

**STATE DEPARTMENT OF EDUCATION
DUE PROCESS APPEAL REVIEW
STATE OF OKLAHOMA**

[Parents Names],)	
on behalf of [Name], student,)	
)	DPH 2093
Petitioner,)	
)	
vs.)	
)	
[Name] CITY SCHOOLS,)	
)	
Respondent.)	

FINAL APPELLATE ADMINISTRATIVE ORDER

APPEARANCES:

[Parent Attorney Name and Address]

[School District Attorney Name and Address]

In order to provide confidentiality and insure privacy, throughout this Order, the Appellant shall be referenced as “Parent” or “Appellant.” The Appellee shall be referred to as “School,” “District,” or “Appellee.” The minor child who is the subject of this action has been referenced as “Child” or “Student.”

Protective Order

As part of this Final Administrative Order, a protective order is hereby entered. No party to these proceedings shall publish to any third-party the name or identify of student. All documents pertaining to these proceedings shall be sealed and any copy of any documents made pursuant to the legal request of a third-party shall be redacted as to names, birthdates, and other private or sensitive information.

Procedural History of Appeal

Parents, by and through attorney [name], filed a *Due Process Hearing Complaint* on December 1, 2015. Parents, subsequently amended their Complaint two times. The *Second*

Amended Due Process Hearing Complaint (“Complaint”) was filed on or about July 20, 2016. The District, by and through attorney [Name], filed a *Respondent Ardmore City Schools’ Response To Petitioners’ Second Amended Complaint* on July 28, 2016, noting, among other arguments, that there were not sufficient reasons or facts stated to determine if there was or was not a violation of the Individuals with Disabilities Education Act (“IDEA”).

On February 20, 2017, Hearing Officer Lucy S. Kroblin issued *Due Process Hearing Decision* (“Decision”), from which Parents bring this appeal. Exhibit A, *Due Process Hearing Decision*. The Hearing Officer’s Decision included: (1) The District denied a FAPE to the Student during the 2014-2015 school year and the Fall 2015 semester; (2) The District failed to abide by Student’s IEPs during the 2014-2015 school year and 2015 Fall semester; (3) The District failed to educate Student in the least restrictive environment; (4) Residential placement is not an appropriate placement for the Student; (5) This hearing officer does not have jurisdiction to determine if a violation of the Americans with Disabilities Act occurred and shall not rule on this issue or the awarding of compensatory damages to the Petitioner’s parents against the District; (6) This hearing officer only has jurisdiction to award compensatory damages; (7) This hearing officer finds there is credible evidence District staff purposely mocked Student. However, this hearing officer does not find the actions of the SLPA resulted in violation of FAPE to Student; and (8) Placement of Student in the seclusion/cool-off room occurred prior to the operable time period and will not be considered by this hearing officer. *Decision* p. 22-26.

The Parents timely requested an appeal hearing pursuant to 20 U.S.C. § 1415(g)(1) & (2); See Exhibit B, *Petitioners’ Request for Due Process Appeal Review*.

Findings of Fact

In addition to any findings of fact specifically set forth in this Order, the Findings of Fact

set forth in the Hearing Officer's decision are adopted as Findings of Fact for purposes of this appeal. If there is any conflict with a specific Finding of Fact set forth herein and those adopted by the Hearing Officer, the Finding(s) of Fact set out in this Order prevail.

Issues on Appeal

The issues before the hearing officer which resulted in the Due Process Hearing *Decision* included: (1) Whether the district provided FAPE to Student during the 2014-2015 school year and Fall 2015 semester? (2) Whether the district abided by the Student's IEPs in place during the 2014-2015 school year and Fall 2015 semester? (3) Whether Student's placement was Least Restrictive Environment during the 2014-2015 school year and Fall 2015 semester? (4) Whether residential placement is appropriate? (5) Whether the district retaliated against Student and Parents? (6) Whether the hearing officer can award monetary damages? (7) Whether District personnel mocked the Student? (8) Whether seclusion of Student can be considered since it occurred outside the operable time period? *Decision* at p. 2.

