

**ILLINOIS STATE BOARD OF EDUCATION
IMPARTIAL DUE PROCESS HEARING**

STUDENT¹,

Student,

Case No: 2023-DP-0015

v.

Janet K. Maxwell-Wickett,
Impartial Hearing Officer

Elementary SD ■■■,

School District.

FINAL DETERMINATION AND ORDER

JURISDICTION

The undersigned has jurisdiction over this matter pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C §1400 *et seq.* and the Illinois School Code, 105 ILCS 5/14-8.02a *et seq.*

BACKGROUND

The Student is a 6-year-old, male who does not currently attend school. His Parent (Mother) resided within the bounds of the District from June 2019 until October 30, 2022. The Student is suspected of being a student with a disability. His diagnoses include Autism Spectrum Disorder (ASD), Tibial Torsion, and Toe-walking. He has developmental and academic deficits including deficits in the areas of communication, gross and fine motor, cognitive, adaptive, and personal-social functioning. The Student was referred to the District for a case study evaluation

¹ Personal identification information is provided in Appendix A.

(CSE) when he aged out of Early Intervention (EI) services around approximately September 30, 2019.

Parent maintains the following: (1) The District violated the mandates of the IDEA and the Illinois School Code when it failed to identify the Student as a student with a disability beginning in October 2019, when he aged out of Early Intervention services pursuant to its Child Find obligation; and (2) The District violated the mandates of the IDEA and the Illinois School Code when from August 5, 2020, through August 19, 2022, it failed to evaluate the Student and failed to provide him with an IEP reasonably calculated to enable the Student to make progress in light of his unique circumstances and to receive educational benefit thus denying him a free and appropriate public education (FAPE). (IHO Exhibit #1, 8, 12.)

Parent, through legal counsel, filed a due process hearing request on August 5, 2022. (IHO Exhibit #1.) The District filed its response to the due process hearing request on September 8, 2022. (IHO Exhibit #6.) The parties participated in resolution session on August 17, 2022. (IHO Exhibit #9-10, 12.) The Prehearing Conference was commenced and completed on November 17, 2022. (IHO Exhibit #12.)

The District raised the Statute of Limitations as an affirmative defense to Parent's Child Find issue. The parties provided briefs and documentary evidence related to same. This Hearing Officer was able to establish the "knew or should have known" (KOSHK) date based upon same. The KOSHK date was determined to be June 1, 2022. Further, it was also determined, in the alternative, that an exception to the Statute of Limitations applied as Parent was never provided with her procedural safeguards. (IHO Exhibits #21-24.) The evidence adduced at hearing further supported these findings.

The original 45-day timeline expired on October 19, 2022. On October 11, 2022, the parties jointly requested an extension of same in order to continue settlement discussion in an attempt to resolve the outstanding issues in this matter. (IHO Exhibit #11.) On December 14, 2022, the parties jointly requested an extension of the timeline as they were engaged in productive settlement discussions and District counsel was planning to seek School Board approval of a proposed settlement. (IHO Exhibit #15.) On March 14, 2023, the parties again jointly requested an extension of the due process hearing timeline in order to the convene the due process hearing on the previously scheduled dates which were mutually convenient to both parties, counsel and witnesses after settlement discussions ultimately failed. (IHO Exhibit #25.) All joint motions for continuance were granted for good cause shown and the 45-day decision due date was ultimately reset to May 1, 2023. Due Process Hearing dates were set by agreement for April 13-14, 2023.² (IHO Exhibit #25.)

The Parent opted for a closed hearing. The Due Process Hearing was held on April 13, 2023. Mr. Charles Fox and Ms. Julie Welsh of the Law Offices of Charles P. Fox represented Parent. Ms. Courtney Stillman of Himes, Petrarca & Fester Chtd., represented the District and Ms. Dana Ash, Director of Student Services, appeared as the District Representative. The parties presented joint witnesses.³ The District presented the following District Exhibits (SD) # 4-7, 16-18 which were admitted into evidence.⁴ The Parent presented the following Parent Exhibits (PE) pages # 15-47, 56-214, 216-225, 238-239 which were admitted into evidence. The parties presented the following Joint Exhibits (JE) # 1-10, 12-18 which were admitted into evidence. The Hearing Officer's Exhibits were: IHO Exhibits # 1-39. Both parties submitted oral closing

² As the hearing was completed on April 13, 2023, the decision due date is April 28, 2023.

