Arkansas Department of Education
Special Education Unit

[redacted]
As Parent of
[redacted] Student **Petitioner**

VS. NO. H-15-10

Paris School District **Respondent**

HEARING OFFICER'S FINAL DECISION AND ORDER

Issues and Statement of the Case:

The Petitioner alleges that the Respondent has denied the Student with a free and appropriate public education (FAPE) for school years 2013-14 and 2014-15. The hearing addressed the issues as to (a)whether or not the Respondent provided the Student with an appropriate Individualized Education Plan (IEP); (b) whether or not the plan would allow her to receive her education in the least restrictive environment with same age peers, as well as educational services with her non-disabled peers; and © whether or not she was provided with appropriate non-academic needs including social and behavioral interventions were the issues to be addressed and decided.

Issues raised by the Petitioner in the initial request for a hearing that were ordered by the hearing officer as non-judicable under the Individuals with Disabilities Education Act (IDEA) included allegations that the Respondent engaged in actions in violation of Section 504 of the Rehabilitation Act of 1973. The Petitioner was judged by written order to have exhausted her administrative remedies with regard to the Section 504 allegations.

Procedural History:

On October 2, 2014, a request to initiate due process hearing procedures was received by the Arkansas Department of Education (hereinafter referred to as the "Department") from [redacted] (Hereinafter referred to as "Parent"), the parent and legal guardian of [redacted] (Petitioner) (hereinafter referred to as "Student"). The Parent requested the hearing because she believes that the Paris 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 Petitioner's request by assigning the case to an impartial hearing officer and establishing the date of November 3, 2014, on which the hearing would commence should the parties fail to reach a resolution prior to that time. An order setting preliminary timelines with instructions for compliance with the order, as well as the dismissal of the non-IDEA claims as noted above, was issued on October 2, 2014. The District notified the hearing officer on November 18, 2014, that a resolution conference was conducted as ordered, but that the conference ended without the parties resolving the issues contained in the Petitioner's complaint. The hearing began as scheduled on November 3, 2014; however, it was necessary to grant six continuances on the record in order for both parties to complete the presentation of their case. Thus the hearing was continued on February 4, 12, & 18, 2015 as well as April 1, 2, and 17, 2015.

On February 3, 2015, one day prior to the second day of the hearing, the Parent filed a second request for a due process hearing (H-15-19) alleging that the District had failed to return the Student to her stay put placement in the District and as such had failed to provide special education services pending the outcome of the Parent's initial filing for a due process hearing. The request included non-judicable issues under the IDEA asking for the hearing officer to address including the sharing of confidential information regarding the Student and contacting one of the Student's prior treatment professionals for information regarding the Student. The Hearing Officer informed the Department that the issues of stay put and the provision of special education services would be included in the current hearing. The parties were given the opportunity to address the issues during the process of the hearing. They reported to the hearing officer that they were not able to reach an agreement on either issue. Consequently, both issues were addressed in the instant hearing process.

On the final day of the hearing, April 17, 2015, the Parent submitted a notice of due process violation and motion to exclude evidence. The Parent alleged due process violation of

the five-day rule of evidence in allowing the District to introduce evidence and testimony following six days of hearing. During the process of the hearing the District requested and received an expert opinion as rebuttal to the Parent's expert witness and requested the expert be allowed to testify on behalf of the District. Parties were reminded that hearing officers have discretion to determine how to enforce the five-day evidence rule. A hearing officer may, upon an objection to the admission of the evidence by an opposing party, either grant the non-disclosing party's request for a continuance or prohibit introduction of the evidence.[1] In the instant case the Hearing Officer decided to allow the evidence and testimony over the objection of the Parent.

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 L. Caldwell, attorney of Maumelle, Arkansas and the District was represented by Jay Bequette, Attorney of Little Rock, Arkansas.

At the time the hearing was requested the Student was a ten-year-old, fifth grade, female enrolled in the District. Her initial entrance into the District was during school year 2013-14 as a fourth grader on November 13, 2013. She was identified as a child with a disability as defined in 20 U.S.C. §1401(3). She began receiving special education services by the District under the disability condition of autism.

Findings of Fact:

1. Did the District fail to educate the Student in the least restrictive environment with same age peers, as well as provide educational services with her non-disabled peers; and did the District provide the Student with appropriate non-academic needs including social and behavioral interventions during school year 2013-14?

The evidence and testimony reveals that prior to becoming the educational responsibility of the District that the Student was being educated by the Shelby County School District in

[1] 34 CFR 300.512 (b)(2); and 34 CFR 300.512 (a)(3). See also Letter to Steinke, 18 IDELR 739 (OSEP 1992); and Alisal Union Elem. Sch. Dist., 35 IDELR 296 (SEA CA 2001).

Memphis, Tennessee. On moving into the District the Parent chose to continue the Student's education via the Shelby County School District K-12 Virtual Academy. The Parent then elected to educate the Student for her third grade year in a private school within the District where the Student would be educated along with non-disabled peers in a combined fourth and fifth grade class with only four students per grade level in the class.[2] However, according to the Parent the school was too small in terms of support personnel to accommodate the special needs of the Student; thus she elected to enroll the Student in the District where more resources were available.[3] According to testimony by the Parent and the elementary school principal the Parent was provided with a tour of the District's facilities prior to making this decision. However, they disagreed in testimony as to what occurred during the tour.[4] Nonetheless, the Parent elected to enroll the Student in November 2013 during her fourth grade year.

On contacting the District in November 2013 the Parent provided the District with the following information regarding the special needs of the Student:

1. A neuropsychological evaluation, dated May 18, 2012, conducted at Memphis Neuropsychology, LLC. The diagnostic impressions in the report included Asperger's disorder with a co-morbid anxiety disorder; a sensory processing disorder; and with deficits in adaptive functioning; as well as deficits in visuomotor integration skills. The evaluation also noted that she displayed significantly better-developed verbal memory skills than nonverbal memory. The results indicated executive dysfunction which was characterized by deficits in attention regulation, working memory, processing speed, self-monitoring and task-monitoring, cognitive flexibility/set-shifting, inhibition, impulse control, and task persistence. The final diagnostic impression being attention-deficit/hyperactivity, combined type co-morbid with Asperger's disorder.[5] The neuropsychologist included sixteen very specific recommendations "to assist in

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[2] Transcript, Vol IV, Page 207-208

[3] Transcript, Vol VI, Page 249-251

[4] Transcript, Vol VII, Page 184-187 and Vol IV Page 221-223

[5] District Binder, Page 8

developing compensatory strategies for areas of weakness while fostering strengths."[6]

2. A speech language evaluation conducted on September 9, 2013, at Pediatrics Plus in Russellville, Arkansas.[7] The results of the evaluation indicated that the Student had a moderate delay in overall language skills; a profound delay for memory skills; a moderate delay for cohesion; a profound delay in the areas of core language, expressive language, and language memory; a severe delay in receptive language skills; a moderate delay of pragmatic language; and a profound delay in social skills.