The issues raised on appeal are: (1) Whether the decision issued by the United States Supreme Court in Endrew F. v. Douglas County School District RE-1, 580 U.S. ____ (2017) (Slip Opinion No. 15-827), impacts any findings or legal conclusion made by the Hearing Officer? (2) Whether the Hearing Officer erred on denying the Petitioners' request for residential placement? (3) Whether the Hearing Officer erred in failing to order any compensatory education (other than speech language therapy) due to the District's failure to provide FAPE/implement the Student's IEPs? (4) Whether the Hearing Officer erred in failing to order sufficient compensatory education for speech language therapy services due to the District's failure to provide FAPE/implement the Student's IEPs? *Petitioners' Request for Due Process Appeal Review* at p. 1-2.

Conclusions of Law

Under IDEA, school districts have a legal, affirmative obligation to identify all students with disabilities within the district. *See* 20 U.S.C. § 1412(a)(3). If a child is identified as a child suspected of having a disability, the school must evaluate the child in **all** areas of suspected needs. *See* 20 U.S.C. § 1414(b); *see also Wisenberg v. Board of Educ.*, 181 F. Supp. 1307, 1311 (D.Utah 2002). Once a child is identified as a child with a disability, IDEA obligates District personnel to provide children, including this Parent's child, with a free appropriate public education (FAPE). 20 U.S.C. § 1412(a)(1).

The burden of proof in this administrative hearing was placed on the Parent as the party seeking relief. *See Schaffer v. Weast*, 546 U.S. 49 (2005). A Hearing Officer may find that a child did not receive FAPE only if the procedural inadequacies: (1) impeded the child's right to a free appropriate public education; (2) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child; or (3) caused a deprivation of educational benefit. *See* 20 U.S.C. § 1415(f)(3)(E).

The Tenth Circuit Court of Appeals has previously explained that in enacting IDEA, Congress explicitly mandated, through the least restrictive environment requirement, a specific mandate that disabled children be educated in the regular classroom to the maximum extent possible. 20 U.S.C. § 1412(a)(5)(A). *Logue v. Shawnee Mission Pub. Sch. Unified Sch. Dist. No. 512*, 959 F. Supp. 1338, 1351 (D. Kan. 1997), *aff'd* 153 F.3d 727 (1998). The IDEA does not require a public school to maximize a child's potential or to provide the best possible education or psychological program. *Johnson v. Independent Sch. Dist. No. 4 of Bixby*, 921 F.2d 1022, 1028-29 (citing *Board of Educ. v. Rowley*, 485 U.S. 197 n. 21). It does, however, require an

educational plan to be calculated to provide more than a merely *de minimis* benefit to the child. *Andrew F. v. Douglas County School District RE-1*, 580 U.S. ____ (2017) (Slip Opinion No. 15-827).

Standard of Review

The hearing officer's factual findings based on strict credibility judgments are deferred to unless the non-testimonial evidence in the record would justify a contrary conclusion or unless the record read in its entirety would compel a contrary conclusion. *See O'Toole v. Olathe*, 144 F.3d 692, 699 (10th Cir. 1998). Further, the scope of review applied on appeal is enunciated in *Carlisle Area School District v. Scott P.*, 62 F.2d 520 (3rd Cir. 1995), with the court holding that:

We thus hold that appeals panels reviewing the fact findings of hearing officers . . . should defer to the hearing officer's findings based upon credibility judgments unless the non-testimonial, extrinsic evidence in the record would justify a contrary conclusion or unless the record read in its entirety would compel a contrary conclusion.

In making Findings of Fact, the impartial hearing officer weighed all the evidence and assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including, but not limited to: the demeanor of the witnesses; any interests, bias, or prejudice the witness may have; the opportunity of the witness to see, hear, know, or remember the facts or occurrences about which the witness testified; whether the testimony of the witness is reasonable; and whether the testimony is consistent with all believable evidence in the case.

Because the Hearing Officer considered the entire record and enumerated the undisputed facts, there is no reason to set aside any of her Findings of Fact based upon the records as a whole or credibility judgments.