³ Witnesses presented by both parties are identified in Appendix A.

⁴ School District Exhibit #1 is included within the hearing record for demonstrative purposes only. It was not admitted into evidence as no evidence was presented to establish that Parent ever saw or received same.

statements, a written outline thereof, and provided citations to any case law relied upon. No stipulations or agreed upon facts were submitted by the parties prior to hearing.

ISSUES

The issues raised by the Parent, including the relief requested, and the response of the District, present the following issues, defenses and requested relief for determination by this Hearing Officer:

(a) Whether the District timely and appropriately identified the Student as a student with a disability beginning in October 2019, when he aged out of Early Intervention services, pursuant to its Child Find obligation.

Parent maintains that the District failed to adhere to its Child Find obligation when it did not evaluate and create an IEP for the Student from October 2019, when he exited Early Intervention services, through August 19, 2022, thus denying him a free and appropriate public education (FAPE).

The District maintains that, at all times at issue, it met its Child Find obligation to this Student. The District maintains that the Student was never enrolled by Parent in the District and thus, there was no Child Find obligation.

(b) Whether over a period of two years, from August 5, 2020, through August 19, 2022, the District evaluated the Student and provided an IEP for the Student reasonably calculated to enable the Student to make progress in light of his unique circumstances and receive educational benefit and thus provided him with a free and appropriate public education.

Parent maintains that the District failed to evaluate the Student and provide appropriate IEPs during the time period in question thus denying the Student a FAPE.

The District maintains that the Student was never enrolled in the District and therefore, there was no obligation to evaluate or provide the Student with an appropriate IEP or a FAPE.

Parent requests the following relief:

- a. Order the District to pay for Independent Education Evaluations (IEEs) in the areas of cognitive, academic, visual/motor, speech, physical, psychological, and functional skills;
- b. Order reimbursement to Parent for private occupational therapy (OT), speech language therapy, and ABA therapy;

- c. Order compensatory education in the form of occupational therapy, speech therapy, ABA therapy, and academic tutoring. [To be determined by evidence presented at hearing utilizing the qualitative approach.]

FINDINGS OF FACT

This Hearing Officer did not have the benefit of a transcript with respect to the testimony heard when writing this decision. Therefore, the following is based upon this Hearing Officer's personal notes and recollection. This Hearing Officer carefully considered the testimony of all witnesses presented and all documents introduced and admitted into evidence whether or not specifically referred to or cited when making her final determination. After considering all the evidence, as well as the arguments of both District counsel and Parents' counsel, this Hearing Officer's Findings of Fact are as follows:

1. The Student is a 6-year old male who is not currently enrolled in school. His Parent/Mother resided within the boundaries of the District from June 2019, through October 30, 2022. (Testimony of Parent, GC⁵; SD #16.)
2. On September 30, 2019, GC, the Early Intervention Services Coordinator for ES, provided to the District its LEA packet which included a consent form signed by Parent, the Student's evaluation reports, and the Individualized Family Services Plan (IFSP) document. (Testimony of Parent, GC: JE #1-2).
3. The Student received physical therapy, occupational therapy, speech language therapy, and developmental therapy as part of his early intervention services. (Testimony of Parent, GC, Dr. W⁶; JE #1-2, 8.)

⁵ GC is employed by the Early Intervention Program at ES. She has been so employed as a service coordinator for the past seven (7) years. She was the service coordinator for the Student from July – December 2019. (Testimony of GC, Dr. V.)

⁶ Dr. W is the Student's pediatrician. He is employed by Advocate Children's Hospital in Park Ridge, Illinois as a behavioral and developmental pediatrician. He has specialized training in the management of children with developmental disabilities. The Student has been his patient since September 2019, prior to the Student turning age 3 years. (Testimony of Dr. W.)