3. An occupational therapy evaluation conducted at Pediatrics Plus on September 13, 2013.[8] According to the results of this evaluation the Student presented with a significant delay in adaptive behaviors, upper limb coordination, motor coordination, and sensory processing skills. Following the evaluation on September 30, 2013, the occupational therapist provided four treatment goals and ten objectives that were considered appropriate for treatment of her deficits.

4. A physical therapy evaluation conducted on September 19, 2013, at Pediatrics Plus. The assessment conclusion was that the Student qualified for physical therapy to address strength and agility to improve her functional participation in age appropriate activities at home, community, and school.[9]

5. A letter from the Student's current treating neurologist, dated November 6, 2013, in which he stated that since she did not tolerate change very well that she would benefit from a slow transition from her current school into the District. He went on further to recommend that she receive homebound instruction with plans for her to be integrated into the school setting.[10] According to the evidence this information was faxed to the District on November 6, 2013.[11]

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[6] Ibid, Page 8-11

[7] Ibid, Page12-16

[8] Ibid, Page 18-25

[9] Ibid, Page 40-45

[10] Ibid, Page 46

[11] Ibid, Page 47

6. An assessment and behavior support plan developed by an independent consultant between October 2011 and August 2012 when the Student was attending elementary school in the Shelby County School District.[12] The targeted behaviors outlined by the consultant included verbal disruptions, physical aggression, property destruction, and elopement. He also recommended tracking self-injurious behavior. His report provided the District with numerous examples of the behaviors and how they were tracked with data collection as well as suggestions for appropriate responses to each of the observed inappropriate behaviors.

On November 6, 2013, the District provided the Parent with a notice of conference at which time the Student's placement requirement would be reviewed.[13] An additional notice of conference is contained in the evidence, dated November 7, 2013, in which it is noted that a referral for special education and related services would be considered. Those invited and that would in attendance included the District's special education supervisor, a special education teacher, a regular education teacher, and the Parent. The notice dated November 13, 2013, stated that the data contained in the evaluations provided by the Parent indicated that the Student met all necessary requirements to be identified as a student with autism and as such would be placed in the District's special education program and that an IEP would be developed.[14] The subsequent IEP included only the signatures of the District's special education director and two occupational therapists. The notice of the decision dated the same date as the meeting indicated that those present included signatures of the Parent, a special education teacher, a general education teacher, the director of special education, along with the two occupational therapists.[15] Rather than following the recommendation by the Student's neurologist for homebound services the committee decided to provide her special education and related services on a shortened school day in a regular education classroom with special education services in a resource

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[12] Ibid, Page 291 - 304

[13] Ibid, Page 53-54

[14] Ibid, Page 57

[15] Parent Binder, Page 27 and 100

classroom.[16] The District did not elect to conduct or collect any evaluative data prior to developing the IEP and did not provide the Student with a temporary IEP during the evaluation process.

The IEP developed included special education instruction in math and literacy. Related services on the IEP included occupational therapy, physical therapy, and speech therapy for sixty minutes per week for each of the three services.[17] One month later (December 13, 2014) the IEP team met again to revise the plan to include a behavior management plan devised by the director of special education and to define the shortened school day that the Student would attend.[18]

The IEP indicated that the District had communicated with the staff at the Student's private school where they reported that "math frustration may actually trigger a behavioral outburst."[19] Her IEP indicated that she would not be subject to the District's regular discipline policies and that the staff would have a behavior plan in place for them to follow.[20] The Parent's exhibit binder contains two identical pages for consideration of special factors on which the above is recorded; however, the District's exhibit contained only one page. The difference is that the second page of the Parent's binder and the single page of the District's binder include the comment that there were other factors which needed consideration stating that the "Student is on a very limited schedule due to aggression when over stimulated."[21]

The behavior support plan as indicated on the Student's IEP developed by the District's special education director was not introduced as evidence until the final day of the hearing. It was not included in the Student's IEP. It was not a part of the original documents provided by

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[16] District Binder, Page 60

[17] Parent Binder, Page 1 - 27 and District Binder Page 65 - 90

[18] Parent Binder, Page 18 - 26

[19] Ibid, Page 2 and 66, respectively

[20] Ibid, Page 4 and 68 respectively

[21] Ibid, Page 5 and 68 respectively

the District to the Parent, nor was it included in the exhibits initially presented by the District.[22] The District's special education supervisor testified that she developed the plan in December 2013 "to actually just give us some guidance for [the Student] until we were able to have the consultant from our Co-op come on board and make observations and develop a plan."[23] According to evidence and testimony, on December 20, 2013, the District submitted a request for a behavior support specialist to assist in developing a behavior support plan for the Student. The consultant testified that she observed the Student on five different occasions between January 30, 2014 and April 7, 2014, prior to developing a behavior support plan.[24] Her testimony revealed that she made observations of the Student in all academic and non-academic areas contained in the Student's IEP for which the Student was in attendance.[25] The only behavioral incident she observed was on the day of the fourth observation, with all other days in a variety of settings being without a behavioral incident. On direct examination she explained that the behavioral incident she observed was the result of a change in the class routine that the Student was not prepared for in advance.[26] The behavior support plan she developed to replace the initial plan was undated, but according to testimony was developed and provided to the District at an IEP team meeting on April 28, 2014, some five months after the Student began attending classes.[27] The plan included only one targeted behavior "noncompliance - refusal to complete any academic or behavioral instruction."[28] The plan did not address any of the reported behaviors provided by the previous schools, the Parent, or those contained in the evaluations.

The behavior consultant's report included a statement of an incident that she did not

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[22] District Binder, Page 282-283

[23] Hearing Transcript, Vol VII, Page 188

[24] Parent Binder, Page 320-321

[25] Hearing Transcript, Vol 1, Page 172 - 194

[26] Ibid, Page 191

[27] Parent Binder, Page 121 and 320 - 325

[28] Ibid, Page 323

observe which occurred the day following her final observation on April 9, 2014. It was reported to her that the Student "engaged in noncompliance to a reading assignment which she refused to do."[29] Testimony of the event solicited from the classroom teacher revealed that the Student refused to participate in a reading activity with the class. She stated that the reading group "gathered around the floor, and that day we were doing simple machines, and doing a play where the kids would read a part from the smart board.....and when it came to her, she was the next one, she didn't want that part and she just refused, which caught me really off guard, because I hadn't seen her do that."[30] The assignment was for the students to read the part of a simple machine. Later testimony revealed that the simple machine that she was to read was the part of an axle.