Discussion

The issues raised by Parents on appeal are: (1) Whether the decision issued by the United States Supreme Court in Endrew F. v. Douglas County School District RE-1, 580 U.S. ____ (2017), impacts any findings or legal conclusion made by the Hearing Officer? (2) Whether the Hearing Officer erred on denying the Petitioners' request for residential placement? (3) Whether the Hearing Officer erred in failing to order any compensatory education (other than speech language therapy) due to the District's failure to provide FAPE/implement the Student's IEPs? (4) Whether the Hearing Officer erred in failing to order sufficient compensatory education for speech language therapy services due to the District's failure to provide FAPE/implement the Student's IEPs? *Petitioners' Request for Due Process Appeal Review* p.1-2.

Parents' Contention 1: Whether the decision issued by the United States Supreme Court in Endrew F. v. Douglas County School District RE-1, 580 U.S. ____ (2017), impacts any findings or legal conclusion made by the Hearing Officer?

Endrew F., rejected the longstanding requirement that educational benefit be "merely more than *de minimis*." *Board of Educ. v. Rowley*, 485 U.S. 197. The United States Supreme Court held "[t]he IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." The Supreme Court, however, declined to establish a test to determine the adequacy of an IEP given the unique circumstances of each child. *Id.*

Regardless of this heightened standard, *Endrew F.*, does not affect any finding or legal conclusion made by the Hearing Officer on multiple fronts. First, it was decided after this *Due Process Hearing* was conducted and Decision rendered. Second, Appellant, who carries the burden of proof, prevailed on the primary issues, that is: (1) Whether the district provided FAPE to Student during the 2014-2015 school year and Fall 2015 semester? (2) Whether the district abided by the Student's IEPs in place during the 2014-2015 school year and Fall 2015 semester?

(3) Whether Student's placement was Least Restrictive Environment during the 2014-2015 school year and Fall 2015 semester? *Decision* p. 22-24. Specifically, on Issue 1 Hearing Officer found that Student did not even receive a *de minimus* educational benefit. *Id.* at 23. Therefore, if warranted, applying a higher standard would have no effect on the Hearing Officer's finding because relief was awarded based on the Tenth Circuit's lower standard.

Parents' Contention 2: Whether the Hearing Officer erred on denying the Petitioners' request for residential placement?

Both [name of school district expert] and [name] (Parents' expert) determined that Student's least restrictive environment was the school's special education room as long as proper services are in place. *District Exhibit 114 Written Report of Expert Testimony (Dr. Howard); PE 184, [parents expert] Evaluation*. After thorough review of the admitted exhibits and hearing transcripts, the weight of evidence overwhelmingly supports educating Student in the special education room within the public school. Parent/Appellant offers nothing more than antidotal support for residential placement in the way of Parent's desire. Additionally, the weight of the evidence indicates residential placement would be more restrictive and likely cause additional problems for Student. Therefore, the Hearing Officer's determination that residential placement is not appropriate is found not to be in error.

Parents' Contention 3: Whether the Hearing Officer erred in failing to order any compensatory education (other than speech language therapy) due to the District's failure to provide FAPE/implement the Student's IEPs?

This contention is vague at best. Parent does not offer any framework for compensatory education. Nor does Parent provide any professional recommendations for compensatory education or provide any goals, educational or otherwise, to be targeted by additional instruction. Nevertheless, parent is not without some remedy. The Hearing Officer's recommendations and the proposed 2016-2017 IEP have compensatory effect. They not only increase the amount of his

instruction, but also the quality of his instruction as well. *Decision* at p.26-27; *District Exhibit 7*. This, however, is predicated on the assumption that Student can tolerate additional instruction.

The School's failure to provide Student with FAPE and implement an IEP cannot be considered the sole reason for Student's dismal achievement. That is, Parent's failure to speak up when she discovered Student was not being properly educated cannot be overlooked. From the first recording on August 19, 2015, parent was on notice that Student was not receiving a proper education. This by no means excuses the School's failures, but does call into question Parent's motivations and actual concern for Student's education. In other words, had Parent been more proactive (especially as a member of the IEP team) corrections could have been made for the Fall 2015 semester, and any loss of educational benefit thereafter mitigated. As a further concern to this Appellate Officer is that the record reflects Student was removed from school in February 2016 and was only receiving one (1) hour of instruction under Parent's direction. Tr. 579-581. Therefore, Student's removal skewed any potential benchmark for compensatory achievement. Parent's contention as to compensator education is denied.