4. The Student was diagnosed with Autism Spectrum Disorder, Tibial Torsion, and Toe-walking in October 2019. (Testimony of Parent, Dr. W, GC; JE #8; PE pages #15-47, 78-99.)
5. At the time the Student was transitioning out of early intervention services, he was non-verbal with significant developmental delays in the areas of adaptive functioning, personal-social functioning, speech language/communication, fine and gross motor skills, and cognitive functioning. He required services in the areas of speech language, occupational therapy, physical therapy, behavioral skills, Applied Behavioral Analysis (ABA) therapy, social and independent functioning skills. (Testimony of Parent, Dr. V⁷, GC, KK⁸, Dr. W., OT⁹; JE #1-8; PE pages #15-47, 78-99, 216-225.)
6. On October 24, 2019, Parent met with Dr. V, the District school psychologist. Parent left the meeting with Dr. V's business card. (Parent, Dr. V, GC; JE #3-7.)
7. From October 24, 2019, until August 19, 2022, a school personnel/IEP team was never convened and domains for evaluation were never opened related to this Student. No Notices of Conference were ever generated or provided to Parent. (Testimony of Parent, Dr. V, DR¹⁰; JE #1-10, 12-18).
8. After the initial meeting with the District on October 24, 2019, did not result in an evaluation of the Student, Parent sought out private evaluations and services in the areas of

⁷ Dr. V is the District school psychologist. He has been employed by the District since 2007. He holds a Ph.D. in general psychology. (Testimony of Dr. V.; SD #17.)

⁸ KK is employed by WCT as a Board Certified Behavior Analyst (BCBA). She has been so employed for one year. She holds master's degrees in special education and applied behavior analysis. She was previously a special education teacher for five (5) years. She has worked with the Student for four (4) hours per week for the past year. (Testimony of KK.)

⁹ OT is employed by WCT as an occupational therapist. She has been so employed for the past two (2) years. She has been a licensed occupational therapist for 4.5 years. She holds a master's degree in occupational therapy and has worked with the Student for one hour per week for the past 1.5 years. (Testimony of OT.)

¹⁰ DR is the District Director of Student Services. She has been employed by the District since April 2022. (Testimony of DR; SD #18.)

occupational therapy, physical therapy, ABA therapy, and speech language therapy at WCT. (Testimony of Parent, Dr. W, OT, KK; PE pages #33-47, 56-214, 216-225, 238.)

9. WCT is not a school. However, it has a school readiness program in which Parent enrolled the Student. (Testimony of Parent, KK; PE pages #33-47.)

10. The Student made behavioral progress while enrolled in ABA therapy services at WCT. Goals were established for the Student in his areas of need and his progress related to same was monitored. KK recommended a fade plan for ABA services once the Student began attending school which includes 15-20 hours of 1:1 ABA therapy per week with periodic supervision by a qualified licensed Board Certified Behavior Analyst (BCBA). (Testimony of Parent, KK; PE pages #33-47, 216-225.)

11. WCT provided the Student with an occupational therapy evaluation to identify his areas of need. Goals were established related to his deficits in self-care, personal safety, sensory processing, fine motor and visual motor skills and progress was monitored related to same. The Student made progress on his occupational therapy goals. Further, the Student made progress in his sensory processing and functional communication goals. (Testimony of Dr. W, OT; JE #8, PE pages #56-90)

12. Parent's mother is a retired teacher. She began working with the Student in October 2019 to provide academic instruction to the Student. (Testimony of Parent, Dr. W.)

13. The Student made progress in early academic, behavioral, and social interaction skills. (Testimony of Parent, Dr. W, KK, OT; JE# 8.)

14. The period from age three (3) years to age six (6) years is a critical period of growth and development for children and it is critical that students requiring it receive early intervention therapies. The Student needed a self-contained classroom with a curriculum for children with

ASD which included speech language therapy, occupational therapy, physical therapy, and ABA therapy. (Testimony of Dr. W, Dr. V, OT, KK; JE #8.)

15. The Student experienced a significant loss when he did not receive an evaluation, an IEP, and a placement and related services from the District beginning at age three. Attendance in the school setting provides the opportunity for experiences and therapies that allow a child to make as much progress as possible in those critical, developmental years. The District conceded this point at hearing. (Testimony of Dr. W, Dr. V; JE #8.)

16. Parent reached out to the District, via email, again on April 3, 2022, identifying the Student as a student with a disability and again requesting a full case study evaluation. (Testimony of Parent, Dr. V, DR; JE #9-10, 12-13; SD #4-7.)

