

**ARKANSAS DEPARTMENT OF EDUCATION**

**Special Education Unit**



**PETITIONER**

**VS.**

**Case No. H-23-17**

**PALESTINE-WHEATLEY SCHOOL  
DISTRICT**

**RESPONDENT**

**HEARING OFFICERS FINAL DECISION AND ORDER**

**ISSUES PRESENTED:**

Whether the Palestine Wheatley School District (hereinafter “District” or “Respondent”) denied ██████████ (hereinafter “Student”) a free, appropriate, public education (hereinafter “FAPE”), between June 29, 2021 and October 7, 2022, in violation of certain procedural and substantive requirements of the Individuals with Disabilities Education Act of 2004, 20 U.S.C. 1400-1485, as amended (hereinafter referred to as “IDEA”), by: (1) failing to remove barriers necessary for ██████ to access her education; (2) failing to provide appropriate reading intervention; (3) failing to provide Extended School Year services; and (4) failing to provide appropriate instruction to address Student’s academic needs in Math, Science, and Social Studies.

**Procedural History:**

On October 7, 2022, the Arkansas Department of Education (hereinafter referred to as the “Department” or “ADE”) received a request to initiate a due process hearing from ██████ ██████ as the Parent of ██████████. On April 15, 2021, ██████████ filed an acknowledgement of educational representative with the Department, stating that ██████████ meets the definition of Parent as defined by U.S.C. 1401(23), and that ██████████ has been acting as the parent of ██████████ for several years with respect to parental IDEA rights. ██████████ (“Parent” or “Petitioner”) is the biological grandparent of ██████████ (hereinafter referred to as “Student”) against the Palestine Wheatley School District (hereinafter referred to as “District” or “Respondent”). Parent requested the hearing because she believed the District failed to comply with the Individuals with Disabilities Education Act of 2004, 20 U.S.C. 1400-1485, as amended (hereinafter referred to as “IDEA”) and the regulations set forth by the

Department by not providing Student with appropriate special education services, as noted supra in the statement of issues.<sup>1</sup>

This is the third due process complaint filed by Parent. The first due process request filed by Parent was Arkansas Department of Education Due Process Hearing H-21-32 and was heard June 23<sup>rd</sup>, 24<sup>th</sup>, 25<sup>th</sup>, and 30<sup>th</sup>, 2021. This Hearing Officer issued a Final Decision and Order on August 16, 2021, finding that the District had denied Student FAPE by failing to properly implement Student's 2019-2020 and 2020-2021 Individualized education programs (IEP), and failed to consider Student's access to campus and nonacademic activities. The second due process request filed by Parent was Arkansas Department of Education Due Process Hearing H-21-39 and was heard September 28-29, 2022. This Hearing Officer issued a Final Decision and Order on November 14, 2022, finding that the District had denied Student FAPE between April 6, 2021, to June 29, 2021, for failing to provide Extended School Year services to address deficits in physical therapy, and failing to provide student reasonable accommodations necessary to implement her IEP and provide access to her nondisabled peers. By agreement of the parties, ADE H-21-32, and H-21-39 are incorporated in their entirety into ADE H-23-17.<sup>2</sup>

At the time that Parent filed her request for a due process hearing, Student was an 11-year-old girl in the fifth grade, enrolled in Palestine-Wheatley School District.<sup>3</sup> Student was a student with a disability under IDEA. Student was diagnosed with Cerebral Palsy and categorically identified under other health impairment.<sup>4</sup>

In response to the Parent's request for a Due Process hearing, the Department assigned the case to an impartial hearing officer. Thereafter, Prehearing conference was scheduled for

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<sup>1</sup> See hearing officer File-Petitioner Complaint.

<sup>2</sup> Transcript, prehearing conference, pgs. 6-7 and Transcript Vol. I, pg. 7.

<sup>3</sup> See Hearing officer File-Petitioner Complaint, pg. 2.

<sup>4</sup> See Hearing officer file-Petitioner Complaint.

November 15, 2022 and the Due Process hearing was scheduled for November 16-18, 2022.<sup>5</sup>

The prehearing conference was held on November 15, 2022. Theresa Caldwell attorney for the Parent, Audie Alumbaugh, advocate for the Parent, and Teddy Stewart, attorney for the District all participated in the prehearing conference. The afternoon after the prehearing conference was held, Theresa Caldwell, attorney for the parent sent an email stating that the District was having problems getting records to the parent and stated that both parties were asking if the due process hearing could start a day later on November 17, 2022.<sup>6</sup> This request was granted and the Due Process Hearing was set to begin November 17, 2022. The Due Process hearing began on November 17, 2022. Prior to the start of the due process hearing, Teddy Stewart, attorney for the District, made it known that the District was out Friday November 18, 2022, and that many of the witnesses were leaving town for the Thanksgiving holiday and would not be available to testify on November 18, 2022. Thereafter the Due Process Hearing in this matter began as on November 17, 2022. Testimony was heard on November 17, 2022. Present for the Hearing were Theresa Caldwell, attorney for the Parent, Teddy Stewart, attorney for the district, Audie Alumbaugh, advocate, Casey Herron, LEA, and [REDACTED] parent. The Hearing was held at Hampton Inn in Forest City.

The following witnesses testified on November 17, 2022 in this matter: Audra Alumbaugh, Alyssa Foster, Karen McGuirt, and Sarah Jumper. At the conclusion of the due process hearing on November 17, 2022, the parties agreed to additional tentative hearing dates of December 6-8, 2022. These dates were tentative because Parent counsel had another due process hearing scheduled those dates but believed it was going to settle. On November 30, 2022, Ms. Caldwell sent an email to everyone stating that her case was not going to settle and therefore,

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<sup>5</sup> See Hearing Officer file, Scheduling order.

<sup>6</sup> See Hearing Officer file, November 15, 2022 email.

December 6-8, 2022 would no longer work, and she provided some additional days. Mr. Stewart, attorney for the District, responded to Ms. Caldwell's email stating that the District had not been made aware of the contingency of the December 6-8, 2022, and making claims that he believed educators' schedules were not being appreciated.<sup>7</sup> On December 1, 2022, this Hearing officer set a conference call to discuss District counsel's concerns and determine hearing dates.<sup>8</sup> During this hearing it was made clear that this hearing officer tries very hard to interrupt educators' schedules as little as possible, as was clear that we did not hold the hearing as previously scheduled on November 18, 2022, because many were going out of town for the Thanksgiving holiday. This hearing officer stated that November 16, 2022, and November 18, 2022, were previously scheduled hearing dates that did not occur because of the District. November 16, 2022 the due process hearing could not occur because the District was having difficulty getting documents requested by the Parent, and November 18, 2022 testimony could not occur because the District was out and witnesses from the District were leaving town for the Thanksgiving holiday. The District did not notify this hearing officer of any of these issues until the day before this due process hearing was set to begin. The Parent was present and ready to proceed. During this conference call the parties agreed to December 13-14, 2022 to continue the hearing and December 19, 2022 by zoom if we needed an additional day.<sup>9</sup>

On December 13, 2022, the due process hearing continued. Testimony was taken on December 13-14, 2022, and December 19, 2022 (via zoom). Present for the Hearing were Theresa Caldwell, attorney for the Parent, Teddy Stewart, attorney for the district, Audie Alumbaugh, advocate, Casey Herron, LEA, and [REDACTED] parent. The Hearing was held at

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<sup>7</sup> See case file email November 30, 2022.

