be addressed. Thus the opinion is that the

¹³⁰ Transcript, Vol II, Page 83

¹³¹ Parent Binder, Page 11

¹³² Transcript, Vol II, Page 215

Parents have failed to show that even though it was agreed to, and they expected to have a specific behavior intervention plan in place for the Student, that the District failed to address his particular behavior needs for school year 2009-10.

Did the District fail to provide the Student with appropriately trained service providers?

The record shows that the direct providers of instructional and related services for the Student during school year 2009-10 continued to include his special education teacher, his regular education classroom teacher, his speech therapist, his occupational therapist, his physical therapist, and a special education para professional. Overall supervision of his special education program was the District's director of special education services. Additional personnel involved in the Student's education included the District's behavior consultant.

The reader is referred to the findings of facts as discussed for school year 2008-09 and the assessment of those facts on this issue. Since there was no change in the District's staff which provided the Student's educational and related services there is no reason to conclude that they were any less qualified this school year than they were the previous school year. Consequently, the Parents have failed to show that the individuals selected by the District to implement the Student's IEP for school year 2009-10 are not qualified and appropriately trained to do so.

Did the District fail to provide specialized instruction consistent with the Student's IEP?

The specialized instruction indicated on the Student's IEP for school year 2009-10 consisted of language arts, math, and speech; as well as speech therapy, physical therapy, and occupational therapy.¹³³ No information was solicited with regard to the provision of occupational, physical, or speech therapies. The emphasis in evidence and testimony centered around the Parents concern for

¹³³ Parent Binder, Page 75

who and how his academic and behavior areas were being implemented by the Student's teachers and para professional. The para professional, however, was never asked to testify.

The Student's special education teachers testified that at the beginning of the 2009-10 school they continued to use discrete trial training as a means of implementing the goals and objectives in the Student's IEP. After the District personnel were provided training in the STAR approach, the teaching staff began replacing the discrete trial training method with the STAR method. The gradual adoption of this methodology may have been responsible for some of the issues and concerns of the Parents.

A discussion of the discrete trial training method was discussed above in addressing the same allegations for school year 2008-09 and will not be repeated here. The STAR (Strategies for Teaching Based on Autism Research) program was begun in part in 2008, but the implementation was not started until November 2009 according to the District's special education coordinator.¹³⁴ She testified that the District purchased the STAR curriculum in August 2009, but had already begun sending District personnel for training in the STAR method prior to the purchase.¹³⁵

¹³⁴ Transcript, Vol I, Page 98 and Page 136

¹³⁵ Transcript, Vol I, Page 157-158

As previously noted the CBI self-contained classroom teacher testified that her CBI instruction concentrated on functional skills such as dressing, bathroom, and eating behaviors and his resource special education teacher concentrated on his academics.¹³⁶ She testified that she and the special education para professional assigned to the Student used discrete trial training to implement his CBI instructions until the STAR program was started in November 2009. The STAR assessment data entered as evidence reflected dates from October 2009 through May 2010 prior to the filing of the due process complaint.¹³⁷ A lot of the questions by council for the Parents was directed towards the District personnel responsible for implementation of both the discrete trial training and the STAR program and their lack of data collection. In response to cross examination the special education teacher testified that she was not aware that it was required that she collect data every single day, “but we did do it...every day, we did functional routines, too, as well, and I know that that is a weekly data that you take on that.”¹³⁸

Also as noted previously the Parents apparently preferred a different specialized approach to teaching the Student in developing his language arts skills. This was emphasized by the introduction with his regular classroom teacher with regard to questioning about the ELLA program. She testified that she was acquainted with the program and that she used it in her classroom. Her testimony was that it would not be her decision, but that of the special education teacher involved in the Student’s academics that would be responsible for use of the ELLA program, it in fact it was deemed appropriate as a means of instructing the Student in reading.

While council for the Parents placed a strong emphasis on the District’s failure to collect

¹³⁶ Transcript, Vol I, Page 172

¹³⁷ District Binder, Vol II, Page 992-999

¹³⁸ Transcript Vol I, Page 299-300

and show the Parents data on who, what, and when for implementation of his educational program, there is not sufficient evidence or testimony to show that the Student's specialized instruction as outlined in his IEP was not appropriately implemented for school year 2009-10.

Did the District fail to provide an appropriate curriculum?

