ARKANSAS DEPARTMENT OF EDUCATION
SPECIAL EDUCATION UNIT

CONFIDENTIAL

---------- Parent **PETITIONERS**
On behalf of ----------, Student
DOB: 05/21/99

vs. **CASE NO.: ----------**

SOUTH CONWAY COUNTY SCHOOL DISTRICT **RESPONDENT**

HEARING OFFICER'S FINAL DECISION AND ORDER

ISSUE AND STATEMENT OF THE CASE:

Whether Respondent denied ----------(hereinafter "Student") a free appropriate public education (FAPE), such education being required under the federal Individuals with Disabilities Education Act (IDEA) and Arkansas statutes that mirror the federal statutes in scope and content, as well as the implementing federal and state regulations, in the 3rd, 4th, and/or 5th grades by using faulty procedures; adoption of inappropriate or faulty Individualized Education Plan(s) (IEP(s)) and failing to implement such IEP(s); failing to provide required supplementary aids, services and supports; and/or failing to use a Least Restrictive Environment (LRE) for Student's special education services.

PROCEDURAL HISTORY:

---------- (hereinafter "Parent" or "Petitioner"), parent of Student, filed her Due Process Complaint on April 17, 2009, with the Arkansas Department of Education's Special Education Unit (hereinafter "ADESEU") against the ---------- School District (hereinafter "District" or "Respondent"), and ADESEU assigned it case number---------- At

that time, Student was finishing her 4th grade year. The gist of the complaint were allegations that the District had failed to comply with various provisions of IDEA (re-authorized 2004, as amended by the Individuals with Disabilities Education Improvement Act, 2006) (20 USC Sections 1400, et. seq.), and its corresponding implementing regulations in 34 CFR, during Student's 3rd and 4th grade years. Those alleged failings were of both a procedural and a substantive nature. The undersigned was assigned by ADESEU as the Impartial Hearing Officer (hereinafter "IHO") and an Order Setting Preliminary Timelines was thereupon issued on April 21, 2009. Petitioner was represented by Little Rock attorney Theresa Caldwell and Conway attorney William Brazil entered his appearance for Respondent. Petitioner was assigned the burden of proof inasmuch as she was the complaining party challenging the IEP(s) and alleging failure to provide FAPE.

Hearing sessions commenced on May 26, 2009, and were also conducted on June 9th, June 23rd, June 24th, July 16th, July 23rd, July 24th, August 6th, September 15th, October 13th, October 15th, October 22nd, November 23rd, December 3rd, December 4th (all in 2009), and February 12, 2010.[1] Because multiple hearing sessions were needed for both parties to have adequate opportunity to present their respective cases, a number of Orders of Continuance had to be issued.[2]

[1] Petitioner's counsel has argued in her initial post-hearing brief that these proceedings were protracted for such an excessive time period because of Respondent counsel's tactics and limited availability for scheduling of sessions. Respondent's counsel, on the other hand, notes in his brief that the delays were caused by the meandering and repetitive nature of his opponent's examinations. In reality, both have legitimate points; additionally, several postponements of scheduled hearing sessions were occasioned by funerals needing to be attended by both parties. Despite considering the lengthy examination of nearly every witness by Petitioner's counsel, however, this matter could have been concluded long ago if Respondent's counsel had been available more than just one or several days per month for the scheduling of sessions. Even at only one session per week, the 16 days of hearing sessions could have been concluded within 4-5 months rather than the 9 months it required primarily because of his scheduling problems. With that being the case, it is also noted that the cause of protraction is not being considered herein as either any type of violation, itself, or as an enhancing factor of the relief being ordered for Petitioner for the violations actually found.

[2] All interim Orders and other documents referenced in this section of the decision are located in the Hearing Officer Exhibit Volume.

Additionally, a number of motions were submitted by Respondent (with responses thereto being filed by Petitioner), including a Motion for Hearing Officer to Recuse, a Motion to Strike Order for Temporary IEP and LRE Placement for 2009-10 Year, and a Motion to Strike Amendment to August 19, 2009 Order. All of those motions were denied by subsequently-issued IHO orders.[3]

Since this case was not concluded by the end of the 4th grade academic year, Student entered the 5th grade without any changes being made in Student's IEP under the guise of "stay-put." Accordingly, Petitioner filed another Due Process Complaint on August 19, 2009, with ADESEU about alleged FAPE violations pertinent to the 5th grade year, and it was assigned case number ---------- Ultimately, Petitioner filed a Motion to Consolidate the two cases, and that motion was granted, thereby re-starting the timelines for the entire consolidated proceedings.

Because disputes arose about stay-put issues relative to the 5th grade year's commencement, the IHO issued a series of orders about a temporary IEP and placement to attempt to get Respondent to conduct an IEP conference to develop new goals and objectives and other appropriate IEP content under the stay-put concept during the early part of the 5th grade year. An IEP conference was finally held on September 21, 2009,[4] and Respondent only added goals and objectives to the IEP. Petitioner, believing the IHO's orders were not complied with by Respondent, filed a letter with ADESEU requesting that agency to enforce the IHO's orders. The ADESEU placed that issue before the IHO, and compliance hearing sessions were

[3] Respondent's Motion to Strike Order for Temporary IEP was found to have merit as to this IHO's erroneous pronouncement that stay-put had expired at the end of the 4th grade year and expiration of the IEP for that year. Nevertheless, my Amendment to August 19, 2009 Order concluded that a revised IEP was proper under the circumstances of the case and continued to order its development.

[4] Petitioner's counsel appeared at the conference with her client. Respondent's counsel objected to that attorney's presence in his absence and directed his client not to meet with Petitioner and counsel. Accordingly, an already completed revised IEP was presented and no discussion held about it.

conducted in October.[5] Eventually, an Order Regarding Compliance and Stay-put was issued on December 6, 2009; Petitioner waived attendance at the ordered IEP conference because Respondent's counsel was again objecting to her attorney's intended presence without his attendance because of his usual unavailability. Respondent held an IEP conference on December 8th and issued a new IEP and schedule for Student per the IHO's December 6th order.[6] That order also announced the finding that Respondent had not been in compliance with the previous temporary IEP orders.

Apparently the December 6th Order alleviated much of the Petitioner's concerns about the Student's educational program and placement during the remaining proceedings since no additional evidence and testimony was needed for the 5th grade year as part of case ----------after the ---------- case presentations were concluded on February 12th. Subsequently, the parties were ordered to submit sequential briefs and they did so.

Testifying in the hearing proceedings were the following witnesses, essentially listed in the order called and noting that Respondent recalled a number of these same witnesses after Petitioner had rested[7, 8]:

1. Lisa Bryant, District Special Education (hereinafter "special ed") Supervisor
2. Ed Ussery, District's CBI Special Ed Teacher for 4th Grade
3. Melissa Johnson, District's School Psychology Specialist
4. Christi Hightower, District's 3rd Grade Inclusion Special Ed Teacher

[5] Unknown to Respondent's staff, Petitioner's counsel recorded the conversations that occurred on September 21st regarding the aborted IEP conference that had been ordered, and a copy of that recording was heard in a compliance hearing session and also submitted for the record.
[6] Respondent appropriately recorded the December 8th IEP conference and submitted that recording for the record.
[7] The latter fact of recalling witnesses in his case-in-chief after having availed himself of the opportunity to elicit their testimonies in cross-examination when Petitioner's counsel initially called them in her case-in-chief, and after Petitioner had rested, was one of the tactics complained about in Petitioner's brief as producing protraction. Respondent's counsel, however, had the right to engage in that procedure and practice.
[8] The positions of the District staff witnesses are listed only as to their experiences and work with Student.