<sup>8</sup> Transcript, second prehearing conference

<sup>9</sup> Id.

Hampton Inn in Forest City on December 13-14, 2022 and by Zoom on December 19, 2022. The following witnesses testified in this matter: Mary Oltman, Kellie Griffith, Byron Southerland, Casey Herron, Stafanie waters, M. Tracy Morrison, and [REDACTED]

Having been given jurisdiction and authority to conduct the hearing pursuant to Public Law 108-446, as amended and Arkansas Code Annotated §6-41-202 through §6-41-223, Dana McClain, J.D., Hearing Officer for the Arkansas Department of Education, conducted a closed impartial hearing.

Both parties were offered the opportunity to provide post-hearing briefs in lieu of closing statements, and both timely submitted briefs in accordance with the deadline set by this Hearing Officer.<sup>10</sup> However, the District's post hearing brief consisted of information outside the scope of this hearing.<sup>11</sup> The brief discusses at length information that occurred at an IEP meeting held on January 3, 2023. As such, this hearing officer has not used any information contained in the District's brief that is outside the scope of this hearing in making my determinations.

### **Findings of Fact**

For the purposes of this section, the facts from the previous two due process hearings have been incorporated for historical purposes.

1. Student is an 11-year-old girl in the Palestine Wheatley School District. Student is a fifth-grade student at Palestine Wheatley Elementary School.<sup>12</sup>
2. Student was first evaluated at four years old at the Monroe County Human Development Center ("MCDC").<sup>13</sup> Student showed significant developmental delays.<sup>14</sup> The Student's

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<sup>10</sup> See Hearing Officer File-post hearing briefs.

<sup>11</sup> Id.

<sup>12</sup> DPH H-21-32, Parent's Exhibits, pgs. 1,13,46.

<sup>13</sup> DPH H-21-32, District's Exhibits, pg. 505.

<sup>14</sup> Id.

first IEP with the District was created in April 2017.<sup>15</sup> The IEP has been revised yearly since April 2017. The student's relevant IEPs are those from the 2019-2020 and 2020-2021 school years.<sup>16</sup>

3. Student is diagnosed with Cerebral Palsy and has qualified for special education services under IDEA since she began her school career. She is qualified under the category of other health impairment.
4. Student requires a walker in order to ambulate around the school campus.
5. March 5, 2019, a Physical Therapy Evaluation was conducted. Evaluator concluded that based on the findings, Student presents with significant delays in acquiring overall gross motor abilities. Her overall standard deviation is -3.00. Student scored well below average in each of her subtests and composites, however, this is to be expected given the nature of Student's diagnosis. Based on Student's current scores, physical therapy treatment is indicated due to Student functioning at a poor level when compared to her peers and indicating that severe deficits in coordination, balance, strength and agility are present. These deficits affect Student's ability to excel in educational, social and recreational settings. These gross motor deficits increase difficulty in navigating the school, participating in physical classes and/or interaction during activities and recess. Furthermore, these difficulties can lead to poor participation, poor social skills, low self esteem and ridicule which can also directly affect Student's educational progress. Based on these standardized test scores and clinical observations/judgment and due to safety

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<sup>15</sup> DPH H-21-32, Parent's Exhibits, pg. 252.

<sup>16</sup> Id., pgs. 13, 46.

concerns with functional mobility, pace of travel, integration and gait instability, physical therapy services are indicated at this time.<sup>17</sup>

6. On March 5, 2019, an Occupational Therapy Evaluation was conducted. It was noted on the evaluation that testing showed Student had poor fine motor skills, poor manual dexterity/coordination skills, poor visual-motor skills, poor upper extremity strength/coordination, easily fatigues, poor visual perception skills, poor bilateral coordination and poor handwriting/efficiency needed to perform within the classroom.

The evaluator summarized the evaluation with the following:

Reviewing overall scores on both standardized tests and observations, the tester feels that [REDACTED] would benefit from continued occupational therapy services at this time, to address delays with age appropriate fine motor, dexterity, visual-perceptual, visual-motor/eye hand coordination, bilateral strength/stability, and bilateral coordination skills, which are negatively impacting her ability to perform successfully in her daily academic environment. she would benefit from continued direct, skilled occupational therapy services to address these delays.<sup>18</sup>

7. On March 26, 2019, a psychological assessment was conducted. Test administered included: Reynolds Intellectual Assessment Scales-2 (RIAS -2); Wechsler Individual Achievement test-III (WIAT-III); Gray Oral Reading Test-Fifth Edition; Clinical Evaluation of Language Fundamental-5-Screening Test (CELF-5), Test of Auditory Processing Skills-3 (TAPS-3)-Word Discrimination subtest; Adaptive Behavior Rating Scale and Burks Behavior Rating Scale-2. Evaluator summary stated:

- I. [REDACTED] measured intelligence on the RIAS-2 is in the Low Average range when compared to same aged peers.
2. [REDACTED] scores on the achievement tests are Below the expected level when compared with her measured abilities.  
  
-Reading: [REDACTED] scores in Reading are in the Below Average range, which is Below the expected levels of her Low Average Intellectual abilities.

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<sup>17</sup> DPH H-21-32, District Exhibits, pgs. 270-273.

<sup>18</sup> DPH H-21-32, District Exhibits, pgs. 264-268.



-Math: █████ scores in Math are in the Low Average range, which is At the expected levels of her Low Average Intellectual abilities.

-Writing: █████ scores in Spelling and Writing are in the Low Average range, which is At the expected levels of her Low Average Intellectual abilities.

3. █████ passed the CELF-5 Speech and Language screening.
4. █████ passed the auditory processing screening test.
5. █████ receives Occupational Therapy.
6. █████ ratings on the ABES indicate Average to Low Average adaptive functioning skills.
7. █████ ratings on the BBR-2 indicated elevated scales in Ability Deficits, Physical Deficits, and Weak Self-Confidence.<sup>19</sup>

8. On April 16, 2019, the IEP team met to develop Student's IEP for the 2019-2020 school year. Participants at the IEP conference were Ms. Oltmann, special education teacher, Cody Jackson, General education teacher, Lori Ginn, Local Education Agency Representative and individual to interpret instructional implications of evaluation results, and █████ parent. Even though it appears from the evaluations conducted, the physical therapist, the occupational therapist and the psychological examiner were not present at any IEP meeting involved in this Due Process complaint.<sup>20</sup>

9. Student's second grade (2019-2020) IEP included:

Direct instruction Reading	50 Minutes	5x weekly	SpEd Classroom
Direct instruction Language/spelling	50 minutes	5x weekly	SpEd Classroom
Direct instruction Mathematics	50 minutes	5x weekly	SpEd classroom

Related Services included:

Occupational Therapy	30 minutes	2x weekly	Therapy Room
Physical Therapy	60 minutes	2x weekly	Therapy Room

Under goals and objectives, the IEP stated:

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<sup>19</sup> Id., at pgs. 259-263.

<sup>20</sup> DPH H-21-32, Parent's Exhibits, pg. 46.