As indicated in the previous school year, this question encompasses both the first allegation that the District failed to provide an appropriate IEP and the previous allegation that the District failed to provide specialized instruction consistent with the IEP.

The District's behavior consultant testified that she was responsible for assisting and training the Student's teaching staff in developing and implementing his curriculum. For school year 2009-10 she used the results of the ABLLS-R that she completed in September 2009. As with the previous year's evaluation results she testified that the Parents were provided with a copy of the comparative score sheet she developed from the results of the two ABLLS. She stated that "this is something a that we reviewed to each other, across – at the meeting, and [the Parents were] completely fine with that..and this is what the teacher uses to guide her curriculum."¹³⁹ She also explained that "when [the results of the ABLLS] are reviewed with the parents in the annual review meeting, then they can, at that point, identify the targets that they want to specifically target..but this is a curriculum guide to run a child's individual program...and so, if it is within the boundaries of parents to develop a child's curriculum for the school, then I would have said that she could have used this information to guide the curriculum....if the parent is the one developing the entire curriculum for the student, then I would explain to her in detail this – and we did talk about what areas I suggested to be targeted, and then at that point, she had opportunities to discuss or say that,

¹³⁹ Transcript, Vol II, Page 46

‘I would like these areas to be worked on, as well.’”¹⁴⁰ Once the STAR data was available and prior to its implementation as the method for which the Student’s instructional curriculum would be implemented the District did not conduct a separate programming conference as was alleged to be necessary according to the Parents.

The special education teacher responsible for implementing the Student’s IEP for school year 2009-10 testified that his functional “goals were linked to the general [education] curriculum in the areas of behaviors.”¹⁴¹ She also testified that not only was the functional curriculum followed in the special education classroom, but also was implemented in his regular education class by his special education para professional.¹⁴²

Based on the evidence and testimony there is no reason to suggest that the Parents were not involved in developing the curriculum to be followed and that no objections were raised either during the development of the Student’s IEP for school year 2009-10 or immediately following during the separate programming conference held during the school year. Consequently, the judgment on whether or not the Student’s IEP curriculum was appropriate for school year 2009-10 would have to be in favor of the District.

Did the District fail to provide special education services based on the Student’s unique needs?

¹⁴⁰ Transcript, Vol II, Page 80-81

¹⁴¹ Transcript, Vol I, Page 240

¹⁴² Ibid, Page 241

As previously noted, the earliest and most extensive evaluative information presented as evidence was conducted in June XXXXXX by a team of specialists at the UAMS College of Medicine, Department of Pediatrics, when he was four and a half years old. The diagnostic impressions at that time was “XXXXXXXXXXXXXXXX, mild to Moderate, as substantiated by developmental history, observed behaviors, number of identified symptoms, and the presence of XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX.”¹⁴³

The reader is referred to the previous year’s record of the results of this evaluation which illustrates the degree of the disability of XXXXXX as experienced by the Student and the degree to which it had on his ability to learn. A more recent extensive evaluation was not presented as evidence; however, the record does show subsequent assessments of his growth in behavior and academics. As concluded in the previous year, the District cannot be judged to have not taken the Student’s unique needs into consideration when developing his IEP as alleged by the Parents.

Also as previously noted the concept of “unique abilities” was never addressed in the testimony elicited from witnesses. His mother’s testimony was that he was not making the progress in his academics that she believed he was capable of making. As a consequence, she believed that the District failed to provide him with an appropriate educational opportunity.¹⁴⁴ However, even though the Parents, and the Student’s after school care therapist who testified in their behalf, believed that the Student had regressed in his behavior, there was no evidence presented to substantiate the claim.¹⁴⁵

Did the District fail to provide appropriate supplemental services?

¹⁴³ Parent Binder, Page 199

¹⁴⁴ Transcript, Vol IV, Page 117-118

¹⁴⁵ Transcript, Vol III, Page 310

Also as noted previously in considering the allegations of the previous school year, the evidence and testimony is absent of the word “supplemental.” It was not addressed in the opening statement by council for the Petitioners, nor in their post-hearing brief. As discussed in the previous school year decision, if what was intended was referring to supplemental educational services, then the Student most likely did not qualify for such services. (See the discussion and conclusion of the facts for the previous school year.)