According to the Parent's expert witness, children with autism such as the Student, often interpret their world in a literal way, for example he stated, "if you tell them – say they won an award and you say, 'Your head is getting big,' they may run to the mirror and look in the mirror and see if their head is getting big."[31] The expert did not testify as to having had any such experience with the Student in his limited observations, only making the statement of how some children with autism interpret everything in a literal fashion rather than in a metaphorical manner. He asserted that this more likely than not was the case for the Student when asked to read the part of a simple machine. The District's expert witness, who the Parent's counsel objected to as a witness, also testified that it would not be possible for an autistic child who interpreted the phrase "It's raining cats and dogs" to respond correctly to a question contingent upon understanding such a phrase.[32] The responses given in testimony by the Student's fourth grade instructors indicated that they did not understand the noncompliance exhibited by the Student in the event as being related to her disability and even stated being perplexed by the Student's actions as noted above by the teacher. The Student's special education resource

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[29] Ibid, Page 321

[30] Hearing Transcript, Vol V, Page 14

[31] Hearing Transcript, Vol V, Page 61

[32] Hearing Transcript, Vol VII, Page 100

teacher saw her behavior simply as the Student not getting "the exact part that she had wanted" when "they weren't getting to pick parts."[33] She went on to state that in her opinion the Student "just didn't want to do anything..she wanted to sit there and do nothing..while the other ones had to do work."[34] Following the noncompliance in the reading group the Student's behavior continued to escalate according to testimony by District personnel into destroying property and "exhibiting general disrespect to school personnel."[35]

Although no incident report was provided as evidence, the Student's speech/language therapist testified that on one occasion during individual speech therapy that the Student "threw a chair."[36] She testified that "there were times when [the Student] would not want to participate, but typically speaking, just talking her through it, we got through it."[37] The therapist's response to the event was consistent with the recommendations contained in the behavior support plan; however, she testified that she did not see the plan as presented as evidence. She responded to the chair throwing incident by buzzing the office. Which was followed by the Principal escorting the Student out of the classroom, to the office, and calling her mother, neither of which was included as remedies in the plan.[38]

It would appear from their testimony that the Student's teachers and other District authority figures interpreted "noncompliance" as a purposeful and obstinate response by the Student to demands or assignments. Neither the behavior support plan provided by the District's special education supervisor as an interim plan, nor the consultant's plan developed in April 2014, contained any other behaviors to be addressed under than noncompliance with assignments and/or behavior, even though they were advised with prior reports and information provided by

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[33] Hearing Transcript, Vol VII, Page 166

[34] Ibid, Page 166 - 167

[35] Hearing Transcript, Vol VI, Page 15 - 19; Vol II, Page 212- 213;

[36] Hearing Transcript, Vol II, Page227

[37] Ibid

[38] Ibid, Page 228

the Parent that the Student's inappropriate behavior included much more that needed to be tracked and responded to in an appropriate manner. The Student's destruction of property following her refusal to read the part of a simple machine as noted above is a prime example. Testimony by the elementary school principal who took the Parent on a pre-enrollment tour of the school testified that he personally did not know a lot of things about autism.[39] The District's resource police officer who was aware of the Student's autism disability testified that he was "not a hundred percent sure exactly what autism is."[40] At the same time he testified that he did not recognize the Student's behavioral outbursts and defiant behavior as "being associated with the disability."[41]

Although the evidence and testimony shows that the District placed the Student in a lesser restrictive environment than recommended by the Student's neurologist on entering the fourth grade in November 2013, they were entirely unprepared for providing for the behavioral manifestations of the Student's disability. Had they followed the suggestions of the Student's neurologist and provided homebound services and/or developed a temporary IEP, they may have had time to more closely review the documents provided and may have developed a better understanding of the Student's disability and how it impacts her obtaining an educational benefit from special and regular education services. Had the District obtained the services of the behavioral specialist when to the Student first entered the school in anticipation of the possible disruptive behaviors based on the information provided by the Parent, more observations may have provided a more appropriate behavior plan than the temporary one developed by the District's special education director. Had the District made efforts to educate the staff, including non-instruction staff, on the manifestations of behaviors as exhibited by the Student's history a more appropriate behavior plan may have been developed and followed.

The Parent has claimed that the Student was not provided her special education services in the least restrictive environment by shortening her school day. Had the District followed the

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[39] Hearing Transcript, Vol II, Page 185

[40] Hearing Transcript, Vol IV, Page 21

[41] Ibid, Page 22

advice of the Student's neurologist, they would definitely had been providing services in the most restrictive environment (i.e., homebound services). The implication was made in the Parent's post-hearing brief that the least restrictive environment should have been in the regular education classroom on a full day schedule along with her same-age as well as non-disabled peers. However, the IEP team, which included the Parent, appears to have taken into consideration the shortened school-day as a means of preparing the Student for a full day program. Consistent with the Parent's post-hearing brief; however, this decision was made without the benefit of any data from observations or evaluations in a full day program.

In addition to the error of not appropriately addressing the Student's behavioral manifestations of her disability the District also failed to provide adequate documentation of academic and related service progress on the Student's IEP for school year 2013-14 as outlined in her IEP.[42] There was, however, no testimony or evidence provided that indicated or suggested that the Parent was not provided with adequate opportunities to participate in the development of the Student's IEPs. The records reflect that she was aware of all of the proposed changes and the implementation of actions taken by the IEP committee for school year 2013-14.[43] Her testimony in fact was that she was pleased with the Student's progress.[44]

The Parent's allegation that the Student was not provided with non-academic needs such as social, behavioral, and communicative interventions were not consistent with the testimony of the Student's fourth grade classroom teacher, her special education teacher, the observations of the behavioral consultant, nor by her speech/language therapist.[45] Hereto as to the recommendations by the Student's independent speech/language evaluator the District elected to provide the Student with only sixty minutes of speech therapy on a weekly basis rather than the one-hundred minutes suggested by the evaluator. When asked how this decision was made, the

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[42] Parent Binder Page 1 - 28 and District Binder Page 65 - 90

[43] District Binder Page 98; 109; 117; 148; and 164

[44] Parent Binder, Page 30

[45] Hearing Transcript, Vol I, Page182-184; Vol II, Page 207 -208; and Page 239

speech therapist, who was not present when the decision was made, testified that "it's individually based on evaluation and then also the needs of the child, [such as] whether or not they might be receiving services from some other source."[46] In the Student's case the therapist testified that it was her belief that the Student was indeed receiving speech therapy from a private provider during the same time that she was providing the services in the school setting.[47] Although the Student's progress was not noted on her IEP the speech therapist testified that she provided services to address the goals as indicated on the IEP.[48] T he District's special education director could only assume that the goals and objectives were implemented.[49]

Although not available to provide testimony the evidence shows that the physical therapist adopted the goals and objectives provided in the independent evaluation as previously noted and provided to the District prior to the Student's enrollment.[50] Hereto the Student's IEP does not reflect any progress towards the goals even though the therapist's notes indicated implementation across thirteen therapy sessions between November 26, 2013, and March 17, 2014.[51] The number of physical therapy sessions is obviously less than required by the Student's IEP. The therapist recorded a note on March 20, 2014, stating that she had received an e-mail from the District's special education director stating that the Student's IEP team had met and decided that the Student no longer needed physical therapy services.[52] The District's special education director testified when asked about discontinuing physical therapy services without an evaluation as to the need for services and when the therapist was not present at the meeting when the decision was made: "I had a verbal...and I'm sure somewhere it was written..because [the