Goal Area: Indirect Student-Reading 3 goals for indirect services in reading, language arts, and spelling. Student mastered all three goals on 5/21/2020

Goal Area: Mathematics There was one goal Student Mastered this goal on 5/21/20

Goal Area: Factor Academic There was one goal Student Mastered this goal on 5/21/20

Goal Area: Indirect Students: Spelling goal was on the IEP but was not initiated.

Goal Area: Physical Therapy: There were two goals and 10 objectives. Student mastered one objective.

Goal Area: There were no occupational therapy goals documented in the IEP nor was Student's progress in occupational therapy documented.

Under present level of academic achievement and functional performance, it is noted that that Student's 2019-2020 school year, her second-grade education will include: 750 minutes weekly in the resource room for: Mathematics-250 minutes weekly; Literacy-250 minutes weekly; reading-250 minutes weekly.

Additionally, Student will need extended school year for Physical Therapy and Occupational Therapy.<sup>21</sup>

10. The IEP team met for Student's annual review on April 14, 2020. Because of COVID 19, the team met by phone. They reviewed Student's progress and developed Student's third grade IEP (2020-2021 school year). Participants listed on the IEP are [REDACTED] [REDACTED] Parent, Mary Oltmann, special education teacher, local education agency representative, and individual to interpret instructional implications of Evaluation Results, and Shannon Heard, general education teacher. Again, no physical therapist or occupational therapist were present for this meeting.<sup>22</sup>

11. Student's 2020-2021 IEP states that information taken from the 2019-2020 IEP says Student was receiving 310 minutes of academics in the special education classroom-30 minutes per week for reading and 250 minutes per week in mathematics, and 30 minutes

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<sup>21</sup> DPH H-21-32, Parent's Exhibits, pgs. 46-60.

<sup>22</sup> Id., at 13.

per week in language and spelling.<sup>23</sup> There is nothing in the record showing that there was a change in the 2019-2020 IEP from 750 minutes weekly to 310 minutes weekly in the resource room. Student's 2020-2021 IEP included:

Indirect services:	math	30 minutes	1x weekly	regular classroom setting
Related Services:	Occupational therapy	30 minutes	2x weekly	Therapy room
	Physical therapy	120 minutes	1x weekly	Therapy room

Under goals and objectives, the IEP stated:

Goal area      Physical development

Student will freely participate in gross motor activities while in therapy in the therapy room with 80% accuracy in the therapy room as measured by clinician data by the end of the school year and/or end of the therapy treatment plan of current evaluation.

There appear to be placement of two additional physical therapy goals with [REDACTED] but nothing is stated in that area of Student's IEP.

Goal area:      Indirect Students-Mathematics

When given instruction and information, Student will demonstrate comprehension skills by answering questions and completing activities related to Math as measured with 70% accuracy by the end of the year.

Goal area:      Factor-Academic-activities /projects

When given classroom instruction concerning projects/activities, Student will demonstrate the ability to gather information pertaining to a class project and or activity and arrange it correctly with and without redirection as measured with 60% accuracy by the end of the school year.

12. Student's ISTATON scores throughout her second-grade year were: Reading-vocabulary-averaged Tier 2; Comprehension-averaged Tier 2 and Tier 3; Phonemic Awareness averaged Tier 2, Alphabetic decoding-Tier 2, spelling-averaged Tier 2, and Math-all scores were Tier 3.<sup>24</sup> Student's second grade teacher testified that Tier 2 was a warning line, a borderline that Student might need help and Tier 3 indicates that Student

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<sup>23</sup> Id., at 32.

<sup>24</sup> DPH H-21-32, Parent's Exhibits, pg. 15.

needs severe help.<sup>25</sup> From the test scores Student was struggling but there were no IEP meetings held to discuss Student’s deficits or modify programming.

13. On September 14, 2020, there was an IEP amendment, which states that the amendment affected the cover sheet, modification page and the PLAAFP statement. However, there is nothing to indicate the specifics of the amendment. It appears to not have made any significant changes in Student’s 2019-2020 IEP.<sup>26</sup> However, on the notice of action for the meeting held on September 14, 2020, there was a statement under other factors and relevant actions taken which stated that the start date of the IEP would be 8-24-2020 and the ending date would be 5-26-2021, and the modification was for on site instruction and not virtual instruction.<sup>27</sup>

14. During Students 2020-2021 third grade year, Student was given the Dibels, a series of short tests that assess K-8 literacy. It is a set of procedures and measures for assessing the acquisition of a set of K-8 literacy skills, such as phonemic awareness, alphabetic principle, accuracy, fluency, and comprehension benchmark assessment. Student scores were:

Fall Screener scores	Mid Year Screener Scores	Spring Screener Scores
Dorf: 21	Dorf: 55	Dorf: 56
Dorf/acc: 54	Dorf/acc: 97	Dorf/Acc: 90
DAZE: 2	DAZE: 0	DAZE: 1

<sup>25</sup> DPH H-21-32, Trial Transcript Vol. III, pgs. 19-20.

<sup>26</sup> DPH H-21-32, Parent’s Exhibits, pgs. 44-45.

<sup>27</sup> DPH H-21-39, Parent’s Exhibit’s, pg. 22.

Student's scores on the Dibels indicate that Student needed intensive supports.<sup>28</sup> On the ISTATION given Student during 2020-2021 school year, Student scored Tier 3 in overall reading and text Fluency, as well as Tier 3 in overall Math.<sup>29</sup> The data shows Student is continuing to fall further behind. At some point during the 2020-2021 school year, Student began spending more time in the resource room with Ms. Oltmann, special education teacher. However, that change is not noted on the IEP, nor were goals and objectives developed for subjects, Ms. Oltmann was teaching. There is no way for this hearing officer to determine exactly what special education services Student was being provided during this time.

15. On March 31, 2021, a Notice of Conference was sent to the Parent to inform her that meeting would be held on April 14, 2021, to review/revise the IEP and consider extended school year services ("ESY").<sup>30</sup>
16. On April 14, 2021, an annual review was held and Extended school year discussed. When asked if there are significant concerns in the following areas, the IEP team found concerns in the following areas:
  1. Degree (Nature and Severity) of the student's impairment.
  2. Degree of regression experienced by the student (relative to current IEP and student functioning level)
  3. Recovery/recoupment time from this regressionFor every two-day interruption of programming, recoupment exceeded one day of instruction.

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<sup>28</sup> DPH H-21-32, at 479.

<sup>29</sup> Id., at 480-483.

<sup>30</sup> DPH H-21-39, Parent Exhibit's, pg. 17

4. Student's physical problems.
5. Availability of alternative resources.

Based on the above, the team determined that regression data did not indicate a need for academics or occupational therapy but did indicate a need for physical therapy during extended school year services. Additionally, the IEP team indicated that regression data indicated a need for extended school year (ESY) services. Lastly under factors relevant to the action, it was stated that student will attend physical therapy during the summer. The document included occupational therapy but that had a line drawn through. This was signed by [REDACTED] on April 14, 2021.<sup>31</sup>

17. Student's Grade report on June 4, 2021, showed Student's grades were steadily declining.

Description	Bldg	Teacher	9wk1	9wk2	SEM1	9wk3	9wk4	SEM2		
language	27	Crafton	65	79	72	53				
Spelling	27	Crafton	83	100	92	77	81	79		
Reading	27	Crafton	74	90	82	49				
Math	27	Crafton	70	65	68	44				
Art	27	Weld								
Music	27	Rowan								
Science/ health	27	Crafton	85	70	78	72	56	64		
Social Studies	27	Crafton	82	88	85	63	54	59		
Physical activity	27	Sherland								
Language	27	Oltmann				94	83	89		

<sup>31</sup> DPH H-21-39, Parents Exhibit's, pgs. 24-26.