The record does reflect that the behavior consultant employed for school year 2009-10 provided not only training for the teachers and para professional staff who were providing direct services to the Student in the school setting, but also, as noted above, provided training to the Parents for implementation in the home.¹⁴⁶

Did the District fail to follow due process procedures by:

- (1) Unilaterally changing the Student’s educational placement;**
- (2) Not providing the Parents with IEP conference decisions;**
- (3) Conducting a functional behavior analysis without parental consent;**
- (4) Unilaterally changing the Student’s IEP;**
- (5) Not providing the Parents with meaningful information prior to an IEP meeting;**

and,

(6) by not providing the Parents with periodic reports on progress of goals and objectives?

The evidence and testimony as presented in the allegation that the Student was not provided educational services in the least restrictive environment was responded to above. The information quoted above also demonstrated how the Student’s teachers responded to his unique needs in

¹⁴⁶ District Binder, Page 1048-1049

altering the amount of time and the place where services were being provided. There was no evidence presented, nor testimony elicited that would justify the allegation that the District unilaterally altered the Student's educational placement without Parental knowledge during school year 2009-10 other than changing the amount of time he would spend in his special education classroom without conducting an IEP meeting to discuss the change.

The IEP meetings were apparently quite lengthy during the previous school year and according to testimony by both District and non-District witnesses the meetings for school year 2009-10 became even more consuming of time. As with the previous year the Parents did not show any evidence that reflected a failure on the part of the District to provide them with copies of the decisions within a reasonable amount of time after the meetings.

A functional analysis of behavior was conducted on May 29, 2009.¹⁴⁷ The decision to conduct the analysis was made in October 2008 with both Parents being present.¹⁴⁸ Why the District delayed conducting the assessment was never addressed in testimony. Council for the Parents contended that the assessment was conducted following the Student's annual review conference held earlier that month and that there was no indication on the annual review conference decision form that such an assessment would be completed; however, it did indicate that the Student's behavior plan would be discussed.¹⁴⁹ Consequently, as noted above it is easy to see how the Parents would assume that an assessment would have been conducted without their knowledge. At the same time, such a delay in conducting an assessment in and of itself cannot be considered a failure to follow due process in not notifying the Parents. The District's failure to develop a

¹⁴⁷ District Binder, Vol I, Page 126-129

¹⁴⁸ District Binder, Vol I, Page 132-134

¹⁴⁹ District Binder, Vol I, Page 100

specific document outlining the behaviors to be addressed is not evident enough of their failure to address his behavior issues.

The only changes noted in the evidence that occurred without a separate programming conference took place after the special education teacher took it upon herself to alter the amount of time the Student would be receiving educational services in the special education classroom. As noted above she believed that she was following the directive as issued by the Department in accounting for the school day time from bell-to-bell as opposed to how it was previously calculated and further testified that the change did not take place without parental notification. Even if a separate programming conference were to have been held and the time altered on the IEP, it would not have altered the amount of time he was to spend in the regular education classroom, but technically it did place him in the more restrictive environment for educational services.

The term “meaningful information” was never defined by the Parents with regard to what it meant to them prior to entering into any of the IEP meetings. The Student’s mother testified that they were not provided with documentation and data on how it was determined as to whether or not the Student met the goals and objectives on his IEP prior to, during, or even after an IEP meeting.¹⁵⁰

The reason given for insisting on having copies of the data for school year 2009-10 was that the Parents believed the discrete trial training as well as the STAR program of instruction “was not being implemented, and because stuff was left blank” and because “there were never any notes sent home about where his progress was with those goals.”¹⁵¹

¹⁵⁰ Transcript, Vol IV, Page 58

¹⁵¹ Ibid

In the absence of the “data” as requested, the Parents were provided with periodic progress of goals and objectives and with daily accounts of his activities, his successes, and his failures.¹⁵² These data sheets contained daily information about his speech, occupational, and physical therapies; his special education and regular education classroom; his art, music, library, tech, and physical education activities; his lunch time activities; his toilet training; and his rest time. This evidence leaves little doubt that the District did in fact provide not only a lot of information on the Student’s progress, but also very meaningful information to which the Parents could respond, even though the information provided did not specifically address the IEP goals and objectives. More importantly to the Parents the information did not suffice their expectations as noted in their complaint.

The evidence and testimony by the Student’s education providers leaves little doubt that extensive efforts were afforded to provide the Parents with sufficient information to keep them informed as to the Student’s progress. Thus the evidence and testimony presented does not justify the allegation that the District failed to follow the due process procedures as outlined above and claimed by the Parents for school year 2009-10.