17. Domains for evaluation of the Student were opened on August 19, 2022, outside of a formal school personnel/IEP team meeting process. The evaluation domains were opened even though the Student was not enrolled or registered in the District. The domain paperwork contained information related to the Student from September 2019, although Parent provided to the District current evaluation data and reports in June 2022. Parent did not sign consent to evaluate in August 2022, as the domain paperwork contained outdated information related to the Student. (Testimony of Parent, Dr. V, DR; JE #9-10, 12-18.)

18. At no time prior to August 17, 2022, did Parent receive a copy of the Notice of Procedural Safeguards for Parents/Guardians of Students with Disabilities. This was uncontroverted by the District at hearing. (Testimony of Parent, GC, Dr. V; JE #1-10, 12-18.)

19. Parent never received a copy of the “When I’m Three, Where Will I Be?” document. This was uncontroverted by the District at hearing. (This document identified as SD #1 is included for demonstrative purposes only). (Testimony of Parent, GC, Dr. V.)

20. At no time from September 30, 2019, through the date of hearing has the District convened an IEP/school personnel team meeting or created any IEPs for this Student. This was uncontroverted by the District at hearing. (Testimony of Parent, Dr. V, DR; JE #1-10, 12-18.)

21. At hearing, the District conceded that when GC provided the District with a request to evaluate the Student as he was aging out of Early Intervention services, this triggered the District's Child Find obligation. Parent did not need to repeatedly request a case study evaluation once the District received that initial notice in September 2019. (Testimony of DR.)

22. Child Find does not require that a student be registered or enrolled in the District. The District conceded this point at hearing. (Testimony of DR.)

23. The Student would have been found eligible for special education and related services had the District evaluated him in September – October 2019. The District conceded this point at hearing. (Testimony of Dr. V; JE #1-10, 12-18.)

24. Parent paid an out-of-pocket a total of \$19,556.52 to WCT from October 2019 through March 6, 2023, for speech language, occupational therapy, ABA therapy and physical therapy services. This total is after insurance discounts and portions paid by her insurance carrier. (Testimony of Parent; PE pages #100-197.)

25. The cost for speech language therapy services is \$150.00 per hour. (PE pages #100-197.)

26. The cost for occupational therapy services is \$160.00 per hour. (PE pages #100-197.)

27. The cost for ABA therapy is \$40.00 per hour. (PE pages #100-197.)

28. The cost for BCBA supervision of ABA therapy is \$100.00 per hour. (PE pages #100-197.)

29. From Parent's home in Richton Park, Illinois to WCT, the mileage is 10.8 miles round trip. Parent made 13 trips in 2019, 109 trips in 2020, 64 trips in 2021, and 33 trips in 2022 through March 6, 2023. (Testimony of Parent; PE page #239.)

30. Parent paid \$964.06 for various educational Apps, tablets, and materials to support the Student's academic instruction provided by her mother. This amount included an upgrade to her internet service to support the use of educational Apps. (Testimony of Parent; PE pages # 198-214.)

31. The Internal Revenue Service (IRS) mileage reimbursement rate was \$0.58 per mile in 2019. (This is a Stipulated Fact - stipulated to by counsel for both parties, on the record during the due process hearing.)

32. The Internal Revenue Service (IRS) mileage reimbursement rate was \$0.575 per mile in 2020. (This is a Stipulated Fact – stipulated to by counsel for both parties, on the record during the due process hearing.)

33. The Internal Revenue Service (IRS) mileage reimbursement rate was \$0.56 per mile in 2021. (This is a Stipulated Fact – stipulated to by counsel for both parties, on the record during the due process hearing.)

34. From January 1, 2022, through June 30, 2022, the Internal Revenue Service (IRS) mileage reimbursement rate was \$0.585 per mile. (This is a Stipulated Fact – stipulated to by counsel for both parties, on the record during the due process hearing.)

35. From July 1, 2022, through December 31, 2022, the Internal Revenue Service (IRS) mileage reimbursement rate was \$0.625 per mile. (This is a Stipulated Fact – stipulated to by counsel for both parties, on the record during the due process hearing.)

36. The Internal Revenue Service (IRS) mileage reimbursement rate is \$0.655 per mile for 2023. (This is a Stipulated Fact – stipulated to by counsel for both parties, on the record during the due process hearing.)

37. On November 1, 2022, Parent sold her home and moved outside of the District. Her current residence is 12.8 miles round trip from WCT. (Testimony of Parent.)