Math	27	Oltmann				86	86	86	
Reading	27	Oltmann				94	83	89	

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18. There is no discussion by the IEP team on either the 2019-2020 or 2020-2021 IEP regarding the need for parental parking when picking up and dropping Student off for school each day. Nor is there discussion on Student's access issues.
19. There is no discussion by the IEP team on either the 2019-2020 or 2020-2021 IEP regarding Student's access to nonacademic services.
20. There is no discussion by the IEP team on either the 2019-2020 or 2020-2021 IEP meeting regarding Student's access to the school campus, i.e., playground, cafeteria, gym, etc.
21. During Student's time at Palestine Wheatley Elementary, Parent has parked in a designated handicapped parking space closest to Student's School door.<sup>33</sup>
22. On the first day of Student's 2020-2021 school year the principal, informed Parent that because of safety concerns Parent would no longer be allowed to park in the designated handicapped parking space closest to the Student's school door. Instead, Parent would need to park in the handicapped parking space in front of the superintendent's office which is a considerable distance from the elementary school Student attends.<sup>34</sup>
23. It is undisputed throughout the testimony that the first day Parent parked in front of the Superintendent's office and walked down to pick Student up from school there was an accident. As Student was physically tired from a day of school, she asked Parent to push

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<sup>32</sup> DPH H-21-32, Parent's Exhibits, pg. 484.

<sup>33</sup> DPH H-21-32, Transcript, Vol. IV, p. 277.

<sup>34</sup> Id., at, pgs. 280-283.

her and allow her to sit on the seat attached to her walker. Parent obliged, but at some point, the sidewalk was cracked and broken, and Parent and Student fell to the ground.

And although not badly injured both were bruised and sore and red for a few days.<sup>35</sup>

24. Parent asked the principal to reconsider and allow her to park in the designated handicapped parking space closest to the Student's school. Principal declined.
25. Ultimately, the District and Parent agreed that Parent would get in line where the other parents drop off their children and either a teacher or a paraprofessional would be there to assist Student out of the car and down the sidewalk to Student's school.
26. Testimony by both Parent and the District showed that during Student's time at Palestine Wheatley elementary school Parent asked the District to provide something Student could access during recess because she was just sitting on the ground at the top of the hill. Student was unable to access the playground equipment unless someone carried her out to the playground swings. The District did provide Student a picnic table to sit at with her friends during recess. Further, there is no accessible route for Student to access the playground. In order for Student to access the playground she has to traverse, on grass and dirt, an incline and according to testimony usually requires at least one student to make sure she doesn't fall but can require as many as four students, one in front, one in back, and one on each side to assure Student's safety when going uphill to return to her classroom after recess.
27. On August 27, 2021, a notice of conference was sent to Parent requesting an IEP meeting be held on September 10, 2021, to review and revise the IEP.<sup>36</sup>

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<sup>35</sup> DPH H-21-32, Transcript, Vol. IV., pgs. 283-291.

<sup>36</sup> Parent exhibits, pg. 83



28. On October 27, 2021, a notice of conference was sent to Parent requesting an IEP meeting be held on November 5, 2021, to review and revise the IEP.<sup>37</sup>
29. An IEP meeting was held on November 5, 2021. All areas of access were discussed by Student's physical therapist and occupational therapist. They determined that there were no access issues that were not already being addressed on the playground, lunch room, and classroom, including building access. What Student's access issues were or how they were being addressed was not documented.<sup>38</sup>
30. On January 25, 2022, a notice of action was sent to Parent requesting an IEP meeting be held on February 8, 2022, to discuss Student's need for a reevaluation in physical therapy, occupational therapy and a comprehensive evaluation.<sup>39</sup>
31. On February 8, 2022, an IEP meeting was held and the team determined that the District would conduct a comprehensive evaluation, a physical therapy evaluation and an occupational therapy evaluation on Student.<sup>40</sup>
32. On February 10, 2022 a physical therapy reevaluation was completed. Based on the evaluations completed, Student presented with significant delays in acquiring overall gross motor abilities. Student's gross motor functional classification scale (GMFCS) was a level II indicating mobility in school and during play would require the use of assistive devices and/or the assistance of others. Student's deficits affect her ability to excel in educational, social, and recreational settings. Student's gross motor deficits increase her difficulty in navigating the school, participating in physical classes, and interaction during activities and recess. Further, these deficits can lead to poor participation, poor

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<sup>37</sup> Id., at 85

<sup>38</sup> Parent Exhibits, pgs. 86-87

<sup>39</sup> Id., at 88.

<sup>40</sup> Id., 89-92.

social skills, low self-esteem, and ridicule which can directly affect Student's educational progress.<sup>41</sup>The evaluator indicated that based on Student's standardized scores and clinical observations/judgment and due to the safety concerns with functional mobility, pace of travel, interaction, and gait instability, physical therapy services were still indicated for Student.<sup>42</sup>

33. On February 10, 2022, an occupational therapy reevaluation was completed. Based on the results of this assessment, Student demonstrated well below average functioning overall in fine manual control. Student's scores indicated below average functioning in fine motor precision. Fine motor precision consists of activities that require precise control of finger and hand movements. Student also demonstrated below average functioning in fine motor integration. Fine motor integration is the ability to integrate visual stimuli with motor control. Student demonstrated well below average functioning in upper limb coordination. Upper limb coordination is the ability to control arm/hand movements, while using visual tracking skills. Student also demonstrated below average functioning in manual dexterity. Manual dexterity is the ability to use the fine motor muscles of the fingers and hands to perform controlled tasks. Manual dexterity skills correspond to common daily activities, such as eating/writing with utensils, writing in a timely/efficient manner, picking up small items with the fingers and manipulating fasteners on clothing. This evaluation indicated a need for continued occupational therapy services.<sup>43</sup>

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<sup>41</sup> Parent Exhibits, pgs. 135-138.

<sup>42</sup> Id.

<sup>43</sup> Parent Exhibits, pgs. 294-301.

34. On March 3, 2022, a psychological evaluation was completed on Student. The Reynolds Intellectual Assessment Scales -2 (RIAS-2) was conducted, and Student scored a 90 on the composite intelligence index which puts Student’s intellectual ability in the average range.<sup>44</sup> Student’s scores on both the Verbal Intelligence Index and the Nonverbal intelligence Index were 91 and 92 respectively and also place Student in the average range.<sup>45</sup> Student was also given the Gray Oral Reading test- fifth edition (GORT-5). This test measures oral reading rate, accuracy, fluency and comprehension. Student scores were:

	Scaled score/ Standard score	Percentile	Age Equivalent	Grade Equivalent
Rate	4/70	2 <sup>nd</sup>	7.0	1.7
Accuracy	4/70	2 <sup>nd</sup>	6.9	1.2
Fluency	4/70	2 <sup>nd</sup>	6.9	1.4
Comprehension	4/70	2 <sup>nd</sup>	6.6	1.2
Oral reading	68	2 <sup>nd</sup>		

Student’s performance on basic reading and reading comprehension was Well Below Average for students her age.<sup>46</sup> Student completed the Wechsler Individual Achievement test-III (WIAT-III). Student scored:

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<sup>44</sup> Id., at 122.