5. Kim Huff-Lemley, District's 2nd Grade Inclusion Regular Education (hereinafter "regular ed" or "general ed") Teacher
6. Sharon Kron, District's 2nd Grade Paraprofessional
7. Michelle Dixon, District's 3rd Grade Inclusion Regular Ed Teacher
8. Glenda Bailey, District's K-3rd CBI Special Ed Teacher (briefly during Student's 3rd grade year)
9. Danielle Otis, District's 4th Grade Inclusion Literacy Teacher
10. Janie Ussery, District's 4th & 5th Grades Inclusion and Resource Special Ed Teacher
11. Sharon Wilson, District's 3d Grade Principal
12. Velda Thompson, District's 4th & 5th Grades Principal
13. Cameron Windham, District's 4th Grade Paraprofessional
14. Katie Lawrence, District's 4th Grade Math, Science, Social Studies Teacher
15. Student
16. Parent
17. Carol Blann, Petitioner's Expert (Little Rock School District Special Ed Teacher)
18. Bryan Ayers, District's Expert (Director of Assistive Technology, Easter Seals)
19. Dr. Doug Adams, District's Superintendent

FINDINGS OF FACTS:[9]

GENERAL:

1. At the commencement of the hearing proceedings, Student was a 10-year old female in Respondent's 4th grade. She carried a diagnosis of ---------- (since 1999) and had the

[9] Although myriad findings, consuming numerous pages, could be listed herein, only those findings of fact directly pertinent to the decision whether FAPE had been provided or the relief warranted will be listed.

undisputed disabling condition of ----------; she also had an ---------- health condition that caused a number of excused absences for her. In psychological testing over the years, she had the following results pertinent to the ---------- IDEA disability:

A. 12/19/03 Testing: Stanford-Binet Intelligence Scale Composite IQ 63[10] with verbal reasoning IQ 63 and abstract/visual reasoning (non-verbal) IQ 66. The test report also noted that the Student's previous Stanford-Binet Composite IQ on 1/31/03 was 69.

B. 05/06/04 Testing (by Melissa Johnson): Vineland Adaptive Behavior Scale-Revised (Vineland-R) Composite Standard Score 70 (moderately low adaptive behavior).[11]

C. 10/27/08 & 11/19/08 Testing (by Melissa Johnson): Reynolds Intellectual Assessment Scales Composite Index Standard Score (hereinafter "SS") 40 with Verbal Index SS 41 and Non-Verbal Index SS 56[12]; Test of Nonverbal Intelligence-3d Ed. (TONI-3) SS 69; Vineland-R Composite SS 59.

Based on these collective scores, Student is more likely than not intellectually functioning overall within the mild mental retardation range, although verbal components of an overall IQ or intellectual functioning capacity could be in the moderate range.[13] That level of intellectual

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[10] According to the Diagnostic and Statistical Manual of Mental Disorders-Fourth Edition-Revised (DSM-IV-R), IQs in the range of 50-55 through approximately 70 have the label of "mild mental retardation" assigned. IQs in the 35-40 through 50-55 range are assigned the label of "moderate mental retardation." [Lower IQs fall in the severe and profound mental retardation range.]

[11] The disability category of mental retardation requires, besides a lower IQ, deficits in adaptive behavior, and the Student's various Vineland-R scores she has obtained fall within that deficit range.

[12] Johnson reported and testified that the verbal score was possibly low and that the non-verbal score might be the best estimate of intellectual functioning from this test.

[13] Several District staff witnesses (including School Psychology Specialist Johnson and 3d grade special ed teacher Hightower)) testified that Student's mental retardation was such that she had already "peaked" (as of 4th grade) in her acquisition of academic skills and achievement levels and that she should not be anticipated to achieve beyond her best levels already acquired as of 2nd grade. Based on my similar license as a psychological examiner (as well as being an attorney) that is similar to Johnson's certification from the Arkansas Department of Education (hereinafter "ADE") and my years of experience conducting psychological evaluations for special ed qualification, I take considerable exception (essentially, a finding of incredibility) with such a belief that a mildly mentally retarded 10-year old could not continue to learn additional academic skills (including reading and math skills) beyond the Kindergarten to 1st grade achievement levels if provided effective and meaningful educational opportunities. Accordingly, my opinion that Student can learn to read better despite her intellectual deficiencies is consistent with the opinions expressed by Student's 4th & 5th Grades' Principal Thompson and both of the expert witnesses, among others.

capacity should be sufficient to enable the Student to continue to acquire academic skills and to increase her current achievement levels.

2. She had been provided special education, including speech therapy, and related services of physical therapy and occupational therapy by Respondent since entering its system in Kindergarten. Student had a structured reading program, ELLA (Early Literacy Learning in Arkansas), that presumably had been consistently used with her for reading instruction in the 1st and 2nd grades; staff at the 2nd grade Annual Review noted she had made academic progress, although still not being on grade level, and it was planned that Student would continue to receive special ed services in both an Inclusion room and a Resource room, as well as her three (3) therapies, during the following 3rd grade academic year.

3. There is no evidence that after the 2nd grade this Student was provided reading instruction by use of a concerted, consistent, systematic structured reading program.[14] Instead, a variety of different methodologies and strategies were employed by the various teachers, seemingly at their discretion and whenever they chose to switch from one to another.[15]

4. Respondent's counsel made a number of admissions pertinent to the findings and conclusions of law herein (as well as being pertinent to the ultimate decision herein) during the course of the hearing, including:

> A. "The District has, from the very beginning, acknowledged that the paperwork was probably messed up, it doesn't comply directly with what it was supposed to do or what it—what was being done. And we have acknowledged that and admitted that…." (Tr. Vol. V, p. 50, 7/15/09)

[14] Confirmed by both experts in their testimony that they saw no evidence of structured programs being used.
[15] This is pertinent inasmuch as Petitioner's expert (Blann) opined that a Down's syndrome student would not be able to learn to read without a structured reading program. She testified that "structured" means that the reading program is systematic, being done consistently with specific objectives and continuous monitoring to determine where the student is in building reading skills. Respondent's expert (Ayers) also admitted that he, himself, used structured reading programs when he formerly taught reading.

B. During another hearing session, he remarks that they (Respondent) have stipulated that the IEPs are not adequate; that there were procedural errors with the paperwork. (Tr. Vol. XII, p.176, 10/22/09)

C. Later during the same hearing session, he states that he admits that there are both procedural and substantive deficiencies in the IEPs, although he also specifically states that FAPE has not been denied to this Student. (Tr. Vol. XII, p. 251, 10/22/09)

THIRD GRADE YEAR:

5. The IEP developed at the 2nd grade Annual Review Conference on 4/26/07 and intended to be implemented during Student's 3rd grade year (2007-08) lists on its first page[16] the course of study for the Student, being reading, writing, math, activities (art, music, and physical education), and speech therapy (as well as listing below that section her physical and occupational therapies). The noted "present levels of performance" are inadequate and relatively uninformative since they contain only one measurement of a 1.7 reading level,[17] but no other measurements for guidance. It also states that Student can not do district-wide and state-wide assessments (Benchmark testing beginning in the 3rd grade) but will participate in an alternative portfolio assessment procedure. The goals and objectives listed in the IEP are of an academic variety, as opposed to a functional variety.[18] It also lists on the continuum of placements page (where the child will get special ed services; such continuum of placements being required by IDEA) that the IEP team did consider a least restrictive environment alternative option of less

[16] Respondent has used the standardized IEP forms required by ADESEU during all academic years to date. Current version of such forms and other required documents for provision of special ed services are found in the state regulations Special Education and Related Services, Procedural Requirements and Standards (ADE 2008).

[17] There was much testimony about this 1.7 reading level measurement throughout the hearing; apparently it was derived from the Accelerated Reading program (hereinafter "AR reading"), which is not an oral reading level but instead is a computer program giving a reading comprehension level and which is not instructional but only motivational in nature.

[18] Respondent did eventually stipulate that the goals and objectives provided on both of the 3rd and 4th grade IEPs were of that academic variety and not functional in nature.

than 21% of the instructional day being spent out of regular class for special ed services.[19] There is conflict in various printed versions of this IEP as to exactly how much special ed minutes and how much regular ed minutes would comprise the Student's program. At one point it reports1200 weekly minutes of regular education and 750 weekly special ed minutes (Parent Exhibit Vol. I, p. 80),[20] while another version reports that the division will be 930 regular ed minutes and 1020 special ed minutes but also specifying 375 minutes per week each in Inclusion reading and Inclusion math (Parent Exhibit Vol. I, p. 116).[21] There no different dates on these two versions to distinguish which was applicable during what period of time.

6. An IEP conference was held on August 16, 2007, soon after 3rd grade started. Apparently, Respondent realized that Student had to take the Benchmark assessment, rather than the alternative portfolio assessment, to determine annual progress since the Student was not in a functional curriculum.[22] Additionally, the IEP team decided to place Student in a full Inclusion classroom rather than using Resource pull-outs from a regular classroom (indicating that would be 750 minutes of Inclusion weekly).

7. On September 26, 2007, another IEP team conference was called by Respondent to reconsider the Student's program. It was now decided that Student would get 1600 weekly minutes of special ed (including therapies) in a self-contained classroom[23] and 350 minutes in a regular ed environment. Once again the Student would be assessed by the alternative portfolio

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[19] No other generated or changed IEP during the 3rd and 4th grade years contained advisement of alternative LRE options having been considered besides the placement actually chosen, a substantive violation. That might also have been a procedural violation if, in fact, no such alternative options were actually discussed in the IEP conference.