38. The Student requires continued speech language therapy for one hour per week for at least one year to remediate his deficits related to the District’s failure to evaluate and provide him with an IEP. (Testimony of Parent, Dr. W, KK, OT; PE pages #15-47, 56-214, 216-225.)

39. The Student requires continued occupational therapy for one hour per week for at least one year to remediate his deficits related to the District’s failure to evaluate and provide him with an IEP. (Testimony of Parent, Dr. W, OT; PE pages #15-47, 56-214, 216-225.)

40. The Student requires continued ABA therapy for one year for five (5) hours per week, supervised by a BCBA at least once per month to remediate his deficits related to the District’s failure to evaluate and provide him with an IEP. (Testimony of Parent, Dr. W, KK; PE pages #15-47, 56-214, 216-225.)

41. The Student requires ten (10) hours per week of 1:1 academic tutoring for one year at an approximate cost of \$78.00 per hour to remediate his deficits related to the District’s failure to evaluate and provide him with an IEP. (Testimony of Parent, Dr. W; PE pages #15-47, 56-214, 216-225.)

42. The testimony of Dr. W, KK, OT, and Parent related to the academic instruction and related services required to remediate the Student’s deficits related to the District’s failure to evaluate the Student from September 30, 2019, through August 19, 2022, and failure to provide

with IEPs from August 5, 2020, through August 19, 2022, was uncontroverted by the District at hearing. (Testimony of Parent, Dr. W., OT, KK; PE pages 15-47, 56-214, 216-225.)

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the arguments of Parent’s counsel and District counsel, as well as this Hearing Officer’s own legal research, the Conclusions of Law of this Hearing Officer are as follows:

Child Find Obligation

The Individuals with Disabilities Education Act (“IDEA”) guarantees children with disabilities the right to a free, appropriate, public education (“FAPE”). 20 U.S.C. §1412(a)(1). IDEA defines a child with a disability as a child having a specific physical, mental, or emotional condition who, because of the disability, needs special education and related services. 34 C.F.R. §300.8. To be eligible for special education, the student must fit the statutory definition of a “child with a disability.” 20 U.S.C. §1401(a)(1)(A); 34 C.F.R. §300.8. Specific evaluation procedures must be used for determining whether a child fits the statutory definition of a “child with disabilities.” See 34 C.F.R. 300.8(a)(1), 300.304-300.311. In addition, all of the statutory definitions require that the disability “adversely affect the child’s educational performance.” See 34 C.F.R. 300.7(b)(1-13); *Mary P ex rel. Michael P. v. Illinois State Bd. of Educ.*, 919 F. Supp. 1173 (N.D. Ill. 1996.) If the student is deemed eligible, then the IEP team determines precisely what services are appropriate. These decisions are outlined in an Individualized Education Program (“IEP”). See 34 C.F.R. §§300.340-300.350; 23 Ill. Admin Code §226.5, 226.562.

In Illinois, each school district shall be responsible for seeking out and identifying all children from birth through age twenty-one who may be eligible for special education and related services. 34 C.F.R. §300.111(a)(1)(i). Procedures have been developed so that school districts

can fulfill the child find responsibilities. District procedures developed to fulfill the child find obligation must include “Ongoing review of each child’s performance and progress by teachers and other professional personnel, in order to refer those children who exhibit problems that interfere with their educational progress and/or their adjustment to the educational setting, suggesting that they may be eligible for special education and related services.” 23 Ill. Admin Code §226.100(a)(2).

Courts have found that the Child Find obligation “does not demand that schools conduct a formal evaluation of every struggling student.” *Demarcus L. v. Bd. of Educ. Of the City of Chi.*, 2014 WL 948883, *5 (N.D. Ill. 2014) (quoting *D.K. v. Abbington Sch. Dist.*, 696 F.3d 233, 249 (3rd Cir. 2012)). The Court in *Demarcus* held “the standard to be applied is whether the school district overlooked ‘clear signs of disability’ and was ‘negligent in failing to order testing,’ or ‘that there was no rational justification for not deciding to evaluate’.” *Id.*