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[46] Hearing Transcript, Vol II, Page 229

[47] Ibid, Page 237

[48] Ibid, Page 236

[49] Hearing Transcript, Vol I, Page 63

[50] Parent Binder, Page 267 275

[51] Ibid, Page 276 - 290

[52] Ibid, Page 290

Student] fought the physical therapist on many occasions...and the physical therapist pretty much decided to end services because there was no progress."[53] The therapist's progress notes, however, do not indicate any physical altercations. The recorded notes on the last day of therapy services were contrary to the testimony. The note read:

> "Good cooperation; no problems noted. Attitude good today complying with all tasks ask of her. Balance good with all skills; overall strength inconsistent fluctuating from fair to good but definitely improved from November when [she] began physical therapy noted by improved performance with sit-ups and push-ups. Eye hand coordination improved noted by consistently hitting target 3/5 trials but impatience with this task is evident and may limit her ability to accomplish this goal."[54]

The occupational therapist was not available to testify; however, her treatment goals and objectives and treatment notes were provided as evidence. The occupational therapist was a team member in the development of the initial IEP in November 2013. At that time it was determined that the Student would receive two thirty-minute occupational therapy sessions twice weekly. The therapy notes provided as evidence indicate that the Student received twenty-three treatment sessions between November 21, 2013, and May 23, 2014.[55] The occupational therapy goals entered as evidence indicated good progress toward the Student's goals.[56] The therapist's note on the final day of therapy (May 23, 2014) stated that the Student "became frustrated when game became more challenging but was able to talk through it with therapist. Good work today."[57]

In summary of the findings of fact for school year 2013-14:

The District failed to respond as quickly as possible to developing a behavior

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[53] Hearing Transcript, Vol I, Page 76

[54] Parent Binder, Page 290

[55] Parent Binder, Page 256 - 264

[56] Ibid, Page 265 - 266

[57] Parent Binder, Page 264

management plan specifically designed to meet the needs of the Student. When produced five months after entering the fourth grade the only targeted behavior as noted above was "non-compliance" which did not sufficiently cover all of the Student's behaviors manifested as a result of experiencing Asperger's disorder. Additionally, from testimony generated from teachers and others who provided services during school year 2013-14, they were not adequately trained nor were they prepared to address all of the Student's behavioral and social needs. The record and testimony does show that the related services of occupational and speech therapy were appropriate and were appropriately delivered by competent professionals. Her physical therapy needs on the other hand were not adequately provided and the discontinuance of such was without evaluative justification. Without the time and benefit of developing a temporary IEP, the District did attempt to provide all of her educational and related services in the least restrictive environment for school year 2014.

On May 26, 2014, the Student's IEP team met to evaluate her progress in the fourth grade and to develop her IEP for the fifth grade. According to testimony the transition from fourth to fifth entailed going from the elementary school setting into the middle school setting.[58] The decision on that date was for the Student to continue being educated in a regular fifth grade classroom and for her to receive "700 resource minutes (Math & Literacy combined total), and 60 minutes weekly OT, and 60 minutes weekly for speech."[59] The team decided that the Student did not qualify for extended school year services during the summer months.[60]

2. Did the District fail to educate the Student in the least restrictive environment with same age peers, as well as provide educational services with her non-disabled peers; and did the District provide the Student with appropriate non-academic needs including social and behavioral interventions during school year 2014-15?

The Parent testified that following the end of the Student's fourth grade she was informed

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[58] District Binder Page 162

[59] Ibid

[60] Ibid, Page 165

that the Student's occupational and speech therapists would not be continuing their contract for services with the District for the following year. Unaware of this at the annual IEP conference noted above she testified that based on the feedback she received from both of these therapists she felt confident about the Student's transition from elementary to middle school. However, on discovering that these two therapists, with whom the Student had developed a positive relationship, would not be available the next school year she experienced concern for the success of the transition.

On suggestion from the therapists who provided nine weeks of service to the Student in a summer program she elected to continue "working with the Valley Behavioral group" for school-based counseling services during school year 2014-15.[61] Here though she was concerned that a treatment plan to be developed by a psychiatrist at Valley Behavioral Health might conflict with the plan already in place by the Student's treating psychiatrist. The absence of the speech and occupational therapist with whom the Student had developed a close and positive relationship with became the primary factor in her making this decision to accept their services. Thus her belief that not having anyone available that the Student trusted and could turn to became the deciding factor for her accepting the help from Valley Behavioral Health. The Student entered the summer program offered by Valley Behavior Health on the school campus where she was scheduled to receive individual and group therapy services. One therapist assigned to work on the school campus was licensed as a clinical social worker in the same month that the summer program began (June 2014) and the other assigned therapist was licensed as a professional counselor with four years of licensed experience.[62]

At their suggestion and with the District having made a referral for services, on June 2, 2014, the Student was given a diagnostic evaluation by Valley Behavioral Health which included her history, her presenting mental health issues, and the treating diagnoses of Asperger's;

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[61] Hearing Transcript, Vol IV, Page 234 - 235

[62] Hearing Transcript, Vol I, Page 233 and Vol II, Page 13

attention deficit hyperactive disorder, combined type; and anxiety disorder, NOS.[63]

Testimony provided by both therapist was that the summer program consisted of structured social interactions, individual counseling, group counseling, lunch, and field trips. The counselor stated that the program was "a behavior-based program, based on a point system."[64] She went on to explain that the program addressed communicating feelings in group activities, anger coping skills, and "things like that." She testified that the students in the summer program were exposed to "levels where [they] can clip up if [they've] done well. If we have observed they really have nice gestures where someone did something, went out of the way to help someone, or responded appropriately to a situation where they could have possibly chosen to interact differently , we reinforce positive behaviors."[65] Her description of the program and her testimony suggested that it was not designed to address the individual and unique needs of the students who were referred for services. All students regardless of diagnosis or disability were subjected to the same behavior interactions.