[20] During Student's 3rd grade year, the week was considered to be composed of a total of 1950 minutes in the instructional day. During the 4th & 5th grade years that total time was reduced to 1800 weekly minutes.

[21] According to ADESEU regulations, time spent in an Inclusion classroom that contains both a regular ed teacher and a special ed teacher is to be divided evenly (50/50) between special ed minutes and regular ed minutes. None of these IEP versions and descriptions correlate with each other as to how much special ed is being received.

[22] IDEA and state regulations require that a student must have a functional curriculum, rather than an academic one, in order to qualify for the alternative assessment procedure.

[23] In this District, self-contained means provision of a functional curriculum or what is also known as Community Based Instruction (hereinafter "CBI") , rather than self-contained referencing how much time (at least 60% of the instructional day) is spent in special ed services appearing on the ADESEU IEP continuum of placements page and is defined in the law.

procedure since she would now be getting a functional curriculum.[24] A few handwritten entries were added to the existing IEP on that conference date. The continuum of placements page was also changed to indicate that a minimum of 60% of the instructional day would be in special ed, and there was no alternative option noted to have been considered (another procedural violation). Additionally, in the IEP section in which instructional modifications, supplemental aids, and supports are to be listed in a number of categories, only some for managing behavior were inserted and nothing in such categories as adapting tests, adapting instruction, adapting materials, and altering assignments (another procedural violation). Student was to be attending lunch and activities with the non-disabled regular ed population; unfortunately, the only 3rd grade self-contained (functional curriculum) classroom existing was in a different school building (Reynolds Elementary, known as Morrilton Primary School/MPS) than Student's then-current school (Morrilton Elementary School/MES), and that MPS facility housed only a regular ed, non-disabled population of Kindergarten and 1st graders. Student would only be able to associate with her own age non-disabled peers at MES during special events that would not occur that frequently. On the first page of the revised IEP, it now contained as "courses" the words "self-contained classroom" rather than a listing of the actual courses in which the Student would be receiving instruction in a functional curriculum. The academic goals and objectives from the previous IEP were not changed, and no functional goals and objectives were added.[25] Respondent's CBI special ed teacher in the MPS self-contained classroom opined that Student

[24] A reasonable inference can be drawn from the facts that initially in 4/07 the student was being assigned the alternative portfolio assessment, then returned to the Benchmark assessment procedure in 8/07 when she did not have a functional curriculum, and in 9/07 was switched back to the alternative portfolio procedure with assignment to a self-contained (functional curriculum) classroom. That inference would be that Respondent's staff was first deciding what assessment they wanted Student to have and that determination was then driving what program was needed to accomplish that intended assessment procedure. That would be the proverbial prohibited "cart before the horse" similar to the prohibited process of deciding placement before determining what the elements of a needed program were.

[25] Respondent's Morrilton Intermediate School (4th – 6th grades) Principal acknowledged that it would have been better to provide functional goals for the functional curriculum, and Respondent's expert (Ayers) admitted that ADESEU regulations about using an alternative portfolio assessment require that a student getting a functional curriculum (needed to be eligible for the portfolio alternative) requires provision of functional goals in the IEP.

was functioning on a level higher than her other CBI students and that her class was not appropriate for Student; she also testified that Student's goals and objectives were not like functional goals she prepares for her CBI students.

8. After Petitioner observed Student manifesting regressive-type behaviors (e.g., soiling herself, engaging in baby-talk) and other unwelcome behaviors, Petitioner visited the self-contained classroom, concluded it was not appropriate for her child, and held Student out of school while requesting another programming conference. That conference was conducted on 10/15/07, and Respondent's staff agreed to return Student to the MES campus, continue instruction in a functional curriculum through pull-out services, reduce special ed minutes from 1600 to 1525 minutes weekly (and increasing regular ed minutes from 350 to 425 weekly), and planned to re-meet on 11/13/07 to determine whether Student should be returned to a self-contained environment. The only change to the IEP as a result of that conference was a handwritten notation of the minutes changes; it still contained no functional goals and objectives and it still listed "self-contained classroom" as the course Student would be enrolled in (without specifically mentioning a functional curriculum anywhere therein).

9. Respondent called another programming conference on 10/17/07 because Student's teachers wanted Student to be in a regular ed classroom for 150 minutes weekly of "shared reading" (Dixon's story time, which was not actual reading instruction since the teacher read stories to the class) and the IEP was only changed to reflect the change in minutes (now 1375 special ed minutes and 575 regular ed minutes per week). Courses on the first page continued to list self-contained classroom as well as therapies and activities. Goals and objectives remained unchanged. Of particular noteworthiness, regular ed teacher Dixon, with a master's degree in reading and presumably therefore possessing a fair amount of expertise in that subject matter, testified that she never provided reading instruction to Student while she was in her classroom.

10. As previously planned, another programming conference was held on 11/13/07. The decision was made to leave Student at MES with an additional 60 minutes daily (300 minutes weekly) in the Inclusion room; special ed minutes were to be reduced to 1345 weekly and regular ed minutes would be increased to 605 weekly. In reality, the revised IEP showed the 605 and 1345 minutes division, so the change was only 30 minutes weekly from one category to the other, not 300 minutes weekly mentioned on the IEP form.[26] There no other changes to the IEP forms and it still specifies that Student's courses were to be "self-contained classroom" along with occupational therapy, speech therapy, physical therapy, and activities (of course, the three therapies are also not actually courses of study). Still no functional goals and objectives were added.

11. On 4/24/08, the IEP team met for Student's Annual Review. Statements on the form included that great progress had been made in completing tasks for the alternative portfolio assessment using the functional curriculum (a non-quantitative pronouncement) and that Student's reading level was 0.8 (Kindergarten level, and reporting an AR reading motivational program level as was done in the previous Annual Review). It also reported that Student could do math with manipulatives and calculators (also not really any kind of specific measure that would enable anyone to gauge Student's progress). The team decided that Student would be getting in the following 4th grade year resource services for 560 minutes weekly[27] and 1390 minutes weekly in a self-contained classroom[28] for reading, written expression, and math skills. Physical therapy was reduced to 60 minutes weekly from the previous 90.

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[26] Whoever completed the decision form and the IEP form was confused in the minutes calculations. It is therefore uncertain at this point what the exact minutes were decided to be in special ed and regular ed.

[27] That is not exactly accurate in description since the 50/50 division of Inclusion minutes would make the "resource" special ed minutes to be only 280 weekly, not the full 560.

[28] The Notice of Conference Decision form also issued on that 4/24/08 conference date does indicate that 1390 weekly minutes would be on a functional curriculum, but as will be subsequently noted, the drafter IEP again contains no functional goals or objectives or any indication of what actual course subject areas were being provided.

12. Of great significance, none of the IEPs used during the 3rd grade year had any data inserted in the regulations-required section concerning quarterly evaluation dates, evaluation codes (such as "continue," "discontinued," "mastered," and "not initiated"), and performance levels (percentages of goals/objectives achieved by the quarterly evaluation date. The pages containing these data are to be provided to a parent quarterly to enable a determination of progress. No other significant, meaningful, consistent measurement progress data is contained in the evidence.[29] Petitioner and Respondent did use a journal system to communicate with each other for several initial months during the 3rd grade (and 4th grade) year by each writing questions and comments in a notebook that would accompany Student back and forth between home and school for the other to read and respond as necessary. Only an insignificant number of entries (less than 10) contained any information about what Student was working on in terms of subject matter or progress comments; the vast majority of the writings pertained to health, behavioral, and special events issues. Accordingly, this journal system was no meaningful evidence that would have enabled Petitioner to consistently gauge her child's progress toward the (misleadingly academic) goals and objectives of her IEP. Samples of Student's work product/sheets were also apparently sent home during the year, but they do not serve as any meaningful, consistent system for accurately gauging progress.[30]

13. Student's 3rd grade special ed teacher Hightower opined that Student had regressed in reading levels across the year and also stated that the Student demonstrated no progress in

[29] The lack of such progress data in the record was eventually admitted to by Respondent's expert (Ayers), even though he previously had opined that progress had been made by Student in 3rd grade. The basis of his opinion about progress turned out to be nothing more than what Respondent's Special Ed Supervisor (Bryant) had told him. This testimonial scenario reflected adversely on his credibility.