<sup>45</sup> Id.

<sup>46</sup> Parent Exhibits pg. 123.

Subtest scores	Standard Score	Percentile
Word reading	69	2 <sup>nd</sup>
Numerical Operations	80	9 <sup>th</sup>
Spelling	80	9 <sup>th</sup>
Essay Composition	76	5 <sup>th</sup>

Student passed the language-screening and auditory processing screening test.<sup>47</sup>

35. Student’s 2021-2022 Istation reading results showed that Student was at significant risk of not meeting grade level expectations in overall reading and text fluency. Further, Student demonstrated that she was struggling and had significant weakness with text fluency, vocabulary, word analysis and reading comprehension.<sup>48</sup> Student’s Istation testing showed she was either tier II or tier III for interventions. Between October 2021 to May of 2022, Student went from a tier III to a tier II in Word analysis and reading comprehension.<sup>49</sup>
36. Student’s 2021-2022 Istation math results showed that in October student was struggling, and in December 2021 and May 2022, Student scores had moved her to continuing to demonstrate significant weakness with this skill.<sup>50</sup>
37. Between April 4, 2022-May 20, 2022, Student participated in the ACT Aspire test. Student’s overall performance in English, Reading and Writing, showed she was below ready. Student’s Science, and Math tests indicated that Student was below ready.<sup>51</sup>

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<sup>47</sup> Id., at pgs. 123-124.

<sup>48</sup> Id., at 387

<sup>49</sup> Id., at pgs. 286-389.

<sup>50</sup> Id., at pgs. 398-399.

<sup>51</sup> Id., at pgs. 413-414.

## DISCUSSION AND CONCLUSIONS OF LAW

### General Legal Principles

In general, the burden of proof is viewed as consisting of two elements: the burden of production and the burden of persuasion. Before consideration of the Parents' claims, it should be recognized that the burden of persuasion lies with the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). Accordingly, the burden of persuasion, in this case, must rest with the Parent.

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

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

## **Applicable Legal Principles**

The IDEA requires the provision of a "free appropriate public education" (FAPE) to children who are eligible for special education services. 20 U.S.C. § 1412. FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. Decades ago, in *Hendrick Hudson Central School District Board of Education v. Rowley*, 458 U.S. 176 (1982), the U.S. Supreme Court addressed these statutory requirements, holding the FAPE mandates are met by providing personalized instruction and support services that are reasonably calculated to benefit educationally from the instruction, provided that the procedures set forth in the Act are followed. The Third Circuit has interpreted the phrase "free appropriate public education" to require "significant learning" and "meaningful benefit" under the IDEA. *Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3d Cir. 1999).

Districts meet the obligation of providing FAPE to eligible students through development implementation of an IEP that is " 'reasonably calculated' to enable the child to receive 'meaningful educational benefits' in light of the student's 'intellectual potential.' " *Mary Courtney T. v. School District of Philadelphia*, 575 F.3d 235, 240 (3d Cir. 2009) (citations omitted). Recently, the U.S. Supreme Court considered the application of the *Rowley* standard, and it observed that an IEP "is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth." *Andrew F. v. Douglas County School District RE-1*, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017). The IEP must aim to enable the child to make progress. The essential function of an IEP is to set out a detailed individualized program for pursuing academic and functional advancement in all areas of unique need. *Andrew F.*, 137 S. Ct. 988, 999 (citing *Rowley* at 206-09) (other citations omitted). The *Andrew* court thus concluded that "the IDEA demands ... an educational program reasonably calculated to

enable a child to make progress appropriate in light of the child's circumstances." 137 S. Ct. at 1001, 197 L.Ed.2d at 352.<sup>52</sup>

*Andrew, Rowley*, and the IDEA make abundantly clear, the IEP must be responsive to the child's identified educational needs. See 20 U.S.C. § 1414(d); 34 C.F.R. § 300.324. However, a school district is not required to provide the "best" program, but rather one that is appropriate in light of a child's unique circumstances. *Andrew F.* In addition, an IEP must be judged "as of the time it is offered to the student, and not at some later date." *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1040 (3d Cir. 1993).

"The IEP is 'the centerpiece of the statute's education delivery system for disabled children.'" *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.* RE-1, U.S. 137 S. Ct. 988, 994, 197 L. Ed. 2d 335 (2017) (quoting *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988)). An IEP is a comprehensive program prepared by a child's "IEP Team," which includes teachers, school officials, the local education agency (LEA) representative and the child's parents. An IEP must be drafted in compliance with a detailed set of procedures. 20 U.S.C. § 1414(d)(1)(B). An IEP must contain, among other things, "a statement of the child's present levels of academic achievement," "a statement of measurable annual goals," and "a statement of the special education and related services to be provided to the child." *Id.* § 1414(d)(1)(A)(i). A free appropriate public education (FAPE), as the IDEA defines it, includes individualized goals, "specially-designed instruction" and "related services." *Id.* § 1401(9). "Special education" is "specially designed instruction . . . to meet the unique needs of a child with a disability"; "related services" are the support services "required to assist a child . . . to benefit from" that instruction. *Id.* §§ 1401(26), (29). A school district must provide a child

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with disabilities such special education and related services "in conformity with the [child's] individualized education program," or "IEP." 20 U.S.C. § 1401(9)(D).

When formulating an IEP, a school district "must comply both procedurally and substantively with the IDEA." *Rowley*, at 206-07 A procedural violation occurs when a district fails to abide by the IDEA's safeguard requirements. A procedural violation constitutes a denial of a FAPE where it "results in the loss of an educational opportunity, seriously infringes the parents' opportunity to participate in the IEP formulation process or causes a deprivation of educational benefits." *J.L. v. Mercer Island Sch. Dist.*, 592 F.3d 938, 953 (9th Cir. 2010). A substantive violation occurs when an IEP is not "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances," *Endrew F.*

Pursuant to Part B of the IDEA, states are required to provide a FAPE for all children with disabilities between the ages of three and twenty-one. 20 U.S.C. § 1412(a); 34 C.F.R. §300.300(a). In 1982, in *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, the U.S. Supreme Court addressed the meaning of FAPE and set forth a two-part analysis that must be made by courts and hearing officers in determining whether a school district has failed to provide FAPE as required by federal law. 458 U.S. 176, 206-07 (1982). Pursuant to *Rowley*, the first inquiry that a court or hearing officer must make is that of whether the State, i.e. local educational agency or district, has complied with the procedures set forth in the IDEA. Thereafter, it must be determined whether the IEP(s) developed pursuant to IDEA procedures was reasonably calculated to enable the student to make appropriate progress in light of his specific circumstances. *Endrew F.*



## PROCEDURAL VIOLATIONS

Regarding the first inquiry, that of whether the District complied with the procedures set forth in the IDEA, this Hearing Officer notes that counsel for the Parent alleges four violations in her Due Process Complaint. This Hearing Officer finds that two allegations qualify as procedural in nature. (1) whether the District failed to provide extended school year services to address deficits in occupational and physical therapy during the summer to prevent further regression; and (2) whether the District provided Student reasonable accommodations necessary to implement her IEP and to provide access to her nondisabled peers.