When questioned as to how the Student did in the summer program the social worker co-therapist testified that she did "pretty well. Her first day was not so well, but overall, I mean, there was – she missed the majority of June...there was a couple of weeks in July that she was not present either."[66] She stated that on the first day of the program that the Student "was agitated about having water spilled on her" and after calming down the Student "escalated quickly again, pulled the fire alarm, and then ran out of the building." In response she stated that "we had to call the police, because she ran off of school property, and then called Mom as well."[67] Later testimony revealed that she did not leave school property but ran to a school bus where one of the drivers offered to escort her back when the District's resource police officer approached the

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[63] Parent Binder, Page 682a - 698

[64] Hearing Transcript, Vol II, Page 17

[65] Ibid, Page 26

[66] Hearing Transcript, Vol I, Page 241

[67] Ibid, Page 241 - 241

Student.[68] In his efforts to restrain the Student she broke his glasses and when in his patrol car kicked the window "multiple times."[69] The therapist explained that "she was not listening, you know, to the rules and not responding well to our intervention, then, you know, when it's a safety risk, we need to go through protocol and recommend inpatient."[70]

On August 29, 2014, the counselor recorded the appropriateness of the services provided and whether or not continued services were needed:

> "Client participated in summer program and activities including individual and group therapy; mom has been participating in family without client to address her observations and experiences at home as well as share client history. Client attends school in alternative learning environment (ALE) where she continues group and individual sessions and a therapist is available to address negative behaviors such as defiance and emotional outbursts. The client has had multiple emotional outbursts and some have required physical restraint by parent. Client has attended modified school day during last school year and at year end attended 90% of day but had outburst event at school. Client had multiple outbursts during summer program and one attempted run away. Client is starting the 2014-15 year at stated above to provide structure and interventions as she goes through transition to new school with class changes, crowded halls, etc., aspect of which are suspected to be potential triggers for outbursts with or without aggression."[71]

On this same date the evidence shows, as noted above, that the Valley Behavioral therapist added intermittent explosive disorder to the treating diagnoses. The justification for the change was noted to be "reported/observed outbursts." The document stated that "Mom is highly involved with her daughter's treatment and has acquired significant early interventions such that

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[68] Hearing Transcript, Vol IV, Page 79

[69] Hearing Transcript, Vol I, Page 244 - 247

[70] Ibid, Page 247

[71] Parent Binder, Page 682

client's current observable behaviors no longer meet the criteria of Asperger's."[72] The documents do not provide the signature of anyone at Valley Behavioral Health other than the therapist. The social worker co-therapist was questioned about a letter denying reimbursement for services by an agency employed to review such request for reimbursement for the State's Medicaid program.[73] The letter is dated July 28, 2014, and the Valley Behavioral Health final treatment review is also dated July 28, 2014.[74]

The District provided the Parent with a notice of conference on August 12, 2014, for a conference to be held that same date for the purpose of reviewing the Student's IEP for school year 2014-15.[75] The Parent testified that she was not prepared to discuss that which took place rather than a review of the IEP. The committee discussed and decided to not implement the Student's IEP in a regular fifth grade classroom, but for it to be implemented in the District's alternative learning center (ALE). When asked what she knew about the ALE the Parent stated that she knew nothing about it, nor by the end of the meeting that she agreed with the committee's decision to move the Student's educational placement to the ALE.[76] Her testimony was that she felt like she "was pushed up against a wall."[77]

Although not an employee of the District the counselor and the co-therapist social worker attended the Student's IEP August 12, 2014, committee meeting.[78] The counselor's progress note recorded that date for Valley Behavioral Heath reflected her attendance at the IEP meeting as well. In her progress note she stated that she and her co-therapist had been working with the Student for nine weeks and were concerned about the Student attending mainstream classes. It

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[72] Parent Binder, Page 677

[73] Parent Binder, Page 317 - 319

[74] Ibid, Page 562

[75] Ibid, Page 132

[76] Hearing Transcript, Vol VI, Page 184

[77] Ibid

[78] Parent Binder, Page 133

would appear from the evidence and testimony that her input in the committee meeting convinced the team that the Student should begin her fifth grade year in the more restrictive environment at the District's alternative learning center (ALE).[79] Her treatment summary at that time stated that the Student had made moderate progress towards the treatment plan goal(s)/objective(s) listed by using coping strategies and other cognitive behavioral therapy to help her adjust to situations in the summer that had prepared her to attempt attending public school and some mainstream classes.

The Parent expressed her concerns about the suggested ALE placement as well as the change in diagnosis with the therapist on August 21, 2014. She stated: "I have concerns about the comments and actions re a change in [the Student's] primary diagnosis and a possible insurance appeal for therapy services. I need to better understand how this action will affect [her] current diagnosis and treatment. Your work with [her] has been limited and short in duration. I do not agree with the recommendations for a change in diagnosis based on (sic) this time and or for the purposes of insurance coverage."[80] When challenged in testimony the counselor stated that she discussed changing the diagnosis with the Parent. However, she also acknowledged that by changing the diagnosis to intermittent explosive disorder that the Student would meet the Medicaid billing requirement for reimbursement as a child with a serious emotional disturbance (SED).[81]

The IEP developed in May 2014, with the entire IEP team present called for the Student to continue to receive her special education and related services in a regular fifth grade education classroom on the middle school campus. Given that the Parent testified her disagreement with the ALE placement this was the last fully agreed to placement. Following the IEP meeting of August 12, 2014, the IEP team decision as noted above was for the Student to receive her special education and related services at the Alternative Learning Environment (ALE) located on the

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[79] Ibid and Page 636

[80] Parent Binder, Page 486

[81] Hearing Transcript, Vol II, Page 32 - 35

high school campus rather than in a regular fifth grade classroom on the middle school campus.

As to the qualifications of those charged with providing special education services to the Student for her fifth grade year the evidence and testimony reveals that the instructor in the ALE has an undergraduate degree in health and physical education with a masters degree in educational leadership. He was a coach and health/physical education teacher for his first five years of teaching and taught eighth grade math for one year at another district before being employed by the District. He stated that he had no prior experience in teaching in an ALE before coming to the District and no experience in teaching students in special education. He also acknowledged in testimony that he was not a "highly qualified" teacher in any of the core academic subject areas.[82] When asked to describe the ALE environment he stated "it's a place where we try to give an alternative environment where students can find success outside the normal setting that they are probably used to."[83]

During the time the Student was assigned to receive special education services at the ALE there were nine students in the class; three from the middle school (including the Student) and six from the high school. Four of the high school students were in their senior year, one in the tenth grade and one in the ninth grade. The Student and one other middle school student were classified as fifth graders and the other student as in the seventh grade. Obviously, none of these students were non-disabled peers and only one was a same-age peer. Although District personnel testified that they considered the ALE a "regular classroom" none of the criteria developed by the Department as described in testimony by either the ALE instructor nor the ALE director met that criteria with regard to the Student.[84]

Neither the ALE instructor or the ALE Director were involved in the decision for the Student to receive special education and related services in the ALE. In fact the ALE Director testified that he had not even met the Student until an acting out incident brought him to the

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[82] Hearing Transcript, Vol III, Page 154 - 155

[83] Ibid, Page 7

[84] Ibid, Page 148 - 151 and Page 202 -205

ALE.[85] After reviewing all of the Department's ALE requirements to meet State standards the ALE Director acknowledged that those criteria and requirements were not met and in effect not an appropriate placement for the Student. The District with all good intentions of attempting to slowly transition the Student into a more socially demanding environment did not adequately train, support, or meet all of the IDEA requirements for providing services in the least restrictive environment.