[30] Respondent's expert (Ayers) acknowledged that one would have to try to infer how the Student was doing from the work samples and home/school communications since he didn't see any data sheets or grade books in the record which also had scant indications of any data collection. Mr. Ayers also testified that the 3rd and 4th grade IEPs were a little bit confusing for him to read and that it was difficult for him to judge what progress was being made on the goals and objectives without data being inserted in the IEPs. If he had such problems as an expert in the field, the untrained Petitioner certainly shouldn't and couldn't be expected to be more competent in understanding, and reaching inferences from, this abysmal lack of required data.

acquiring sight words in reading from when she was tested with the Brigance Comprehensive Inventory of Basic Skills in 5/05 (40 out of 102) in comparison with amount acquired by the end of 3rd grade (40 out of 100). She also testified that she kept no grade book and didn't recall whether she brought any performance data to the Annual Review in 4/08.

14. During the year, Student received a number of disciplinary infraction statements and sanctions that included corporal punishment but not suspensions. Respondent performed no Functional Behavioral Assessment (FBA) and considered no Behavior Intervention Plan (FBI) to deal with those behavior problems.[31] Staff believed that negative behavior was caused by Student's frustration in not understanding what her peers were doing and learning and from boredom.

FOURTH GRADE YEAR:

15. As with the 3rd grade IEP, the 4th grade IEP does not list any actual subject matter courses (whether academic in nature like reading or math or functional domains from a functional curriculum) but lists "self-contained classroom" in the proposed schedule of services section. The first semester indicates the weekly instructional time division would be 560 minutes in regular ed and 1390 minutes in special ed, while the second semester had a revision/reduction to only 410 minutes of regular ed to reflect that the instructional week was reduced from 1950 minutes to 1800 minutes. Once again there are no functional goals or objectives, only academic ones. Once again there are almost no modifications, supplemental aids, and supports indicated as being needed, except in the managing behavior category and a few access equipments. Once again the only present level of performance measurement is the

[31] Although some of the disciplined behaviors were of a serious nature such as hurting other students, an FBA and FBI are usually involved when a student needs to be suspended. Nevertheless, Respondent emphasized a number of times that Student was being disruptive in the Inclusion classroom environment and therefore an FBA and FBI could have been considered.

0.8 for reading (being an AR program level).[32] This IEP section is therefore insufficient and inadequate. Once again, there is listed no other LRE option that had been considered by the IEP team and why it might have been rejected, even thought that is required to be provided. There are no goals and objectives for the subjects of science and social studies or any indication that those subjects were ever being taught to Student.[33]

16. On 9/9/08 the IEP team met at the request of Petitioner.[34] The special ed paperwork indicates specifically that Petitioner did not want Student in a functional curriculum and that Petitioner continued to fight against a functional curriculum.[35] It also noted that Petitioner wanted a personal care aide. As a result of that meeting, the team decided not to change anything regarding Student's schedule and program and rejected assignment of a personal aide since there were aides available throughout the day in her various settings.

17. Another conference was held on 9/17/08 to consider Petitioner's request for additional evaluation. She also submitted a request for a Functional Behavioral Assessment and a child-specific aide assessment. The team agreed to the additional evaluation with components being intelligence, achievement, and adaptive behavior. Staff and Petitioner were also requested to complete separate "Special Circumstances Instruction Rubric" questionnaires pertaining to need for an aide. The evaluation was conducted by Respondent's School Psychology Specialist Johnson on 10/27/08 and 11/19/08, and the intelligence and adaptive behavior scores are

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[32] Respondent's expert (Ayers) opined that there was no significant difference between the 2nd grade's year end level of 1.7 (7th month of 1st grade) and the 3rd grade's year end level of 0.8 (8th month of Kindergarten). That opinion seems questionable in light of Student's teacher's (Hightower) opinion that there was reading ability regression over the 3rd grade year.

[33] Both experts (Blann and Ayers) commented about that lack of any indication that those subjects were being covered and Blann noted that the ADE Frameworks require 4th graders to have such instruction.

[34] At that point Petitioner had kept her child out of school for 10.5 days and was inferentially threatened with prosecution under compulsory attendance laws.

[35] Respondent disputed that Petitioner was complaining about a functional curriculum but instead didn't like the setting of the self-contained classroom and the other students therein (she didn't want her child to be "with <u>those</u> students" (tonal emphasis repeatedly supplied by Respondent's counsel)). Student's 4th grade Principal recalled that position. Although it would be quite understandable for a parent to prefer to have peer positive behavior models for a child rather than negative role modeling by students of a lower functioning level in a self-contained class, it is noted that it was Respondent's staff that completed this form and used the cited language about functional curriculum—Respondent is therefore being held to its actual content as the author/recorder thereof.

reported herein previously under Finding #1. A Functional Behavioral Assessment was not provided under Respondent's belief that Student's behaviors were not that problematic.

18. An evaluation/programming team conference was conducted on 11/20/08. In the Notice of Decision of that date, it was noted that Student spent the majority of the day in the Inclusion setting except for 1.5 hours daily in the self-contained setting and 0.5 hours daily in a Resource classroom setting, as well as getting a total of 4 hours per week in her three therapies.[36] That decision form also reported that special ed was appropriate for this Student (without further defining what or where) and those services would be continued for academic, achievement, and functional skills in reading, spelling, math, and the therapies. There were no changes made to the existing 4th grade IEP.

19. Regarding academic achievement, School Psychology Specialist Johnson administered both the Wide Range Achievement Test-Third Ed. (WRAT-3) and the Wechsler Individual Achievement Test-Second Ed. (WIAT-2). Finally, there are some standardized measurements of the Student's academic skills. On the WRAT-3, Student obtained standard scores (SS) as follows: Reading 63, Spelling 68, math <46 (none of these scores being above the 2nd percentile). On the WIAT-2, the SS scores were as follows: Reading Composite 54, Math Composite 47, and Spelling 59. Johnson subsequently converted those SS results to grade equivalents, with the result being that the WRAT measurements were all below the 1st grade level and the WIAT measurements were on a Kindergarten to beginning first grade level. Those results certainly do not depict much, <u>if any</u>, actual progress in academic skill acquisition having

[36] In the stay-put dispute, Respondent argued that this recitation of her program hours was only "historical" and not a reflection of what Student had been actually getting. That argument is unequivocally rejected herein, just as it was in prior rulings and orders. At the time of that 11/20/08 conference, that recitation was meant to be a reflection of what was then supposed to be occurring. At about this same time period, a typed schedule of the Student's day was prepared that similarly depicted what was recited on the form. (Parent Exhibit Vol. II, p. 387)

been made by Student in her last 1.5 years of education in the 3rd and 4th grades in comparison with her levels reportedly achieved in the 2nd grade.[37]

20. Petitioner's expert, Blann, also evaluated Student during the 5th grade year in 10/09, about a year after Johnson's testing in the 4th grade. Blann used the Woodcock-Johnson Tests of Achievement-III and reported the following grade equivalents scores: Total Achievement K.1 (1st month of Kindergarten), Broad Reading 1.1, Broad Math <K, Broad Written Language <K. Blann indicated that these scores indicated that Student was still only on a "readiness" level of beginning to mid-Kindergarten. Now after nearly 2.5 years of education being the subject of these proceedings, Student still is not showing any progress in acquiring academic skills of reading and math; this is confirmed by Johnson's testimony that her grade equivalent scores a year earlier were essentially similar to Blann's scores a year later.

21. Regarding the assessment for the need of a personal aide, School Psychology Specialist Johnson testified about the "Special Circumstances Instruction Rubric" that had been introduced to Respondent by a prior special ed supervisor. It is noted that this is not a standardized test and has unknown, if any, validity and uncertain utility. A simple scoring procedure is used to just add up all of the ratings points (a maximum of 16 total), and Johnson stated that a student would need to be rated 12 or higher to be entitled to an individual aide (essentially at least a 75% severity, 12/16). The undersigned is aware that there are personal care aides meant to assist students with significant health problems or who have such profound functional deficiencies that assistance is needed for such things as toileting, dressing, and feeding. Another type of individual aide is an instructional aide assigned to assist a student in staying focused/directed and needing instructional support. While Johnson used the total scale, it is the undersigned's opinion that only the last two (2) categorical columns labeled

[37] Johnson testified that Student hadn't regressed in skills, she just hadn't progressed and was reading on the same level in 4th grade that she was in 1st and 2nd grades.