Regarding the first alleged procedural violation that the District failed to provide extended year services to address deficits in occupational and physical therapy, it is this Hearing Officer's opinion that there was sufficient evidence presented by the Parent that the District failed to provide extended year services in physical therapy as provided for in Student's IEP.<sup>53</sup>

34 C.F.R. 300.106 Extended school year services states:

(a) General.

(1) Each public agency must ensure that extended school year services are available as necessary to provide FAPE, consistent with paragraph (a)(2) of this section.

(2) Extended school year services must be provided only if a child's IEP Team determines, on an individual basis, in accordance with §§300.320 through 300.324, that the services are necessary for the provision of FAPE to the child.

(3) In implementing the requirements of this section, a public agency may not—

(i) Limit extended school year services to particular categories of disability; or

(ii) Unilaterally limit the type, amount, or duration of those services.

(b) Definition. As used in this section, the term extended school year services means special education and related services that—

(1) Are provided to a child with a disability—

(i) Beyond the normal school year of the public agency;

(ii) In accordance with the child's IEP; and

(iii) At no cost to the parents of the child; and

(2) Meet the standards of the SEA.

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<sup>53</sup> DPH H-21-39, Parent Exhibit's pg. 26.

On April 14, 2022, the IEP team ( [REDACTED] and Mrs. Oltmann)<sup>54</sup>, met and determined that, “regression data does not indicate a need for academics or occupational therapy. It does indicate a need for physical therapy during extended school year services”.<sup>55</sup> Ms. Ginn, the special education coordinator who did not attend the meeting on April 14, 2022, testified that Student didn’t qualify for extended school year services in OT or PT based on the regression data.<sup>56</sup> However, Ms. Ginn also testified that the regression data was not in the documents, but that she had personally seen it because she requested it from the PT, OT, and Speech therapists.<sup>57</sup>

When asked if after the April 14, 2021, meeting someone got together and said student doesn’t need extended year and that’s why she didn’t get PT, Mrs. Oltmann stated that could be right, but I can’t say.<sup>58</sup> There is no clear explanation from the District as to why this Student did not receive the extended school year services that were on her IEP. This is the third due process hearing this hearing officer has had with these parties. During H-21-32 and H-21-39, the District witnesses have discussed an IEP that has never been produced or admitted into evidence. Here they discuss meetings happening without the parent’s knowledge or participation. Both Mrs. Oltmann and Ms. Ginn testified in the first two Due Process Hearings (H-21-32 and H-21-39) that the IEP was changed to state that Student would not receive PT as an Extended School Year service. However, neither could point this hearing officer to one document, either the notice of decision, the changed IEP, or the regression data they state was used in making the decision to change ESY services provided to Student. The same can be said for this hearing. There was no evidence presented by any witness, or document that shows the IEP was ever changed to indicate

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<sup>54</sup> It should be noted that the evidence presented showed that only Mrs. [REDACTED] and Mrs. Oltmann made up this IEP team.

<sup>55</sup> DPH H-21-39, Parent’s Exhibits, pg. 26

<sup>56</sup> DPH H-21-39 Transcript Vol. II, at 78.

<sup>57</sup> Id., at 79.

<sup>58</sup> DPH H-21-39 Transcript Vol. I., at 217.

that Student did not qualify for ESY during the summer of 2021. Regarding extended school year services for occupational therapy, there was no evidence presented that Student met the regression requirements for extended school year services for occupational therapy.

The second alleged procedural violation that the District failed to provide student reasonable accommodations necessary to implement her IEP and to provide access to her nondisabled peers. This hearing officer found in Parent's Due Process Complaint number one H-21-32, that the District denied Student access to the school's playground during recess and that the IEP team had not discussed supplementary aids and services that are appropriate and necessary for the student to participate in the extracurricular and nonacademic activities. At the prehearing conference for Due Process Hearing number two, H-21-39, counsel for the District, when asked if he was willing to acquiesce to the accessibility issue he stated:

"I mean, yes. I mean, essentially, there is nothing that changed in that time. So, I re-read your Order this morning and you don't just specifically address the playground, you make pretty general findings that the district essentially didn't even address those accessibility issues in the IEP or anything like that. And, so, that was, you know in April. this was filed in June. There was absolutely nothing changed in that period. And so, there is really nothing to discuss. And so, I just...in the interest of time, if we do go to a hearing, I just don't think that those issues need to be addressed. So, in a sense, yes, we will concede on that issue because there is really nothing to discuss."<sup>59</sup>

At the beginning of this due process hearing, counsel for the District stated:

"As far as accessibility, because nothing has really changed at the district outside of [REDACTED] going to a different location now, if we could narrow our discussion on our

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<sup>59</sup> DPH H-21-39, Transcript Prehearing conference, pg. 16.

questions to changes and rely on the previous record, I would have no objection to that".<sup>60</sup>

There was no evidence or testimony introduced during this due process hearing to support that the District has addressed Student's accessibility issues.

Under IDEA, an IEP includes the following: (1) a statement of the child's present academic achievement and functional performance; (2) a statement of measurable academic and functional goals; (3) a description of how a child's progress towards meeting goals will be measured; (4) a statement of the special education and related services, and supplementary aids and services that will be provided for the child; (5) an explanation of the extent, if any, to which the child will not participate with nondisabled children in regular classes and activities; and (6) a statement of individual, appropriate accommodations necessary to measure academic achievement and functional performance on state and district-wide assessments. 20 U.S.C. § 1414(d)(1)(A)(i)(I)-(VI). This part of an IEP must also include a statement of program modifications or supports to be provided for the child to advance the student toward attaining annual goals, be involved in and make progress in the general curriculum, participate in extracurricular and other nonacademic activities, and be educated and participate with other children in activities. *Id.* The IDEA statute fails to define extracurricular and nonacademic activities, so we must look to the regulations. 34 C.F.R. §300.117, requires disabled students be educated to the maximum extent appropriate, with nondisabled students, including participating in extracurricular and nonacademic activities and receiving necessary supplementary aids and services for such participation. Section 34. C.F.R. §300.117 states:

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<sup>60</sup> Transcript Vol. I., pg. 7

In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in § 300.107, each public agency must ensure that each child with a disability participates with nondisabled children in the extracurricular services and activities to the maximum extent appropriate to the needs of that child. The public agency must ensure that each child with a disability has the supplementary aids and services determined by the child's IEP Team to be appropriate and necessary for the child to participate in nonacademic settings.

Furthermore, section 34 C.F.R. §300.107 requires a school district to take steps to provide those supplementary aids and services that have been determined appropriate and necessary by the IEP team to afford the disabled student an equal opportunity to participate in extracurricular, nonacademic activities and academic activities.

An IEP meeting was held on November 5, 2021. Areas of access were discussed by Student's physical therapist and occupational therapist. They determined that there were no access issues that were not already being addressed on the playground, lunchroom, and classroom, including building access.<sup>61</sup> What Student's access issues were or how they were being addressed was not documented nor was any evidence presented to support these findings other than District witnesses. On this particular issue this hearing officer does not find this testimony credible. Student's physical therapy evaluation completed on February 10, 2022, states that "Student's deficits affect her ability to excel in educational, social and recreational settings. Student's gross motor deficits increase her difficulty in navigating the school, participating in physical classes, and interaction during activities and recess."<sup>62</sup> Student's

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<sup>61</sup> Parent Exhibits, pgs. 86-87.