As to the allegation that the District failed to provide the Student with related services as indicated on her IEP, the District's special education director testified that the Student's occupational and speech therapies were not provided on her returning to school for the fifth grade because the District had not yet entered into a contract with qualified persons to provide the services.[86]

The consequent acting out and destructive behaviors of the Student, which by all professional and expert assessments were related to her disability, were responded to by non-skilled, non-trained, as well as inadequately trained personnel. For school personnel, including the resource police officer, the Valley Behavioral Health personnel, and other school personnel to see this Student's response to demands as being non-compliant obnoxious choices is a demonstration of their lack of understanding of the Student's disability. It would appear from the evidence and testimonies that the District was dependent on the counselor and social worker from Valley Behavioral Health to help them determine placement. Neither of these two individuals were qualified to make such decisions and by all accounts in their testimony had limited understanding of the behavioral manifestations of the Student's disability.

In summary of the findings of fact for school year 2014-15:

To not adequately support the Student with appropriate behavioral interventions and to not adequately train the instructional and non-instructional personnel who were assigned to teach and provide instruction to the Student is a failure to provide the student with a free and

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[85] Ibid, Page 197

[86] Hearing Transcript, Vol VII, Page 190 - 191

appropriate education for school year 2014-15. In order to not escalate the harsh environment already in place it would be advisable for the District to ask the local prosecuting attorney to not pursue any legal charges that may involve the District in reference to any of the Student's aggressive or destructive behaviors. From all accounts, especially those of both the Parent and District experts, the Student's acting outing out behaviors would not have escalated to the destructive point that they did had the persons responsible been adequately trained in how to respond to individuals with high functioning autism.[87]

3. Did the District fail to provide special education services in violation of the stay put rule of the IDEA pending the outcome of the due process hearing?

As noted previously this issue was filed as a second due process complaint with the Department after the instant case was underway. Also as noted above the parties were offered the opportunity to resolve the issue without opening a second due process hearing. Given that the parties responded that they could not reach an agreement this Hearing Officer elected to address the issue in the current decision.

On October 2, 2014, the same date the Department received the Parent's request for a due process hearing, the Parent delivered a letter to the District Superintendent in which she "retracted, cancelled, and rescinded" all "consents, releases, and/or authorizations previously executed" concerning the Student. On picking up the Student following delivery of the letter she was informed by the District's director of special education that the District would no longer be able to provide special education services for the Student. On cross examination the Parent testified that she did not understand her letter to mean what she was told by the special education director. She stated it was her belief that it meant that the District had to "stop any sort of action, or it prevented them from further obtaining re-evaluations, communication with outside providers."[88]

The District's special education director testified that she contacted the Department and

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[87] Hearing Transcript, Vol V, Page 117 and Vol VII, Page 125

[88] Hearing Transcript, Vol VII, Page 55

was informed that the Parent's letter was a revocation of all consent for special education services.[89] Such action on the part of the Parent however, did not give the District permission to deny the Parent or the Student any other service, benefit, or activity of the District as was indicated in the special education director's understanding after talking with someone at the Department.[90] It was at this point that it would have been the District's responsibility of the Department's regulations to ask for a due process hearing to resolve the issue of whether or not the Student needed special education services. No such request by the District was made. In fact the District's superintendent testified that he was "not going to convene a committee" to determine the placement of services for the Student following her verbal threats, because "if I think that the safety of the students or the staff might be in danger, that's my decision."[91] He went on to testify that he would not convene an IEP team meeting "when there is a possible danger...now, we can go through the Due Process [of IDEA}, we can do the manifestation determination, we can do all that...but in the interim, if I think it's for the safety of anybody in this school district, then, yes, I have the authority to do that."[92] He further testified that he understood that the District had the right to ask for an expedited due process hearing and for a hearing officer to decide if a temporary placement outside the school was necessary.

Even when, according to the District, the Parent elected to not return the Student to the ALE placement, he Student remained the educational responsibility of the District. Contrary to the District witnesses stating that they understood that the last agreed on placement was at the ALE, it was the ALE placement that the Parent disagreed with which instigated the current due process hearing. Therefore the last agreed to placement was the regular education classroom as determined by the IEP team at the annual review conference in May 2014. The District's

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[89] Ibid, Page 195

[90] Ibid, Page 194 and Section 9.06.5.2 of Special Education and Related Services: Procedural Requirements and Program Standards , Arkansas Department of Education, 2008.

[91] Hearing Transcript, Vol VII, Page 20 - 21

[92] Ibid, Page 21

superintendent also testified in response to the ALE placement following the Parent's filing for a due process hearing on the issue that it was his obligation to "do what I think is best for the safety of the students."[93] However, there was no testimony nor evidence presented that the Student's acting out behaviors were directed towards another student. He further testified that the actions the District took was because it was reported to him that the Student threatened to kill someone. The ALE instructor testified that during the behavior incident that the Superintendent referred to above was where the Student was swinging a piece of metal trim from a window blind at him; however, he testified that he was never really threatened by her behavior, even though "towards the end of it, she said she was going to kill us all."[94] He went on to say in response to direct questioning if he thought she could kill someone, he responded "No, I did not take it as viable..I did not think she was going to."[95] The District superintendent testified that he was aware of the Student's diagnosis of autism; however, as a teacher he stated he "probably had not" taught an autistic student and that he did not have any training in working with children with autism.[96] The District's resource police officer who had a physical altercation with the Student during her summer program as noted above, testified that he "understood that she is autistic or has some form of autism [but] I'm not a hundred percent sure exactly what autism is, myself."[97] At the same time the officer was considered a member of the ALE team. He attended the weekly staff meetings where the Student's progress was reviewed.[98] The social worker assigned to provide services during the summer months with the Student was licensed in June 2014, the same month she was assigned to be the Student's co-therapist.[99] When questioned as to her knowledge of the

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[93] Hearing Transcript, Vol VII, Page 18

[94] Hearing Transcript, Vol III, Page 43 - 73

[95] Ibid, Page 73

[96] Hearing Transcript, Vol VII, Page 31 -32

[97] Hearing Transcript, Vol IV, Page 21

[98] Parent Binder, Page 355 - 356

[99] Hearing Transcript, Vol I, Page 233

Student's diagnosis she was unsure about autism, but believed it was Asperger's.[100] Although the District may be hampered by the availability of outside resources to provide mental and physical health to the students, it is incomprehensible to contract with individuals or agencies who are poorly equipped to handle the District's students with special needs.

Conclusions of Law and Discussion

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.[101] 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.[102] The term "special education" means specially designed instruction.[103] "Specially designed instruction" means adapting, as appropriate, to the needs of an eligible child under this part, the content, methodology, or delivery of instruction.[104] As noted in this case the Student presented as being a child eligible to receive special education services based on her disabilities secondary to autism. The District accepted this Student in the middle of her fourth grade being fully informed by previous evaluations and assessments, not only to her diagnosis of autism, but were made aware of all of the symptoms and behaviors she manifested as a result of the autism. Even though the District elected not to conduct their on comprehensive evaluation prior to a final decision on services and placement they were fully informed as to the Student's unique needs.