"Instruction/Rating" and "Inclusion/Mainstreaming/Rating" are particularly relevant to a determination of whether this Student needed an individually-assigned instructional aide (the paraprofessionals working with her ever since 2nd grade, at the latest, are of the instructional aide variety), since the other two categories of "Health/Personal Care/Rating" and "Behavior/Rating" have not been testified about as being problem areas for this Student. Accordingly, a severity "total" rating using the pertinent columns would be 6 out of 8 possible points (similarly at a 75% severity level). The reported scores of the various raters were as follows: Principal Thompson 6/8 (75%), Inclusion regular ed Teacher Lawrence 7/8 (87.5%), CBI Teacher E. Ussery 8/8 (100%), and Resource Teacher J. Ussery 7/8 (87.5%) If use of this form as an aid to decision-making is at all warranted as Johnson apparently concluded, all of these staff ratings are therefore in a range of severity, viewed in this more logical perspective, that should have resulted in more serious consideration of assignment of an individual aide to allow the Student to remain in the Inclusion or regular ed classroom with her non-disabled peers to a maximum extent appropriate (being the LRE requirement of IDEA).[38]

22. After the 11/20/08 evaluation conference, apparently Respondent's staff did not stick to the schedule for the remainder of the 4th grade year, and it is virtually impossible to ascertain, let alone prove, what this student was getting in terms of regular ed and special ed services for those last 6 months. Staff testified that this was done under an IEP designed to be "flexible" so as to be able to give the Student whatever she needed whenever she needed it in their discretion. Needless to say, the IEP's actual contents, while being grossly deficient, contain no indication or hint of that alleged flexibility that would have been required to keep Petitioner informed and aware of what was occurring for her child.[39]

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[38] The various staff ratings on this form appear in Exhibit Vol. IV, pp. 538-41. It is also noted that Petitioner's own rating was only 2/8 (25%) (p. 542).

[39] Respondent's Special Ed Supervisor Bryant did eventually acknowledge in her testimony on 9/15/09 that IEPs are not supposed to be written for flexibility.

23. Student did receive a report card, but the grades ultimately determined by the special ed staff (particularly the CBI Teacher E. Ussery) were reported to have been determined only considering Student's better work. The IEP for the 4th grade did, unlike the 3rd grade IEP, actually contain some quarterly measurements regarding the various academic goals and objectives, but even as late as into the hearing sessions during Student's 5th grade year not every quarter contained such data.[40] Like in the 3rd grade, a home/school journal system of communication was used, and copies from the entire year were provided in evidence; as before, only a very few of the entries pertained to any instructional work or results and the remainder was about other matters. Respondent's Superintendent, a lawyer and educator, did agree with the proposition that IDEA requires parental involvement and, for that involvement to appropriately occur, a parent needs to know what is taking place. The totality of the evidence substantiates that Petitioner, in fact, was not adequately informed about what was going on in Student's 4th grade year, just as she was not during the 3rd grade year.[41]

24. The 4th grade Annual Review conference was conducted on 4/23/09 and unattended by Petitioner at her choice. The decision form states that because of the due process proceedings, a progress review will be delayed until after the conclusion of the hearing, that Student will continue to get 560 [sic] minutes of regular ed and 1390 minutes of special ed. There is to be no change in program or placement. As usual, it also failed to provide meaningful data as to progress made, only noting that progress was being made in the goals and objectives.

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[40] Respondent's expert (Ayers) testified that it would have been helpful for the staff to tie goals and objectives to performance levels and that it was difficult to judge progress on those goals and objectives without all of the data being there. He also admitted that he didn't have the information to know if the goals and objectives were appropriately implemented and that he couldn't substantiate progress in reading and math goals/objectives. Respondent's 4th grade special ed Resource Teacher Ussery agreed with the proposition that Petitioner would have been better informed about Student's progress by actual performance level codes/data than by report cards that were only based on successful work.

[41] Petitioner testified that she never saw the performance data, what there was of it, on the IEP goals and objectives pages and that is considered to be credible considering both the past practices of Respondent and the fact that no evidence was offered to the contrary that those IEP pages had been supplied to her at any time prior to commencement of the due process hearing proceedings.

The IEP prepared on 4/23/09 states that no changes are being made and the 4th grade version is being extended as is because of the due process hearing.

25. Respondent, through its Special Ed Supervisor, admitted at the end of the hearing proceedings that Student's 4th grade IEP had not been fully implemented as written regarding the related services[42] of therapies that were to be supplied. After deducting absences, Bryant stated that Respondent still owed the Student 5.5 hours of speech therapy, 7.5 hours of occupational therapy, and 3.0 hours of physical therapy for the 4th grade year to comply with its IEP specifications.[43]

FIFTH GRADE YEAR, STAY-PUT, AND COMPLIANCE:

26. Another Annual Review conference was conducted by the IEP team on 8/19/09 at the beginning of the 5th grade school year. Finally, there is reasonable specificity and data included on the decisional notice form, even though it erroneously concluded again that no changes would be made due to the due process proceedings. On that same date, the undersigned issued an order for an IEP meeting to draft a temporary IEP and placement for its implementation during the pendency of the proceedings since a new grade year had started and the prior IEP had expired as of 4/09, as noted on its face, and there was nothing to which stay-put could attach. Respondent objected to that reasoning and was found to be correct that stay-put continues throughout the pendency of such proceedings, no matter how long that might take. Nevertheless, the content of the order essentially was requiring stay-put without calling it that. To that effect, the Order required the temporary IEP to contain no less special ed and related services than contained in the 4th grade IEP, new goals and objectives (reflective of the actual curriculum(s) being

[42] While Bryant included non-supplied speech therapy in that category of non-implementation, IDEA does include speech therapy as special education rather than as a related service.
[43] Petitioner's counsel had previously calculated a considerably higher number of non-supplied therapy sessions in each category of therapy.

provided, i.e., academic and/or functional) , and other new content (e.g., statement of parental participation and concerns, summary of present levels of performance, etc.). Additionally, Student was to have no lesser exposure to her non-disabled peers as occurred in the majority of the 4th grade year and was to have no less than the same amount of assistance of a classroom aide or paraprofessional is was provided in the last several months of the 2008-09 year.

27. After Respondent's objection to the 8/19/09 Order for a temporary IEP and placement, an amending order was issued on 9/13/09 (Amendment to August 19, 2009 Order). It required an IEP meeting to be conducted no later than 9/18 to revise Student's schedule and services to conform to what was depicted in the Order (i.e., stay-put being that Student had "supposedly"[44] been provided 840 weekly minutes of special ed and related services and 960 weekly minutes spent in an Inclusion room or otherwise with non-disable peers presumably working on a general ed curriculum). It was also again ordered that new goals and objectives be drafted and the IEP be updated with other appropriate content such as a summary of present levels of performance. None of these updates and revisions were considered to be a change in current educational placement and therefore not prohibited by the stay-put principle. Respondent requested and was granted an extension to 9/21/09 to conduct that ordered meeting.

28. On 9/21/09 Petitioner appeared with her attorney for the scheduled IEP meeting. Respondent's counsel, not being present and not having sent any other legal representative, strenuously objected to Petitioner's lawyer being present (unannounced) without his presence[45]

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[44] At the 9/15/09 hearing session, Respondent's Special Ed Supervisor admitted having read my 9/13/09 Order but stated it needed clarification without indicating what needed clarifying; she also stated it had not been decided yet whether Respondent would comply with that Order. Since that date's hearing session was truncated in length, the undersigned suggested that the parties could meet at its conclusion since everyone, including the lawyers, could be available right then. Although Bryant later (during the October hearing sessions regarding compliance with orders) attempted to use that word "supposedly" as proof of the lack of clarity of the order and in defense of not doing what was ordered, the choice of the word "supposedly" was caused, in fact, by the difficulty anyone would have trying to determine exactly what was being done and when during that academic year considering Respondent's own lack of IEP clarity and all of the testimony and documentary evidence received to that date.