<sup>62</sup> Id., at 138.

occupational therapy evaluation states “that student is below average in overall fine manual control, fine motor integration, upper limb coordination, and manual dexterity.”<sup>63</sup> Testimony was presented that Student uses a walker, that she has to traverse uneven sidewalks to get around campus, the playground is not safely accessible to Student, she must use stairs to get into the therapy building, must walk longer distance than other students to access a locker that was provided to Student and must navigate through between six to ten non accessible doors just to get to her classes. Further, Student has to depend on other students or staff to assist her getting into the bathroom stall as they are not accessible. There was an ADA analysis completed on the Palestine Wheatley School District and included in Parent’s exhibits. This analysis shows that the campus is riddled with accessibility issues, including the doors, bathrooms, sidewalks, playground and stage. Although this hearing officer does not have the authority to determine ADA issues, IDEA does require a school district to take steps to provide those supplementary aids and services that have been determined appropriate and necessary by the IEP team to afford the disabled student an equal opportunity to participate in extracurricular, nonacademic activities and academic activities.

### **Conclusion**

Having considered Parent’s allegations of procedural due process violations, and in light of the findings and conclusions *supra*, it is the conclusion of this Hearing Officer that District procedurally violated the IDEA by (1) failing to provide extended year services to address deficits in physical therapy, and (2) failing to provide those supplementary aids and services appropriate and necessary to afford Student an equal opportunity to participate in extracurricular, nonacademic activities and academic activities.

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<sup>63</sup> Id., at 122.

## **SUBSTANTIVE VIOLATIONS OF IDEA**

Having analyzed the first prong of the FAPE analysis, specifically that of procedural violations, and determined that the District failed to provide extended year services to address deficits in physical therapy, and failed to provide those supplementary aids and services appropriate and necessary to afford the disabled student an equal opportunity to participate in extracurricular, nonacademic activities and academic activities, it is now necessary to consider whether these procedural violation resulted in a substantive denial of FAPE to Student. Even if a school district violated IDEA procedures, it does not automatically follow that the school district has denied the child a FAPE. *K.E. v. Indep. Sch. Dist.* 15, 647 F.3d 795, 804 (8<sup>th</sup> Cir. 2011). Rather, a school district's educational plan for a given student will only be set aside for IDEA procedural violations "if the procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parent's opportunity to participate in the formulation process or caused a deprivation of educational benefit." *Id.* At 804-805. Here, as discussed above, although the occupational therapist and the physical therapist stated at the IEP meeting held on November 5, 2021 that Student did not have accessibility issues, their physical therapy evaluation, occupational therapy evaluation, the ADA analysis and other witnesses' testimony contradicted these statements.<sup>64</sup> From the testimony and evidence presented, Student has difficulty accessing all of her nonacademic activities, extracurricular activities and general curriculum activities. The Parent brought Student's lack of access to the playground to the attention of the superintendent and the principal, and that was met with the District providing a picnic table for student to sit at during recess.<sup>65</sup> The parent brought up the uneven sidewalk that

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<sup>64</sup> Parent Exhibits, pgs. 86-87, pgs., 135-138, pgs., 294-301, pgs. 455-490.

<sup>65</sup> DPH H-21-39, Trial Transcript, Vol. IV., pgs. 167-168.

Parent and Student fell on and Parent was injured. The Parent discussed the lack of accessible parking for students with disabilities. None of Parent's concerns were discussed with the IEP team or addressed in Student's IEP. Here, Student's access to her educational program which includes nonacademic activities, extracurricular activities, and the general curriculum was compromised. This is the third Due Process hearing with these parties and still no evidence was presented that any of Student's accessibility issues have been addressed. District counsel has reiterated at H-31-39 and at this hearing that nothing has changed regarding Student's accessibility issues. I find this denial amounts to a substantive denial of FAPE by the District.

As for the District's failure to provide physical therapy for Extended School Year. As discussed supra, On April 14, 2021, the IEP team ( [REDACTED] and Mrs. Oltmann), met and determined that, "regression data does not indicate a need for academics or occupational therapy. It does indicate a need for physical therapy during extended school year services".<sup>66</sup> Student has Cerebral Palsy. Cerebral Palsy is the most common motor disability in childhood. Cerebral means having to do with the brain. Palsy means weakness or problems with using the muscles. Student uses a walker to traverse the school campus. At the IEP meeting on April 14, 2021, it was noted that the regression data supported ESY services in physical therapy during the summer of 2021.<sup>67</sup> Testimony was that Student has significant issues on her left side. This includes difficulty using her leg, arm and hand on that side of her body. This can cause difficulty for Student doing simple tasks such as hold a sheet of paper with one hand and writing on it with the other hand. Student needs physical therapy to help learn skills she needs to do academic work, and to be able to ambulate around obstacles she faces every day. Also at the April 14, 2021, IEP meeting, the documents reflect that for every two-day interruption of programming, recoupment

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<sup>66</sup> DPH H-21-39, Parent's Exhibits, pg. 26.

<sup>67</sup> DPH H-21-39, Parents Exhibit's, pgs. 24-26.



exceeded one day of instruction. It further stated that lengthy recoupment time would delay acquisition of a new skill beyond a reasonable time.<sup>68</sup> Additionally, in that meeting it was determined that regression data indicated a need for ESY in physical therapy. I find this denial to be a substantive violation of FAPE.

**Whether the District failed to provide appropriate reading intervention**

It is undisputed in this case that Student has significant reading deficits. Testimony by Student’s teachers suggest she just doesn’t test well. However, her test results are consistent. Student’s ISTATION scores throughout her second-grade year were: Reading-vocabulary-averaged Tier 2; Comprehension-averaged Tier 2 and Tier 3; Phonemic Awareness averaged Tier 2, Alphabetic decoding-Tier 2, spelling-averaged Tier 2, and Math-all scores were Tier 3.<sup>69</sup> Student’s second grade teacher testified that Tier 2 was a warning line, a borderline that Student might need help and Tier 3 indicates that Student needs severe help.<sup>70</sup> From the test scores Student was struggling but there were no IEP meetings held to discuss Student’s deficits or modify programming.

During Students 2020-2021 third grade year, Student was given the Dibels, a series of short tests that assess K-8 literacy. It is a set of procedures and measures for assessing the acquisition of a set of K-8 literacy skills, such as phonemic awareness, alphabetic principle, accuracy, fluency, and comprehension benchmark assessment. Student scores were:

Fall Screener scores	Mid Year Screener Scores	Spring Screener Scores
Dorf: 21	Dorf: 55	Dorf: 56
Dorf/acc: 54	Dorf/acc: 97	Dorf/Acc: 90

<sup>68</sup> Parent’s exhibits, pg. 24.

<sup>69</sup> DPH H-21-32, Parent’s Exhibits, pg. 15.

<sup>70</sup> DPH H-21-32, Trial Transcript Vol. III, pgs. 19-20.

DAZE: 2	DAZE: 0	DAZE: 1

Student’s scores on the Dibels indicate that Student needed intensive supports.<sup>71</sup> On the ISTATION given Student during 2020-2021 school year, Student scored Tier 3 in overall reading and text Fluency, as well as Tier 3 in overall Math.<sup>72</sup> The data shows Student is continuing to fall further behind.