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[100] Hearing Transcript, Vol I, Page 237

[101] 20 U.S.C. § 1412(a) and 34 C.F.R. § 300.300(a)

[102] 20 U.S.C. § 1401(3)(A)

[103] 20 U.S.C. § 1402(29)

[104] 34 CFR § 300.26(b)(3)

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 this case the Parent has alleged that the District failed to provide the Student with a free and appropriate education for the school year in which they accepted her enrollment (2013-14) as well as the following school year (2014-15).

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 Parent's allegations of the District's failure to provide 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 IEP developed through the Act's procedures was reasonably calculated to enable the student to receive educational benefits?[105]

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.[106]

Congress established, and the courts have consistently agreed, that FAPE must be based

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

[106] *Honig v. Doe,* 484 U.S. 305 (1988)

on the child's unique needs and not on the child's disability.[107] 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. In this case the Student's behavior difficulties were seen as a manifestation of her disability by both the expert employed to review the record by the District as well as the expert employed by the Parent to assist in reviewing the data, but the evidence and testimonies reflect that the District did not necessarily respond earlier enough to provide an appropriate education to the Student. More likely than not, this failure was also related to none or inadequate training and understanding on the part of not only some of the teaching professionals, but also non-teaching professionals such as the police officer who had direct contact with the Student. Some, however, as illustrated through testimony by the speech/language therapist and evidence presented from the occupational therapist, were cognizant of the special needs of the Student. As a consequence problem behaviors they encountered were minimal when compared to those reported to have occurred in other settings.

In reviewing the elicited testimony and the evidence, in this case there is ample testimony and evidence that the District attempted to focus on what they believed to be the unique needs of the Student (i.e., noncompliance); however, the majority of those involved in the Student's school life saw her noncompliant behavior as an obstinate choice of not wanting to do some requested or instructional activity. By taking such a stance and by adopting what might be considered as conventional interventions applicable to all students and failing to design a program to implement a behavior plan specifically addressing the Student's response to demands, versus relying on inadequately trained outside agency professionals, was shown not to be in fact a consideration of this Student's unique needs.

It is necessary, therefore to look at the facts in this case as to whether or not the District responded to the unique needs as expressed by the Student on entrance into the District in

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[107] 20 U.S.C. § 1400(d)(1)(A); § 1401(14); and 34 C.F.R. § 300.300(a)(3) (emphasis added)

November 2013. The evidence and testimony indicates that they, in cooperation with the Parent, elected and attempted to provide an appropriate IEP for implementation in the regular education classroom when she entered the District. Even though the Student experienced and demonstrated acting out behaviors when faced with untoward demands as indicted by her disability, she was provided with the opportunity to learn. The failure of the District to provide the Parent and other IEP team members with progress notations on the IEP in and of itself do not reflect a denial of FAPE. This holds even more so in that the Parent was in attendance at all of the IEP meetings where the Student's needs were being addressed and she maintained almost daily contact with school personnel. Here to it would appear that the District depended too much on the Parent's intervention when the Student's behavior became unmanageable by District personnel.

The District's complete failure to provide FAPE appears to have begun at the beginning of school year 2014-15. This more likely than not was the result of the District relying on the input of professionals from an outside agency who were attempting to address the behavioral needs of the Student without themselves without being adequately trained in how to assess and address a child with high functioning autism. Although the social worker employed by the outside agency to provide services may have engendered a positive relationship with the Student on a personal level, neither she nor her counselor co-therapist demonstrated a substantive understanding of the Student's disability of autism and how her inappropriate behaviors were a consequence of her disability. Although with good intentions to assist the Student in making the transition from one regular classroom campus setting to another classroom campus setting is understandable for her new school year, the manner in which it was implemented resulted in the Student being placed in not only a more restrictive environment, but one that did not permit appropriate access to same-age non-disabled peers and one that subjected her to being instructed by an inadequately trained teacher.

Although she made adequate progress with minimal behavior issues in her fourth grade year, had the District acted sooner in developing and training the school personnel on how to implement the behavior plan the destructive and threatening events may not have occurred to the degree that they did. Unfortunately, the plan itself did not address all of the Student's potential

acting out behaviors. When the more serious behaviors occurred at the beginning of school year 2014-15 the District failed to see the need to address the behavior by conducting a manifestation determination prior to suspending the Student from attending school or to ask for an expedited due process hearing to determine an appropriate placement outside the school.

The District comes now stating in their post-hearing brief that because the Parent "agreed" with the ALE placement that the stay-put provision of the IDEA is the more restrictive environment at the ALE. The evidence presented is absent of any factual information as to parental knowledge of how the placement in the ALE was going to meet the Student's unique needs. It is apparent from the testimony that the District personnel were concerned about the potential for destructive behavior as demonstrated by the Student, but never made an attempt following the first incident of destructive behavior the previous year to assess and develop a more appropriate means of addressing the behavior. However, from testimony it would appear that it was believed that the behavior was the result of not getting her way and the plan was for it to be corrected in therapy during the summer. The evidence and testimony by the Parent showed that she questioned the placement prior to the implementation of the IEP developed for her fifth grade year placing her in the ALE.

The Parent's challenge that FAPE was denied when the Student entered the District in November 2013, however, was not shown to be so by the testimony or the evidence. The evidence and testimony show that the District, accepted the evaluations and assessments provided by the Parent and attempted to develop an IEP which contained both special education and related services to address the unique needs of the Student. The only procedural error made by the District was failing to conduct their own comprehensive evaluation of the unique needs of the Student prior to making a final decision on placement.

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.[108]

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 record shows that the District did, with the exception of not developing an appropriate behavior management plan, did provide an appropriate program of services for her fourth grade school year, with exception of sufficient physical therapy services. Although the delivery of services the following school year was cut short by the Parent requesting a due process hearing, the proposed placement of services being implemented by the District was shown by the evidence and testimony to have not been appropriate to meet the unique needs of the Student.

The question before this Hearing Officer as to whether or not the Student was denied FAPE by the District for failure to implement her IEP in the least restrictive environment for school years 2013-14 and 214-15, as well as to the appropriateness of the IEP requires: (1) looking at each individual issue raised by the Parent to determine whether or not the District has been in compliance with the definition of FAPE under the IDEA, and (2) whether or not any single due process 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[109] agreed with the Supreme Court's decision in Rowley in stating that the IDEA requires that a disabled child be

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

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

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.[110] 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)."[111]

The Eighth Circuit Court of Appeals has addressed the issue of the appropriateness of an education in 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.[112]

The major question in the current case is whether or not FAPE for these two school years was denied by the District by not providing services in the least restrictive environment and by having not provided all of the related services that the Student's evaluators and experts deemed appropriate. The District developed an IEP based on previous assessments and provided special education services during school year 2013-14 in a regular fourth grade classroom; which was less restrictive than that recommended by the Student's neurologist, but more restrictive according to the Parent in that it was on a shortened school day. Even though everyone including

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

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

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

the Parent appeared to be content with the Student's progress at the end of school year 2013-14, the District determined that because of her disruptive behaviors during the summer while on the school campus it would be necessary to apply a more restrictive setting in which to provide services for school year 2014-15. Even though that decision appears to have been unduly influenced by the outside agency who provided those summer services, the ultimate responsibility for the decision rested on the District's education professionals and not the mental health professionals.