[45] As this particular dispute arose, a phone conference was conducted with the undersigned and the attorneys. The undersigned ruled that Petitioner's counsel had the right to be at the meeting and suggested several options to Respondent's counsel for protection of his client (e.g., recording the meeting for his later review and no signing of

and directed his client to not engage in any discussion about the pre-prepared IEP's new goals and objectives or otherwise. Special Ed Supervisor Bryant followed that direction and merely read the contents of the goals and objectives and refused to discuss anything with Petitioner, even though a recording made by Petitioner's counsel proved that that counsel offered to step out of the meeting room so that the team could engage in typical IEP meeting fashion. The undersigned later that date issued a "Clarification & Supplement to 9/13/09 Amendment to August 19, 2009 Order" to make it clear that failure to update the IEP by the end of that day, as ordered, would result in a finding of non-compliance continuing on a daily basis thereafter and that could cause an enhancement of any relief deemed warranted if a denial of FAPE was found. Subsequently, hearing sessions involving the issues of what transpired on 9/21/09 and whether Respondent had complied with the series of stay-put orders were conducted on 10/13/09 and 10/15/09. At the hearing session on 12/3/09, the undersigned ruled that Respondent, in fact, had not complied with my orders since the 9/21/09 had no parental participation, too much CBI time (functional curriculum) was being implemented compared with what was supposed to be happening after the 11/20/08 conference (as clarified by the Student's schedule provided to Petitioner, Parent Exhibit Vol. II, p.387), being the last uncontroverted agreement and understanding between the parties about Student's current educational placement before the filing of the complaint herein in 4/08, and there was no updating of present levels of performance or other appropriate content. Advisement was provided that the undersigned's ultimate final decision would announce whether the non-compliance was considered willful and intentional or not. Respondent's non-compliance was, in fact, willful and intentional, and that will impact the relief that is being ordered herein.[46]

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documents until after his review), and he did not respond to my inquiry why the meeting had not been conducted at the conclusion of the 9/15/09 hearing session.

[46] This finding of fact is based on the totality of what transpired, including the fact that this IHO was never contacted about alleged confusion or requested to clarify any matter, and my conclusion that the professed confusion

29. The 9/21/09 IEP now substitutes the fact that a functional curriculum (rather than the previous designation of "self-contained classroom") would be the Student's courses with speech therapy and activities. Even with this change, however, the IEP front page still does not indicate exactly what courses within that functional curriculum would be covered (such as the functional domains of recreation and leisure skills, daily living skills, etc.). The statement about parental participation development of the IEP only states "parent was present" rather than reporting that Respondent chose to follow its own attorney's direction and not engage parent in <u>any</u> participation, whatsoever.[47] Despite my orders several occasions requiring present levels of performance to be updated, the IEP states no change can be made to that section, only goals and objectives can be changed. Now, finally, there functional goals and objectives included in the IEP (apparently to the exclusion of any academic variety of goals and objectives, despite the 11/20/08 conference decision form (and schedule) indicating Student was supposed to be receiving instruction in academic literacy skills in Inclusion and Resource rooms). No changes were made to the modifications, aids, and supports pages, allegedly on the basis of stay-put. And, finally, the IEP's continuum of placements page now does contain an entry about a lesser restrictive option (other than the chosen 60% or more time spent in special education) having been considered. While the IEP front page indicates the instructional time division to be 410 weekly minutes in regular ed and 1390 minutes in special ed, a schedule chart prepared by Special Ed Supervisor Bryant shows the actual time division to be 340 weekly minutes in regular general ed and 1460 minutes in special ed (District Exhibit Vol. V, p. 865), certainly a unilateral "change in placement" (number of minutes in each category, which amounts also happen to not comport with the IEP statement) from a similar chart based on the 11/20/08 schedule that

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caused by use of the words "supposedly" and "presumably" in my orders was a pretense and an excuse for Respondent to once again engage in its seemingly common practice and pattern of doing whatever it wanted to do whenever it wanted to do it, regardless of written contents of IEPs or issued orders.

[47] A rationale of one having "only following orders," even when those orders or direction are provided by one's attorney, usually is not considered to be exculpatory because of having done so. Respondent took that risk and must now face its consequences.

showed about 750 weekly minutes in general ed and 1050 minutes in special ed (Vol. V, p. 864).[48]

30. After the parties were orally advised that Respondent had not complied with the undersigned's orders and stay-put requirements, the actual stay-put program was announced by the undersigned at the 12/3/09 hearing session and incorporated into an Order Regarding Compliance and Stay-Put issued on 12/6/09. Student was to be receiving 450 weekly minutes of special ed (2 periods per day) of a functional curriculum (such as functional reading and functional math and other domains) within the CBI classroom environment; 120 weekly minutes in the special ed and related services of speech therapy, occupational therapy, and physical therapy; 675 weekly minutes (3 periods per day) of academic curriculum special ed instruction in reading, math, and any other subject taught in the 5th grade within the Resource room environment; 225 weekly minutes (1 period per day) in the activities of physical education, art, music, with Student's same-age non-disabled peers; and 210 weekly minutes in regular ed language arts (this time could be spent in the AR program).[49] Additionally, a paraprofessional aide was to be available to assist Student in the activities periods, the CBI classroom environment, the language arts instruction, in the Resource environment at the teacher's discretion, possibly during lunch and recess if necessary to maintain socially appropriate behavior. Student was to have lunch and recess with general education (noon-disabled) peers. Respondent was also ordered to conduct an IEP conference (Petitioner waived attendance at that conference since her counsel would not be permitted to participate (although permitted to be available on site) if Respondent's counsel was not present), re-draft the IEP to contain present

[48] The handwritten corrections on these chart pages were made by the undersigned during the testimony about them, with no objections being lodged by Respondent about the accuracy of those changes. That is another example of how difficult it was to determine the true nature of the child's program and type of services and provided curriculum from Respondent's written documentation.

[49] A typographical error appears in the Order; the actual weekly special ed minutes equal 1350 (not 1365 referenced in the Order) and weekly regular ed minutes equal 450, assuming that the language arts instruction time would be in an Inclusion room.

levels of performance, notation of the permissible non-participation of Petitioner, academic-type goals and objectives for those subjects being taught in the general ed and Resource special ed environments and functional-type goals/objectives for those subjects of special ed instruction in the CBI environment, and therapy goals/objectives. Grades were to be prepared by both general ed and special ed teachers for their respective subjects of instruction. Preparation of a new schedule chart comporting with the IEP was also required. This Order was fulfilled by Respondent on 12/8/09 and the resulting IEP and chart are in the Hearing Officer's Exhibit volume. That IEP finally looks like it always should have, including a listing of the courses actually provided, the ordered contents including both academic and functional goals and objectives, present levels of performance with actual measurements, and even some additional modifications/aids/supports. The IEP conference was recorded and that recording is included in the Hearing Officer Exhibit volume.

CREDIBILITY:

31. Regarding credibility of the witnesses and opinions provided, it is found that Petitioner's expert (Blann) was far more credible than Respondent's expert (Ayers) due to factors such as amount of actual experience instructing Down's syndrome students of Student's age in reading and experience in observing and testing Student (Ayers never met Student). Additionally, many summary opinions expressed by Ayers (e.g., about progress having been made, appropriateness of IEP contents, etc.) were not based on evidentiary support to which he could point. I also find that Respondent's 4th and 5th grade Principal (Thompson) was one of the more credible Respondent witnesses when opining that Student could learn to read better (in a Resource environment) than her current level, that Student didn't need to be in a functional environment all day, that it would have been better for there to be functional goals, that Student's cognitive abilities were higher than other CBI students with functional curriculums from her past

experience, and that Student needs to learn as much as she possibly can. I also find that Petitioner, herself, was credible as to what she understood (and didn't understand) based on conferences, documentation, IEPs, and most matters about which she testified. Respondent's counsel's questioning of the Student, including his "demonstration/assessment" of her academic skills, was of no value due to its lack of validity and the highly artificial environment in which it took place.

CONCLUSIONS OF LAW:

Petitioners have satisfied their burden of proof in establishing that Respondent has denied provision of FAPE to Petitioners in all three (3) years in question (3rd through 5th grades) by its actions or lack of actions including, but not limited to, the following:

1. Respondent's procedural and substantive violations related to the IEPs were of such significance as to preclude Petitioner Parent from meaningful participation in the decision-making process;

2. Student's IEPs, until the last one drafted in 12/09 finally in compliance with the IHO orders, were not reasonably calculated to confer meaningful educational benefit to Student and Student made virtually no progress in the programs provided;

3. Respondent failed to implement IEPs as written and also made unilateral changes in Student's program, particularly involving the implementation of stay-put; and

4. Respondent did not always implement an IEP in the least restrictive environment.

Petitioners did not carry their burden of proof regarding the allegation of Student's need for an individual instructional aide or failure of Respondent to provide a Functional Behavioral Assessment or a Behavior Intervention Plan to Student.

Respondent willfully failed to comply with interim orders of the undersigned.

Due to the denial of FAPE, Petitioners are entitled to relief.