During Students 2021-2022 fourth grade year Student’s 2021-2022 Istation reading results showed that Student was at significant risk of not meeting grade level expectations in overall reading and text fluency. Further, Student demonstrated that she was struggling and had significant weakness with text fluency, vocabulary, word analysis and reading comprehension.<sup>73</sup> Student’s Istation testing showed she was either tier II or tier III for interventions. Between October 2021 and May of 2022, Student went from a tier III to a tier II in Word analysis and reading comprehension.<sup>74</sup> Student’s 2021-2022 Istation math results showed that in October student was struggling, and in December 2021 and May 2022, Student scores had moved her to continuing to demonstrate significant weakness with this skill.<sup>75</sup> Between April 4, 2022-May 20, 2022, Student participated in the ACT Aspire test. Student’s overall performance in English, Reading and Writing, showed she was below ready. Student’s Science, and Math tests indicated that Student was below ready.<sup>76</sup> According to Student’s comprehensive psychological evaluation completed March 3, 2022, Student is of average intelligence, yet she has made minimal progress

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<sup>71</sup> H-21-32, pg. 479.

<sup>72</sup> Id., at 480-483.

<sup>73</sup> Id., at 387.

<sup>74</sup> Id., at pgs. 286-389.

<sup>75</sup> Id., at pgs. 398-399.

<sup>76</sup> Id., at pgs. 413-414.

if any in reading and math.<sup>77</sup> The IEP team failed to address these deficits and instead continued to provide Student the same services in reading and math while all of Student's standardized testing showed she was not catching up with her same age peers even though she possesses the intelligence to do so. The IEP team did not provide a curriculum that would assist Student in "catching up" with her peers. Instead, they continued providing Student with the same curriculum in reading and math with the hope that Student would make gains necessary to reach her peers. However, as discussed above Student's fourth grade Istation, and ACT aspire show that Student wasn't making much if any progress. Additionally, there was no consensus in the testimony as to what reading curriculum Student was being taught. Further Mrs. Oltmann testified that Student started and ended the fourth-grade reading at "about" a second grade level.<sup>78</sup> Despite Student not making expected progress in reading or math during the fourth grade, Mrs. Oltmann testified that Student's fifth grade IEP provided no additional or different services from the fourth grade IEP.<sup>79</sup>

The IEP must aim to enable the child to make progress. The essential function of an IEP is to set out a detailed individualized program for pursuing academic and functional advancement in all areas of unique need. *Andrew F.*, 137 S. Ct. 988, 999 (citing *Rowley* at 206-09) (other citations omitted). The *Andrew* court concluded that "the IDEA demands ... an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." 137 S. Ct. at 1001, 197 L.Ed.2d at 352.<sup>80</sup> *Andrew*, *Rowley*, and the IDEA make abundantly clear, the IEP must be responsive to the child's identified educational needs. Here Student's IEP was not reasonably calculated to enable her to make progress in

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<sup>77</sup> Parent Exhibits, pgs. 123-124.

<sup>78</sup> Transcript Vol. II, pg. 37.

<sup>79</sup> *Id.*, at 107.

reading and math in light of her individual circumstances. This hearing officer finds this is a substantive violation of IDEA.

**Whether District failed to provide appropriate instruction to address  
Student's academic needs in Science and Social Studies**

Parent argues that because Student was being removed from her Science and Social Studies classes in order to receive her compensatory therapy services awarded in Due Process Hearing H-21-39 the District failed to provide Student appropriate instruction in Science and Social Studies. However, there was insufficient evidence introduced through testimony or documents to support a finding on this issue. Although Student was removed from Science and Social Studies numerous times for compensatory therapy services, Parent failed to establish that the amount of time was significant enough to show that the District failed to provide appropriate instruction in Science and Social Studies. I find this was not a substantive violation of IDEA.

**Other Issues**

Parent's post hearing brief contains a lengthy discussion about private school placement as a compensatory service. However, private school placement was not included in the due process complaint nor was any evidence presented at the due process hearing to support a private school placement. This hearing officer will not address an issue raised for the first time in a post hearing brief.

### **Conclusion**

The results of the testimony and evidence warrant a finding for the Parents. Specifically, Parents introduced sufficient evidence in the record to establish by preponderance of the evidence that District denied Student a FAPE between June 30, 2021-October 7, 2022. District is hereby ordered to take the following actions regarding Student:

1. The District is ordered to reimburse Parent any out-of-pocket expenses for physical therapy evaluations, or physical therapy services provided to Student from June 30, 2021 until the start of the 2021-2022 school year. Parent shall within 15 days of this decision provide the District receipts of any physical therapy evaluations or services provided between June 30, 2021 and the start of the 2021-2022 school year. Within 15 days of receiving Parent's receipts, the district shall provide reimbursement to the Parent.
2. The District is ordered to reimburse Parent for mileage to take student to and from physical therapy evaluations or physical therapy services between June 30, 2021 and the start of the 2021-2022 school year. Mileage shall be reimbursed at State mileage reimbursement rate. Parent shall within 15 days of this decision provide the District with documentation of mileage to take student to and from physical therapy evaluations or physical therapy services between June 30, 2021 and the start of the 2021-2022 school year.
2. The District is ordered to contract with an occupational therapist agreeable to the Parent to perform a seating and positioning evaluation. This evaluation must be completed within 60 days of this decision.

3. The District is ordered to contract with a physical therapist to conduct an access evaluation to determine Student's accessibility regarding her participation in extracurricular, nonacademic activities and academic activities with her nondisabled peers. This evaluation must be completed within 60 days of this decision.
4. The District is ordered to provide a reading and math curriculum agreeable to the Parent to address Student's deficits in Reading and Math.
5. The District is ordered to provide Student 2 hours a week of outside tutoring in increments and days agreeable to the parent within 30 days of this decision. This outside tutoring is not prospective in nature. Instead, this award of tutoring is intended to be a compensatory remedy. Because the District failed to provide Student appropriate curriculum in reading and math since June 30, 2021-October 7, 2022, Student is significantly academically behind her peers. This tutoring should serve to compensate Student for the loss of appropriate reading and math instruction with the goal being for Student to reach the academic level of her same aged peers. This tutoring shall begin within 30 days of this decision and continue during the summer of 2023 and throughout the 2023-2024 school year. Student is not to be removed from any core classes to receive this compensatory
2. The District is ordered to hold an IEP meeting within 60 days of this decision to discuss the outside occupational and physical therapy evaluations. Both therapists who conducted the evaluations shall be present to explain their results to the IEP team. The IEP team shall discuss and provide appropriate accommodations and

modifications for Student based on the results of the occupational and physical therapy evaluations.

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

**Finality of Order and Right to Appeal:**

The decision of this Hearing Officer is final. A party aggrieved by this decision has the right to file a civil action in either Federal District Court or a State Court of competent jurisdiction, pursuant to the Individuals with Disabilities Education Act, within ninety (90) days after the date on which the Hearing Officer's Decision is filed with the Arkansas Department of Education.

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

**IT IS SO ORDERED.**

*Dana McClain*

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**HEARING OFFICER**

2/8/2023

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**DATE**