Parent maintains in her Due Process Complaint Notice that the District failed to timely identify the Student as a “child with a disability” alleging that the District should have found him eligible when he aged out of Early Intervention services and was referred by GC to the District on September 30, 2019. The testimony and documentary evidence presented at hearing establish that the District failed to meet this standard when it failed to initiate an evaluation and find the Student eligible for special education services in September – October 2019. The testimony and documentary evidence presented at hearing establish the following: The Student resided within the boundaries of the District. (FF# 1.) The Early Intervention services coordinator presented him to the District on September 30, 2019, as a child with a disability in need of a case study evaluation for special education and related +services. Parent’s consent to share information, a letter indicating the need for a case study evaluation, and the Student’s Individualized Family Services

Plan (IFSP) document were provided. (FF# 2.) The IFSP document reflected that the Student had significant needs. He had an Autism diagnosis, was non-verbal and had significant developmental delays in many critical areas including adaptive functioning, personal-social functioning, speech language/communication, fine and gross motor skills, and cognitive functioning. (FF #3-5.) Parent met with the District school psychologist and left with a business card. A school personnel or IEP team meeting was not convened. Evaluation domains were never opened. Parent was not provided with any Notice of Procedural Safeguards. (FF #6-7.) The District appeared to predicate the Student's evaluation on Parent's enrollment of the Student in the District. However, Child Find does not require a Student's enrollment in the District before a case study evaluation can be initiated. (FF #21-22.) Further, Dr. V, who was responsible for transitioning the Student, testified that he spent fifteen (15) years in that role attending 1,000 to 1,500 IEP meetings and was very familiar with the process. Dr. V conceded at hearing that he knew, in September – October 2019, that given the Student's significant developmental delays, he would have qualified for an IEP at that time. However, no action was taken by the District related to a case study evaluation of the Student. (FF #1-7, 18-22.)

Parent again reached out to the District requesting an evaluation for special education and related services in April 2022. (FF #16.) She provided additional information and current evaluation reports in June 2022, requesting that a plan be developed and an IEP put into place so the Student could start school in August 2022. Again, no action was taken. (FF #16-17.) The District encouraged Parent to enroll the Student and place him in general education with some possible supports such as a visual schedule and a paraprofessional aide. However, special education, and related services and supports, including a paraprofessional aide, could not be guaranteed without an IEP. Over four (4) months later, on August 19, 2022, evaluation domains

were drafted and sent to Parent. However, the evaluation domains were based upon outdated information from the Student's initial transition to the District from Early Intervention services in September 2019. Further, the domain paperwork was drafted outside of any type of school personnel or IEP team meeting process. (FF #16-20.) Therefore, Parent did not provide consent to evaluate. After multiple attempts to engage with the District, and finally receiving domain documents with outdated information, Parent lost faith that the District would provide needed services to the Student. While the District attempted to blame Parent and alleged a lack of cooperation, the obligation to evaluate the Student and provide a FAPE was the District's obligation alone. The District's allegation of lack of parental cooperation was disingenuous and unsupported by the hearing record.

The testimony and documentary evidence introduced at hearing clearly illustrates that the District was on notice as of September 30, 2019, that the Student was a student with a disability who was aging out of Early Intervention services and in need of a case study evaluation for special education and related services. The LEA referral packet sent by GC along with a letter and his Individualized Family Service Plan was more than enough to substantiate a case study evaluation for special education and related services. The District knew that Child Find did not require the Student be registered or enrolled in the District in order to trigger its obligation to evaluate the Student. (FF #21-22.) There was simply 'no rational justification' for its decision not to evaluate in September - October 2019. It is the finding of this Hearing Officer, based upon the testimony and documentary evidence presented at hearing that the District ignored 'clear signs of disability'

and was ‘negligent in failing to order testing’ thus violating its Child Find obligation and denying the Student a FAPE.¹¹

Free Appropriate Public Education (FAPE)

The Individuals with Disabilities Education Act (“IDEA”) guarantees children with disabilities the right to a free, appropriate, public education (“FAPE”). 20 U.S.C. §1412(a)(1). In order to determine whether a school district has provided a FAPE requires the determination of whether the school district complied with the procedural and substantive requirements of IDEA. *Board of Education of the Hendrick Hudson Central School District, Westchester County et. al. v. Rowley*, 458 U.S. 176, 206, 102 S.Ct. 3034 (1982). In matters alleging a procedural violation, the hearing officer may find that a student did not receive a FAPE only if the procedural inadequacy impeded the student’s right to a FAPE, significantly impeded the parent’s opportunity to participate in the decisions-making process regarding the provision of a FAPE to the parent’s child or caused a deprivation of educational benefit. 20 U.S.C. §1415(f)(3)(E); 34 C.F.R. §300.513(a); *Rowley* at 206-207. In the instant case, Parent’s due process complaint notice does not allege any procedural violations of the IDEA.