DISCUSSION:

As is often the case with special education disputes, an analysis of whether FAPE has been provided or not usually begins with reference to Board of Education of the Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176 (1982), and the current case is no different. It is well known that the Supreme Court imposed a two-part inquiry for FAPE determinations: (1) whether the educational agency has complied with the procedures set forth in the Act (IDEA) and (2) whether the IEP is reasonably calculated to enable a student to receive educational benefits. If both of those procedural and substantive inquiries are able to be answered affirmatively, then FAPE has been provided to the student. Not all procedural violations are considered a denial of FAPE and some may be treated as only technical errors; when there is a collection or series of procedural errors, the odds are much higher that they amount to a denial of FAPE. Additionally, substantive errors are routinely treated as being a more serious variety and more likely result in a deprivation of FAPE. Applying the first inquiry to the facts herein, there can be little doubt that the answer to that inquiry is negative.

IDEA describes the necessary components of an IEP at 20 U.S.C. § 1414(d)(1)(A):

> (A) Individualized Education Program.
> (i) In General. The term "individualized" education program" or "IEP" means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes
> (I) a statement of the child's present levels of academic achievement and functional performance, including—
> (aa) how the child's disability affects the child's involvement and progress in the general education curriculum;
> …
> (cc) for children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;

> (II) a statement of measurable annual goals, including academic and functional goals, designed to—
> (aa) meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum
> …
> (III) a description of how the child's progress toward meeting the annual goals described in subsection (II) will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;
> (IV) a statement of the special education and related services and supplementary aids and services …to be provided to the child…and a statement of the program modifications or supports for school personnel that will be provided for the child
> (V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class…
> …
> (VII) …the anticipated frequency, location, and duration of those services and modifications…

(emphasis added; see, also 34 CFR § 300.320)

It is axiomatic that Congress intended parents of disabled children to be a vital participant on the IEP team and involved in the decision-making occurring during the drafting of an IEP. (see the content of 20 U.S.C. § 1414(d)(1)(B) and 34 CFR § 300.321; see also, Blackmon v. Springfield R-XII Sch. Dist., 198 F.3d 648, 657 (8th Cir. 1999) wherein it was stated: "A school district's obligation under the IDEA to permit parental participation in the development of a child's educational plan should not be trivialized." That decision went on to quote Rowley for that proposition: "It seems to us no exaggeration to say that Congress placed every bit as much emphasis on 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." (458 U.S. at 205-06)). To serve in that participatory role at both drafting time, implementation time, and reviewing time, a parent has to be adequately informed and aware of what is going on, including being provided accurate information about what type of program the disabled child is getting and how the child is doing in that program. If an IEP does not specify what courses or subjects are covered by it, does not

adequately notify where the child currently stands in terms of academic achievement and functional performance, does not contain all of the required goals and objectives (both academic and functional), and doesn't list all of the needed modifications and supports the child needs and is to be provided, and if the section of the IEP pertaining to measures of performance progress on satisfying goals and objectives is blank or not complete and/or is not supplied to a parent, there is a mixture of multiple procedural and substantive errors regarding that IEP that unequivocally would leave a parent mostly in the dark. Stating academic goals and objectives for a student's subject areas, coupled with failure to insert functional goals and objectives regarding the use of a functional curriculum that was actually being primarily implemented, would mislead a parent into not understanding what the student was supposed to be getting from the IEP, just as occurred herein. Such errors couldn't help but impede that parent's opportunity to participate in the formulation process, and such inadequacies would result in the compromising of a child's right to an appropriate education, as is the case herein. In such circumstances of multiple procedural and substantive deficiencies, as Respondent correctly noted in its brief, it is legitimate to set aside the offending IEP(s). (Independent Sc. Dist. No. 283 v. S.D., 88 F.3d 556, 561 (8th Cir. 1996).

> IDEA also incorporates the principle of LRE in 20 U.S.C. § 1412(a)(5):
>
> Least Restrictive Environment.
>
> (a) In General. To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature and severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

(see, also 34 CFR § 300.114) This requirement of education with nondisabled students is usually understood to mean same-aged peers without disabilities or age-appropriate regular classrooms. (see, 34 CFR § 300.116 (e). Clearly, when Respondent decided to relocate Student to the K-3

self-contained classroom at the Reynolds campus toward the beginning of 3rd grade because that was the only District campus with that grade level educational setting, it was violating the LRE principle since the nondisabled children would not be Student's age-appropriate peers (the nondisabled age levels at Reynolds were only Kindergarteners and 1st graders) and Student would only rarely be afforded opportunity to be with his former same-aged peers. When Respondent chose to assign Student to mostly self-contained classes in the 5th grade as part of its own conclusion of what stay-put was, again it was diminishing Student's former opportunity of being with same-aged nondisabled peers in activities classes to the extent that she attended them with her CBI class.

Of all of Respondent's errors, however, the perceived most egregious one concerns the second query posed by the Rowley decision, namely whether the IEPs for Student were reasonably calculated to enable her to receive educational benefit. IDEA, itself, has noted the following about Congressional findings at 20 U.S.C. § 1400(c):

> . . .
> (4) However, the implementation of this title [IDEA] has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities.
> (5) Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be more effective by—
> (A) having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible, in order to—
> (i) meet developmental goals and, to the maximum extent possible, the challenging expectations that have been established for all children; and
> (ii) be prepared to lead productive and independent adult lives, to the maximum extent possible;
> (B) strengthening the role and responsibility of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home[50];
> (C) coordinating this title with . . . school improvement efforts, including . . . [No Child Left Behind], in order to ensure that such children benefit from such efforts and that special education can become a service for such children rather than a place where such children are sent;

[50] Petitioner's testimony did include the complaint that in the 3rd grade, and after, Respondent's staff stopped sending home spelling lists and other homework for her to work on with Student.

> (D) providing appropriate special education and related services, and aids and supports in the regular classroom, to such children, whenever appropriate;
> . . .

(emphasis added).

It is also well known that the Rowley Court did not require an educational program to maximize a child's potential but only required provision of meaningful access to public education, a "basic floor of opportunity." The Court did not provide further definition of "some educational benefit" other than to note that a program that enabled a student to achieve passing marks and advance from grade to grade would usually, but not always, signify that FAPE was being provided. [Conversely, inferential reasoning would indicate that a complete lack of progress would make the appropriateness of an educational program (IEP highly suspect.] The Eighth Circuit has frequently used the Rowley requirement of "some" educational benefit but has not quantified it to any greater degree than the Supreme Court did. (see, e.g., Peterson v. Hastings Public Sch., 31 F.3d 705 (8th Cir. 1994) That Circuit also recognizes that IDEA does not actually require a school system to guarantee that progress will be made (Bradley ex re Bradley v. AR. Dept. of Educ., 443 F.3d 965 (8th Circ. 2006), but it also has reflected that the Rowley Court (458 U.S. at 202) has stated that academic progress is an "important factor" to consider when determining whether a disabled student's IEP was reasonably calculated to provide educational benefit (CJN v. Minn. Pub. Schs., 323 F.3d 630, 638 (8th Cir. 2003)). Additionally, the Eighth Circuit has noted that "generalized opinions of progress offered by witnesses at [a] hearing are 'meaningless' in light of all the other evidence . . . [and the] panel did not err in discounting the evidence of de minimis academic . . . progress and the panel pointed to specific evidence in the record contradicting such a benefit . . . ." (Neosho R-V v. Clark, 315 F.3d 1022, 1029 (8th Cir. 2003) Judge Gibson, in concurring in part and dissenting in part in Fort Zumwalt Sch. Dist. v. Clynes, 119 F.3d 607, 617-618 (8th Cir. 1997) noted that several other circuits (2nd, 3rd, and 4th) have provided clarification of the Rowley "some

educational benefit" standard in that it means not just trivial benefit or de minimis benefit. (see, e.g., Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 183 (3rd Cir. 1988)) Inasmuch as the Eighth Circuit has not specifically rejected the principle that "some" means more than de minimis, the other circuits' similar rationales are compelling and persuasive.

In Student's case herein, the overwhelming documentary and testimonial evidence is that she had literally made no progress in acquiring academic skills such as reading and math in the 3rd and 4th grades, as well as even into the 5th grade at the time of Blann's achievement testing in October 2009, under Respondent's educational programs emphasizing a functional curriculum. That lack of progress is due not so much because of Student's cognitive impairment but is considered to be more so because of Respondent's inconsistent, non-concerted, and unsystematic use of different instructional methodologies with that functional focus. In essence, Respondent's staff has apparently relegated Student prematurely[51] to the virtual "backwaters" of CBI and a functional curriculum as much as they could (sometimes unilaterally enacting a change of placement by not providing the curriculum instruction that the IEP and implementing schedule would lead one to believe was occurring) and despite Petitioner's protests that Student was not being challenged enough, particularly by the functional curriculum.. Accordingly, it is apparent that her IEPs, themselves, for those years (not to mention problems with their implementation such as deciding what curriculum would be provided at any particular point in the day under a "flexible" IEP) were not, in fact and law, reasonably calculated to enable this child to receive an educational benefit beyond the most trivial, if any at all. To paraphrase a charity's former solicitation advertisement of years ago: Student's mind was (and still is) a terrible thing to waste.