Conclusions of Law and Discussion

¹⁵² District Binder, Vol II, Page 674-969

Part B of the Individuals with Disabilities Education Act (IDEA) requires states to provide a free, appropriate public education (FAPE) for all children with disabilities between the ages of 3 and 21.¹⁵³ The IDEA establishes that the term “child with a disability” means a child with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities, and who by reason of their disability, need special education and related services.¹⁵⁴ The term “special education” means specially designed instruction.¹⁵⁵ “Specially designed instruction” means adapting, as appropriate, to the needs of an eligible child under this part, the content, methodology, or delivery of instruction.¹⁵⁶ As noted in the instant case the Student presented as an eligible child in need of special education having been diagnosed XXXXXXXXXXXXXXXX.

The Department has addressed the responsibilities of each local education agency with regard to addressing the needs of all children with disabilities such as the Student in it’s regulations at Section 2.00 of Special Education and Related Services: Procedural Requirements and Program Standards, Arkansas Department of Education, 2008.

In 1982, the Supreme Court was asked and in so doing provided courts and hearing officers with their interpretation of Congress' intent and meaning in using the term "free appropriate public education." Given that this is the crux of the Parent’s contention in this case it is critical to understand in making a decision about the Parents’ allegations of the District’s failure to provide

¹⁵³ 20 U.S.C. § 1412(a) and 34 C.F.R. § 300.300(a)

¹⁵⁴ 20 U.S.C. § 1401(3)(A)

¹⁵⁵ 20 U.S.C. § 1402(29)

¹⁵⁶ 34 CFR § 300.26(b)(3)

FAPE. The Court noted that the following twofold analysis must be made by a court or hearing officer:

- (1). Whether the State (or local educational agency (i.e., the District)) has complied with the procedures set forth in the Act (IDEA)? and
- (2). Whether the individualized educational program developed through the Act's procedures is reasonably calculated to enable the student to receive educational benefits?¹⁵⁷

¹⁵⁷ *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-207 (1982)

Six years later the Supreme Court addressed FAPE again by emphasizing the importance of addressing the unique needs of a child with disabilities in an educational setting by addressing the importance of a district's responsibility in developing and implementing specifically designed instruction and related services to enable a disabled child to meet his or her educational goals and objectives.¹⁵⁸

¹⁵⁸ *Honig v. Doe*, 484 U.S. 305 (1988)

As pointed out by both parties in their post hearing briefs, there is no disagreement that the courts have consistently agreed that FAPE must be based on the child's unique needs and not on the child's disability.¹⁵⁹ Too often this hearing officer has found that parents, school administrators and attorneys representing them, agree on the basis but do not make this distinction in their arguments on the complaints or the differences they've encountered. The charge to education professionals is to concentrate on the unique needs of the child rather than a specific disability such as in this case, the Student's diagnosis of XXXXXXXXX. In reviewing the elicited testimony and the evidence, in this case there is ample comments, testimony, documents, and even an external expert witness whose extensive knowledge and testimony regarding the STAR methodology for educating a child with XXXXXXXXX, did not always focus on the unique needs of the Student, but rather addressed the pros and cons of the methodology and what is reportedly required for successful implementation. However, when looking at the initial assessment of the Student's unique needs prior to entering the responsibility of the District, the subsequent advancement in educational, behavioral and social performance appears to support the efforts extended by both the Parents and the District in addressing his unique needs. Consequently, the argument as to whether or not the District did or did not collect data to demonstrate that they implemented a particular methodology according to the design of the originators does not stand when looking at this Student's unique needs and the progress he has made in his educational endeavors.

This finding is also consistent with the Act in that courts and hearing officers cannot impose their personal or preferential views on educational methods. "The primary responsibility for . . . choosing the educational method most suitable to the child's needs was left by the Act to

¹⁵⁹ 20 U.S.C. § 1400(d)(1)(A); § 1401(14); and 34 C.F.R. § 300.300(a)(3)

state and local educational agencies in cooperation with the parents or guardian of the child.”¹⁶⁰ In commenting on this, the Rowley case as cited, the Seventh Circuit stated that “Rowley leaves no doubt that parents, no matter how well motivated, do not have a right under the Act to compel a school district to provide a specific program or employ a specific methodology.”¹⁶¹ The Eighth Circuit has followed suit by quoting the Rowley case in noting that the Supreme Court’s opinion was that lower courts such as they must not impose educational methods, but rather must defer that judgment to the educational experts who design and review a child’s IEP. The only imposed standard accordingly by the Court was that the IEP, and what ever methodology was chosen to be used in it’s implementation, must allow the child to receive some educational benefit and that he or she be educated as much as possible alongside his or her non-disabled classmates.¹⁶²

¹⁶⁰ Ibid.