Even though the District believed they were no longer obligated to provide special education services to the Student following the Parent's revocation of consent, the IDEA and the Department regulations stipulate that they continued to be responsible to the Student. As such on suspending the Student from school following her threats to harm someone they could have asked for an expedited hearing to assist them in determining an appropriate placement.

Due to the lack of evidence provided for the short time the Student was in school for school year 2014-15, it is not possible to determine the appropriateness of the IEP, other than to note as above that the placement was inappropriate for implementing the IEP.

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.[113] 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."[114] In this case there is no doubt that the Parent participated in the process of following through with District recommendations for placement and on her own began the process of a referral for consideration of special education. The culmination of her efforts were confirmed by the District in November 2013, when the District

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[113] 20 U.S.C. §§ 1400(c); 1401(20); 1412(7); 1415(b)(1)(A), (C)-(E); 1415(b)(2)

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

agreed that the Student was in need of special education services. However, they did not elect to develop a temporary IEP and instead developed an IEP based solely on previous and outside agency evaluations. Although she may not have agreed with all of the decisions reached by the District for school year 2013-14, her testimony reflected a history of active involvement in the Student's health, welfare, and education which can only be admired by those of us without such challenges as those that she meets daily. It apparently took the chaotic results of the summer program provided by the therapists from Valley Behavioral Health to convince the District, but not the Parent, that a more restrictive environment was needed for the following school year. Her knowledge and participation may have been limited by the District's need to quickly pursue a placement decision for school year 2014-15 and her reaction as to it's appropriateness may have been delayed until the Student was suspended. However, there is no evidence or testimony that indicated she was not involved in the decisions made at the time they were decided as to IEP content and implementation.

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."[115] 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 progress, although not well documented, in the fourth grade was addressed and illustrated by the scattered evidence and testimony, including that of the Parent. Whether or not the District should have known that she would not be able to make progress in the more restrictive ALE setting or the more restrictive setting would decrease some of the behavior problems is impossible to tell from the limited time in the setting and any evidence of instruction. However, to have failed to continue to address her unique academic and behavioral needs in a

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[115] *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)

regular classroom setting first was a due process procedural failure for which the IDEA advocates. 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. From the documents entered as evidence and the testimony of the educational professionals this would appear to have been the case for this Student when she initially became the educational responsibility of the District in November 2013. The decision was made without conducting any evaluations to place her in a regular education classroom, but on a limited time basis. This decision was made with the Parent present, but without implementing any behavior programed interventions in that regular classroom. Without sufficient evaluative information they chose to apply a limited day at the school, but in a lesser restrictive environment than recommended by her neurologist.

To refer her for intervention by inadequately trained therapists was a decision made at the suggestion of the District, but only with the permission of the Parent. In this case neither party had any means of knowing as to the skills of the therapists in understanding and managing the behaviors elicited by the Student due to her Autism. Although the summer program was not conducive to improving the Student's ability to react to demands and changes in her schedule, the District made no concerted effort to measure what might be more appropriate for intervention by failing to conduct a manifestation determination following the more serious behaviors emitted by the Student. The procedural compliance of seeking IDEA due process intervention when needed is as important to a district as it is to a parent. To not do so when indicated is a failure on the part of both.

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.[116] The alleged violation of not following the IDEA's due process procedure such as

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[116] *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*

not conducting a comprehensive evaluation prior to initial placement for determination of the need for special education services would appear on face to meet that level of a violation of FAPE. Further, for the District to have not included appropriate school personnel as well as other persons knowledgeable of the Student's disabilities in the initial referral conference has been shown to be of sufficient violation to warrant a judgment for the denial of FAPE.

The District's failure to continue to provide special education services during the due process hearing as alleged by the Parent as a violation of the stay-put rule is also justified. The District's belief that the last agreed on placement was the ALE is not accurate according to the due process complaint initiated by the Parent, nor the evidence as presented. The stay-put provision must continue throughout the judicial procedures including appeals.[117]

Order

The Parent has introduced sufficient evidence in the record to reflect that some of the decisions made by the District on being approached with the challenge to meet the educational, social, and behavioral needs of the Student failed to comply with the standards set forth by the IDEA and the Department. Those decisions do not appear to have been intentional or malicious, but rather the lack of understanding of the Student's disability by both educational and non-educational professionals responsible to the Student. The immediate and subsequent failure to appropriately assess and address the Student's needs on entering the District in November 2013 and the subsequent failure of an appropriate behavioral intervention resulted in a denial of FAPE. The subsequent placement for school year 2014-15, was also made without adequate justification other than the opinions and experiences of non-education professionals. Hereto with the accumulation of due process errors we encounter a conclusion that the Student failed to receive FAPE. Unfortunately these decisions were made not only by the District, but also by the private agency involved in this saga, as well as the decisions that were made under their

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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).

[117] *Ridley School District v M.R. (3rd cir, cert. denied), U.S. (May 2015)*

guidance.

From the testimony and evidence the District has also elected not to provide any education services based on the belief that since the Parent withdrew her consent for services that they were no longer obligated to educate the Student. Failure to seek a due process remedy to the situation was also a failure by the District to provide FAPE.

Therefore this Hearing Officer concludes and orders that:

1. The District will immediately upon receipt of this order, but no later than August 12, 2015, develop a temporary IEP for the Student to be educated in a regular education classroom, with appropriate supports and services, and begin the process of providing the Student with a comprehensive evaluation which will include an assessment of any behavior, sensory, or emotional disorders, as well as any learning deficits as defined by the Department.

2. The comprehensive evaluation as ordered in (1) above will be conducted by examiners that the Parents, in coordination with their council, agree are appropriate to conduct the educational examinations and behavioral analyses, which can be those typically contracted with by the District or independent evaluators.

3. The comprehensive evaluations as ordered in (1) above will be completed no later than October 1, 2015.

4. Upon completion of the evaluation as ordered in (1) above and no later than October 22, 2015, the District's director of special education services will assemble an appropriate IEP team, to include the examiners contributing to the evaluation, to consider the results of the evaluation and to develop an IEP, including a behavior support plan, as indicated by the results of the evaluation.

5. Between the date of this order and the completion of item (4) above, the District will provide the Student with opportunities and number of hours as deemed agreeable to by the Parent for compensatory educational opportunities consistent with the known levels of educational functioning. The specific educational opportunities are not being ordered; however, the amount of time will be no less than eight (8) hours per week until item (4) above is completed.

6. The District will immediately upon receipt of this order, but no later than August 12,

2015, contract with a qualified behavioral consultant to provide training to any and all education and non-education professionals who may or will have contact and interactions with the Student in the manifestations of behaviors associated with the entire spectrum of Autism.

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.

Robert B. Doyle, Ph.D.
Hearing Officer

May 26, 2015
Date