[51] Those lower expectations were premature considering the Student's age and severity of intellectual capacities. It might be that later, in her teen years, that more emphasis should be returned toward acquisition of independent living skills, but, even then, there should be no abandonment of instructional attempts to enable her to acquire greater academic skills.

Because of the seeming relative educational neglect of Student by Respondent's emphasis on a functional curriculum and skills, rather than academic skills, Student is now so far behind that an Inclusion environment has little, if any, chance to currently benefit her, even if an individual instructional aide was assigned. Instead, she will need extensive and intensive instructional efforts, with repetitive reinforcements, in a small group format to catch up lost ground, regardless that it, or the remainder of her education, will not likely ever get her back to grade level. The undersigned agrees with 4th and 5th grade Principal Thompson that the proper program for her now would be, and has been, instruction in academic and functional curriculums in self-contained and primarily resource environments with continued exposure to her same-aged nondisabled peers. Respondent's attorney now acknowledges that propriety in his brief, but the implemented practice has not always been to that effect (e.g., 3rd grade special ed teacher Hightower reported using the functional curriculum within her Resource room), and many of Respondent's staff witnesses opined, at their attorney's examining solicitation, that Student primarily, mostly, or only needed a functional curriculum within the CBI setting.

ORDER

For Respondent's failure to provide FAPE to Student, the following is being required:

1. Respondent will retain a consultant of Petitioner's choice at a cost not greater than $150 per hour (plus reasonable travel expenses at the State mileage reimbursement rate) upon Petitioner's advisement of her choice. That educational consultant should have training and/or expertise in the teaching of academic subject matter (particularly reading) to Down's syndrome children, at least including elementary and intermediate grade levels. Petitioner is allowed to select an alternative or sequential consultant(s) as might be needed across the time span of this Order, but Respondent will only be responsible for the expense of one such consultant at a time.

After that consultant has been identified and been able to review whatever documents are available and observe Student in a Resource classroom environment, he/she will design an academic skills instructional program, including appropriate goals and objectives and (if deemed appropriate by the consultant) a structured reading program, which will be incorporated into a new IEP by Respondent's IEP team as soon as possible, and at that time the Annual Review conference can be simultaneously conducted. Although IEPs do not typically list instructional methodologies that will be used, this IEP will specifically identify whatever reading and math instruction methodologies are specified by the consultant(s) to ensure delivery of instruction according to those methodologies rather than by whatever methodology Respondent's staff might select at any moment, as they had done in the past. That IEP, and any subsequent ones for this Student, shall be at least as detailed and in compliance with regulatory requirements for contents as the one prepared in December 2009. [If IEP content is prepared in advance of any conference, that should always be provided to Petitioner in advance of the meeting.]

2. The IEP team will meet at least every other month to assess the progress being made by Student in academic subject matter acquisition and will have sufficient data available to assess that progress, making such available to Petitioner and her consultant in advance of the meeting. That data shall include, initially, additional specific subject matter achievement testing, particularly including, but not limited to, reading skills and reading comprehension. The chosen consultant is allowed to attend such meetings, as is Petitioner's attorney at all meetings ordered hereunder or otherwise conducted regardless of the availability of Respondent's attorney to attend any such meeting. There will be similar achievement assessments whenever Petitioner's consultant so directs but no less often than every six (6) months. These specific subject matter achievement testings will be by a qualified examiner of Petitioner's choice under the then-applicable Independent Educational Evaluation (IEE) regulatory standards and procedures and the cost will be the responsibility of Respondent. [This provision will not necessarily inhibit

Respondent from conducting an examination by its own staff, but Petitioner's consultant will determine which results are more valid and dependable if significant discrepancies arise from separately-done evaluations.]

3. Beginning the week of June 15, 2010, and continuing through August 13, 2010, Respondent shall provide Student with 1.5 hours daily, Mondays through Fridays, of the reading instruction program selected by Petitioner's consultant and 1.0 hours daily of the math instruction program similarly selected, and 0.5 hours daily of at least one other academic subject matter appropriate for Student's grade level. At the consultant's choice, that instruction can be provided by either a regular ed teacher, a reading specialist, or a special ed teacher, and whatever instructor is used will receive training primarily by the consultant, if he/she is available to do so, or secondarily else-wise, if not familiar and competent with the chosen teaching program(s). Additionally during that same time period (6/15 – 8/13 date range) Respondent shall provide compensatory special education and related services as follows: 2 hours per week of speech therapy, 1 hour per week of physical therapy, and 1 hour per week of occupational therapy, split into however many sessions per week of each as specified by Petitioner. This provision and amount of academic instruction and therapies as ordered for 2010 shall be repeated during the summer months of 2011 during a 9-week period. This academic skills and subject matter instruction (but not necessarily the therapies) shall be provided on a one-to-one basis by an actual teacher at least 50% of each instructional hour and skills should be subject to reinforcement activities by a qualified paraprofessional, under the supervision of the teacher, no more than 50% of the instructional time.

4. For the remainder of this academic year and during the 2010-11 academic year, Student shall have no more than two (2) periods of functional curriculum instruction per day, permissibly within a self-contained setting and in which the various domains and reading and math are covered; one (1) hour per day of activities with same-aged nondisabled peers; four (4)

periods per day of special ed academic curriculum instruction (including 1 period of reading, 1 period of math, 1 period of any other academic subject matter appropriate for the applicable grade level, and the other period covering subject matter of Petitioner's selection that could include additional reading and/or math); and the same amount of therapies (speech, physical, and occupational) as is specified in the 12/09 IEP. Any remaining instructional time not specified preceding will be of Petitioner's choice and setting. Lunch and recess periods shall always be with same-aged/grade level nondisabled peers.

5. An instructional aide will be available to Student at all times, or less at Petitioner's choice, during the regular academic school year in the remainder of 2009-10 and during the 2010-11 academic years. Such aide shall be responsible for assisting no more than two (2) other students besides Student at any particular time, and reinforcement activities by the aide or by peer tutors shall not consume more than 50% of any instructional period. In other words, Student's instruction, whether academic or functional, individually or simultaneously with several other students (or with an entire class during activities periods), shall be provided by an actual teacher, whether regular ed or special ed, no less than 50% of any period.

6. All revisions in Student's instructional program(s) shall be documented in her IEP(s) according to the methods permitted by IDEA and State regulations (e.g., by written addendum). Additionally, at all times during the timeframe covered by this Order, Petitioner will be provided a chart-depiction of Student's actual schedule, including any revisions intended to last longer than several days, that is signed and dated by a staff member and which will enable Petitioner to know usually where her child is, what she is receiving in terms of instruction and curriculum, and by which teacher at any given time of the day. The schedule chart prepared by Special Ed Supervisor Bryant in 12/09 at the request of the undersigned is an example of an appropriate such chart.

7. If Student has not made at least a half-year measured increase in grade level reading skill achievement (not AR reading and not just in reading comprehension) by October 30, 2010, compared to the current level from the initial achievement assessment ordered herein, Student will then be thereafter provided an additional three (3) hours per week of academic reading instruction, as designed and directed by Petitioner's consultant, as compensatory education for the remainder of the 2010-11 school year (excepting usual holidays).

8. Petitioner may, at her choice, agree to lessen the requirements specified in this order, but if that should occur, there should be written documentation about that and for what period of time that is to occur. A lessening of requirements (e.g., number of daily hours of compensatory education) at one point will not be deemed a waiver of such requirements thereafter.

FINALITY OF ORDER and RIGHT TO APPEAL

There should be no doubt that Petitioners are considered to be the prevailing party herein. This decision is final and shall be implemented unless a party aggrieved by it shall file a civil action in either a federal district court or a state court of competent jurisdiction pursuant to IDEA within ninety (90) days after the date on which this decision is filed with the Arkansas Department of Education.

Pursuant to § 10.01.36.5 of Special Education and Related Services: Procedural Requirements and Program Standards (ADE 2008), the issuance of this decision terminates the undersigned IHO's jurisdiction over the parties.

IT IS SO ORDERED.

_____
JAMES M. AMMEL
IMPARTIAL HEARING OFFICER

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DATED