Parents' Contention 4: Whether the Hearing Officer erred in failing to order sufficient compensatory education for speech language therapy services due to the District's failure to provide FAPE/implement the Student's IEPs?

At all times during the operative period, Student's IEP required Student to receive speech therapy for twenty (20) minutes twice a week. Plaintiff's Exhibit CF 265-337. Student's therapy was scheduled on Tuesdays and Thursdays. Plaintiff's Exhibit 31. The Hearing Officer ordered the District to provide Student compensatory speech therapy equaling twenty-four (24) twenty (20) minute sessions conducted by a licensed Speech Language Pathologist ("SLP"). While it is unclear how the Hearing Officer calculated the amount of compensatory therapy, the record and her findings provided some insight. The Hearing Officer evaluated the Speech Language

Pathologist Assistant's ("SLPA") notes and determined:

These notes indicated that during the 2014-2015 school year, the SLPA . . . missed 34 speech-therapy sessions with Student. On 17 of these days school was either not in session, activities or state testing or specific work with Student was occurring or Student was absent. On the remaining 15 days, the SPLA was absent or in meetings six (6) days. The remaining 10 days missed were noted as due to Student being asleep or upset.

[F]all 2015 semester referenced she missed nine (9) additional sessions with Student for a total of twelve (12) sessions missed in the fall 2015 semester. Five (5) of the nine (9) sessions recorded, school was either not in session, activities or state testing or specific work with Student was occurring or Student was absent. On three (3) of the nine (9) sessions missed sessions recorded [SLPA] was absent or in training. Student's behavior was the recorded cause for not complete one (1) session. *Decision* p. 10 ¶¶ 76, 78.

While these accounting are somewhat unclear, additional analysis/clarification is unnecessary. What is clear and supported by the record is Student missed therapy because of behavior issues or being asleep. The record further supports the School failed to properly address his behavior and manage his day so that he could participate in his scheduled speech therapy sessions. Although the Hearing Officers does not go into detail about the causes behind Student's missed sessions, it is unfathomable that causation was not a significant consideration. In other words, compensatory services are necessary where the School was the primary impediment.

It should be noted that this Appellate Officer appreciates Parent's position that twenty (20) minutes of therapy twice a week means Student is to receive the ordered therapy regardless of whether or not it takes place during his scheduled time. In other words, missed sessions must be made up regardless of why missed. This position, however, is shortsighted because it fails to account for the finite availability of services and the needs of other students.

The record supports that during this period the Speech Language Pathologist Assistant ("SLPA") had fifty-to-sixty (50-60) students on her caseload, which she saw twice per week. PE 31. To require her to make up sessions with Student regardless of why he missed would create an

untenable standard when rightfully applied to other students with similar IEPs. Specifically, it is this Appellate Officer's opinion that this would make scheduling difficult and require the school to provide make up service when the reasons for doing so are outside of the School's control.

Nevertheless, this Appellate Officer agrees that some compensatory speech therapy is warranted for the sessions missed when the School allowed Student to sleep or failed to control his behavior. To that end, the compensatory speech therapy ordered by the Hearing Officer is sufficient in light of the facts and weighing of the totality of the circumstances.

Notice of Appeal Rights

Pursuant to 20 U.S.C. § 1415(g) & (i) and 34 C.F.R. § 300.516, the decision of the Appeal Review Officer is final except that any party involved in such hearing who feels aggrieved by the findings and decision made shall have the right to bring a civil action in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy within ninety (90) day of receipt of this Order.

_[signature]_____

Catherine Welsh
Appellate Review Officer
2727 E. 21st St., Ste. 500
Tulsa, Oklahoma 74114
(918) 585-8600 – telephone
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CERTIFICATE OF MAILING

This is to certify that on this 1st day of May, 2017, a true and correct copy of the above and foregoing Order mailed, postage pre-paid, to the following individuals:

[School District Attorney]

[Parent Attorney]

Ms. Jo Anne Blades, Program Manager
Special Education Resolution Center
9726 East 42nd St., Ste. 203
Tulsa, OK 74146
Special Education Resolution Center

_____[Signature]_____
Catherine Welsh