¹⁶¹ *Lachman v. Illinois State Bd. Of Educ.*, 441 IDELR 156 (EHLR 441:156) (7th Cir. 1988)

¹⁶² *E.S. v. Independent School District, No. 196*, 135F.3d 566, 569 (8th Cir. 1998); *Gill v. Columbia 93 School District*, 217 F.3d, 1027, 1038 (8th Cir. 2000); and *T.F. v. Special School District St. Louis County*, 449 F.3d, 818 (2004)

At the same time in addressing the amendments to the IDEA of 2004, the courts found that “case law recognizes that instructional methodology can be an important consideration in the context of what constitutes an appropriate education for a child with a disability” but “at the same time, these courts have indicated that they will not substitute a parentally preferred methodology for sound educational programs developed by school personnel in accordance with the procedural requirements of the IDEA.”¹⁶³ At the same time the ACT does recognize the importance of discussing the proposed methodologies to be used in providing individualized instruction: “. . . it is clear that in developing an individualized education there are circumstance in which the particular teaching methodology that will be used is an integral part of what is ‘individualized’ about a student’s education and, in those circumstances, will need to be discussed at the IEP meeting and incorporated into the student’s IEP.”¹⁶⁴ However, it all comes down to the IEP team, “in all cases, whether methodology would be addressed in an IEP would be an IEP team decision.”¹⁶⁵

¹⁶³ *64 Fed. Reg.* 12552 (3-12-99)

¹⁶⁴ *Fed. Reg.* 12552 (3-12-99)

¹⁶⁵ *Ibid*

In requiring that a child with a disability be provided his or her education in the least restrictive environment the Act simply means that he or she must be educated alongside his or her non-disabled classmates to the maximum extent appropriate.¹⁶⁶ One of the seminal court cases used in emphasizing the importance of the least restrictive environment requirements of the Act is the *Roncker versus Walter* case in the Sixth Circuit.¹⁶⁷ The Eighth Circuit has adopted the results of the *Roncker* case in determining the least restrictive environment, but went further in a recent case noting that a child should be separated from his or her peers only if the services that make a segregated placement superior cannot be provided in a non-segregated setting. For some disabled children the superior services may or may not be appropriate in a non-segregated setting when his or her unique disabilities are taken into account. Thus to say that all children with a specific disability such as XXXXXXXX should be educated in a regular education classroom simply because the services can be provided is a failure to account for each child's unique presentation of that disability.¹⁶⁸

It is necessary, therefore for this hearing officer to look only at the facts in this case as to whether or not the District in cooperation with the Parents developed IEP's which concentrated on the unique needs of the Student and not specifically at his disability and that the IEP team considered his unique needs in deciding on an appropriate methodology and an educational placement which was most appropriate to implement his education program. The testimony elicited in the course of the hearing in general is replete with accusations and opinions based on personal and even professional preferences for dealing with the disabilities of this child; not only

¹⁶⁶ 20 U.S.C. § 1421(a)(5)

¹⁶⁷ *Roncker v. Walter*, 700 F.2d (6th Cir. 1983)

¹⁶⁸ See *Pachl v. Seagren*, 453 F.3d (8th Cir. 2006)

with the methodology, but also where, when, and how the methods should be implemented. Although the Parents, along with supportive advocates, agreed to the program of instructions for each school year and participated actively in all of the IEP team discussions there is the presented challenge as to whether or not the IEP's and their implementation by the District denied the Student FAPE by not being appropriate and by not being provided in the least restrictive environment.

In more specifically defining what is meant by FAPE, the Court held that an educational agency has provided FAPE when it has provided personalized instruction with sufficient support services to permit the student to benefit educationally from that instruction. The Court noted that instruction and services are considered "adequate" if:

- (1). They are provided at public expense and under public supervision and without charge;
- (2). They meet the State's educational standards;
- (3). They approximate the grade levels used in the State's regular education; and
- (4). They comport with the student's IEP.¹⁶⁹

The definition of children covered under IDEA; however, is seen as being doubly circular in that a child with disabilities must be so disabled as to require special education and related services. Again, as noted above, special education and related services are those that meet the unique needs of a child with disabilities. Moreover, related services are those that assist a child to benefit from special education, which can only be received by a child with disabilities.

The issues addressed in this case have been presented by the Parents as being such egregious violations of procedural requirements of the Act that they have denied the Student with FAPE. Keeping in mind, as noted above, FAPE is defined as special education and related

¹⁶⁹ *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-207 (1982)

services that are provided at public expense, under public supervision and direction, and without charge, which meet the standards set forth by the Department. Thus the question boils down to: (1) looking at each individual issue to determine whether or not the District has been in compliance with that definition, and (2) whether or not any single violation, or the accumulation of violations, is severe enough to constitute a denial of FAPE.

The Court of Appeals for the Eight Circuit in *Zumwalt v Clynes*¹⁷⁰ agreed with the Supreme Court's decision in *Rowley* in stating that the IDEA requires that a disabled child be provided with access to a free appropriate public education and that parents who believe that their child's education falls short of the federal standard may obtain a state administrative due process hearing.¹⁷¹ Further, *Rowley* recognized that FAPE must be tailored to the individual child's capabilities. The Court of Appeals for the Eighth Circuit has also outlined the procedural process by which a parent and student may pursue their rights under the IDEA:

“Under the IDEA, parents are entitled to notice of proposed changes in their child's educational program and, where disagreements arise, to an 'impartial due process hearing.' [20 U.S.C. § 1415(b)(2).] Once the available avenues of administrative review have been exhausted, aggrieved parties to the dispute may file a civil action in state or federal court. *Id.* § 1415(e)(2).”¹⁷²

The Eighth Circuit Court of Appeals has addressed the issue of the adequacy of an IEP in

¹⁷⁰ *Zumwalt v Clynes*, (96-2503/2504, U.S. Court of Appeals, Eight Circuit, July 10, 1997)

¹⁷¹ *Board of Education v. Rowley*, (458 U.S. 176-203, 1982)

¹⁷² *Light v. Parkway C-2 School District*, 41 F.3d 1223, 1227 (8th Cir. 1994), cert. denied, 515 U.S. 1132 (1995)

meeting the standards established in IDEA in order to provide FAPE. In *Fort Zumwalt School District v. Clynes*, the majority is quoted as stating that the IDEA does not require the best possible education or superior results. The court further states that the statutory goal is to make sure that every affected student receive a publicly funded education that benefits the student.¹⁷³ In their decision the court relied on the previously cited Rowley case by quoting Rowley at 203 (grades and advancement from grade to grade "an important factor[s] in determining educational benefit").¹⁷⁴

¹⁷³ *Fort Zumult School Dist. v. Clynes*, 96-2503,2504, (8th Cir. 1997)

¹⁷⁴ *Ibid*, at 26 IDELR 172

It was the intent of the IDEA to encourage parental participation in the development of a disabled student's IEP. The value of parental participation in the development of an IEP has been consistently emphasized in the IDEA.¹⁷⁵ As the Supreme Court stated in the previously cited Rowley case "It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process ... as it did upon the measurement of the resulting IEP against a substantive standard."¹⁷⁶ The previously cited Eighth Circuit case regarding the necessity of there needing to be serious procedural violations in order to declare a violation of FAPE, on the other hand, takes a strong opinion in the other direction when it comes to the requirement of parental participation: "An IEP should be set aside only if 'procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits.'"¹⁷⁷ In this case there is no doubt that the Parents, especially the Student's mother, participated in the development of the Student's IEP's for both school years, even though she may not have agreed with all of the decisions reached by the IEP team. Her testimony reflected a history of active involvement in the Student's health and welfare which can only be admired by those of us without such challenges as those that she meets daily.

¹⁷⁵ 20 U.S.C. §§ 1400(c); 1401(20); 1412(7); 1415(b)(1)(A), (C)-(E); 1415(b)(2)

¹⁷⁶ *Bd. of Educ. of Henrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 189, 205 (1982)

¹⁷⁷ *Independent School District No. 283 v. S.D. by J.D.*, 88 F.3d 556 (8th Cir. 1996) and *J.P. v. Enid Public School*, No. CIV-08-0937-HE (W.D. Okla. 9-23-2009)

Also as noted earlier the courts have agreed that an IEP must be designed to provide the possibility for a student to obtain an educational benefit from the proposed instruction. What constitutes an educational benefit or meaningful benefit has also been the discussion of multiple court decisions. Again, going back to the Rowley standard, progress according to the courts should be measured in terms of educational needs of the disabled child and should be more than “trivial” or “de minimis.”¹⁷⁸ In evaluating whether FAPE was furnished the courts have demanded an individual inquiry into a child’s potential and educational needs. In this case the Student’s progression was addressed and illustrated by the witnesses including the Student’s mother. At the same time she believe the judgements of “friends” who suggested to her that he had regressed in some of his behaviors, because of what the District had not been doing, rather than his unique response in the course of addressing his XXXXXXXXX. The Parents may not have agreed with the District’s reports and their assessment of his progress. However, they too provided some of his behavior training as well as his educational program in the home and he received some of his related services of physical therapy by an outside agency after school hours. Thus, his progress and any perceived lack thereof as alleged by the Parents, cannot be attributed solely to one person or even agency. This Student’s Parents have involved numerous individuals in his life with the sole intent of everyone to help him develop to his greatest potential.

It is not a mandate of the IDEA that a parent, anymore than a district, be able to forecast with ultimate certainty of the adequacy of a particular IEP. The IDEA, as noted above, must however, be developed in such a manner as to allow a student the opportunities to achieve an educational benefit from the educational program. From the documents entered as evidence and the

¹⁷⁸ *Polk v. Central Susquehanna Intermed. Unit 16*, 853 F.2d 171 (3rd Cir. 1988); *Ridgewood B. of Educ. v. N.E.*, 172 F.3d 238 (3rd Cir. 1999); and *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000)

testimony of the educational professionals this would appear to have been the case for this Student in both school years.

The Supreme Court supported Congress' emphasis on the importance of procedural compliance; however the accusation that a student has been denied FAPE has not been supported by the court when the alleged violation has been based solely on procedural violations.¹⁷⁹

The position of the Parents throughout the hearing was evident in that they were not willing to accept anything less than what they believed to be in the best interest of their son. However, it is the decision of the hearing officer, as noted in the discussion of the facts as presented above, that there does not exist in the testimony or evidence sufficient grounds on which to declare that the District denied the Student with FAPE.

Neither does the testimony and evidence support the allegation that the District breached their due process procedural responsibility to the degree that would constitute a denial of FAPE unilaterally changing the amount of time allotted for him in each of his educational settings or by failing to provide the Parents with a copy of the proposed IEP's at the end of each IEP team meeting.

Order

In that the Parents have provided insufficient evidence and testimony to warrant support of the allegations of a denial of FAPE their request for the relief as requested is hereby denied.

¹⁷⁹ *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206-207 (1982). See also *Evans v. District No. 17 of Douglas County*, 841 F.2d 824 (8th Cir.1988). (See also *Independent School District No. 283 v. S.D. by J.D.*, 88 F.3d 556 (8th Cir. 1996). More recently see: *Hiller v. Board of Education*, (16 IDELR 1246) (N.D. N.Y. 1990); *Bangor School Department* (36 IDELR 192) (SEA ME 2002); *Jefferson Country Board of Education*, (28 IDELR 951) (SEA AL 1998); *Adam J. v. Keller Independent School District*, 328 F.3d 804 (5th Cir. 2003); *School Board of Collier County v. K.C.*, 285 F. 3d 977 (11th Cir. 2002), 36 IDELR 122, *aff'g* 34 IDELR 89 (M.D. Fla. 2001); and *Costello v. Mitchell Public School District 79*, 35 IDELR 159 (8th Cir. 2001).

The District will immediately upon receipt of this order, but no later than October 15, 2010 prepare for and notify the Parents of an IEP conference in which it will be decided as to how the Student's unique needs can be met through the provision of services as deemed appropriate through consultation with experts as determined qualified by the District, including related services. Should the Parents elect not to participate or attend, the District will proceed as best it can to develop an IEP for school year 2010-2011 to meet the unique needs of the Student.

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 further jurisdiction over the parties to the hearing.

It is so ordered.

/s/ Robert B. Doyle
Robert B. Doyle, Ph.D.
Hearing Officer

September 27, 2010
Date