As recently clarified by the United States Supreme Court, under the Individuals with Disabilities Education Improvement Act (“IDEA”), a school satisfies its substantive obligation to provide a free appropriate public education by offering a child “an IEP reasonably calculated to enable a child to make progress in light of the child’s circumstances.” *Endrew F. ex rel. Joseph*

¹¹ During the Due Process Hearing, the District sought to introduce testimony and documentary evidence through the District Representative (DR), who had only worked for the District since April 2022, regarding its written Child Find policies and various newspaper advertisements showing its Child Find efforts. Upon objection to same by Parent’s counsel, this Hearing Officer found that testimony and documentary evidence to be irrelevant and barred admission of same. This Student was presented to the District on September 30, 2019, as a child with a disability by the Early Intervention services coordinator as ES. The District did not need newspaper articles and written policy manuals to identify this Student. GC provided the District with all of the information needed to trigger an evaluation. Dr. V conceded that the Student would have been found eligible for an IEP in late 2019 had the District met its legal Child Find obligation. (FF #21-23.)

F. v. Douglas Cty. Sch. Dist., No. 15-827, 137 S.Ct. 988 (U.S. Mar. 22, 2017.) “[A]n IEP is reasonably calculated to confer educational benefit when it is ‘likely to produce progress, not regression or trivial educational advancement.’” *Alex R. ex rel. Beth R. v. Forrestville Valley Cmty. Unit Sch. Dist. No. 221*, 375 F.3d 603, 615 (7th Cir. 2004.) [T]he progress contemplated by the IEP must be appropriate in light of the child’s circumstances. . . . The instruction offered must be ‘specially designed’ to meet a child’s ‘unique needs’ through an *individualized* education program.” *Andrew F.*, 137 S.Ct. 988. The IEP is to provide a statement of the “special education and related services and supplementary aids and services . . . to be provided to the child.” 34 C.F.R. 300.320(a)(4).

The IEP is the “centerpiece” of the IDEA. The IEP is constructed only after careful consideration of the child’s present levels of performance of achievement, disability, and potential for growth. For a child not integrated in the regular education classroom, a child’s IEP may not need to aim for grade level advancement if that is not a reasonable prospect for the child. *Andrew F. v. Douglas County Sch. Dis. Re-1*, 375 S. Ct. 988, 69 IDELR 174 (US 2017). The child’s program, however, “must be appropriately ambitious in light of the circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom.” *Id.* The goals can differ; however, the goals should provide the child with the chance to “meet challenging objectives.” The IEP must also aim to enable the child to make progress. The Supreme Court explained that an IEP which provides for merely more than de minimis progress from year to year “can hardly be said to have offered an education at all.” *Andrew F. v. Douglas County Sch. Dis. Re-1*, 375 S. Ct. 988, 69 IDELR 174 (US 2017). Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. *Id.*, at 206–207, 102 S.Ct. 3034.

The testimony and documentary evidence presented at hearing was clear and uncontroverted by the District. When presented with the Student and a request for a case study evaluation on September 30, 2019, the District took no action and failed in its obligation to evaluate the Student and identify him as a Student with a disability. Three years later, after repeated Parent requests, the District provided evaluation domain documents to Parent generated outside of a school team or IEP team meeting and containing outdated information. (FF #16-20.) The District conceded that the Student would have been found eligible for special education and related services had he been evaluated by the District in September – October 2019. (FF #23.) From August 5, 2020, through August 19, 2022, the District did not evaluate the Student and no IEPs were created for him. (FF #1-8, 16-20, 23.) Based upon the testimony and documentary evidence introduced at hearing, it is the finding of this Hearing Officer that the District denied the Student a free and appropriate public education (FAPE) when it failed to evaluate and provide him with IEPs reasonably calculated to enable him to make educational progress in light of his unique circumstances from August 5, 2020 through August 19, 2022.

Compensatory Education

“Compensatory services are well-established as a remedy under the IDEA.” *Jaccari J. v. Board of Educ. of City of Chicag, Dist No. 299*, 690 F.Supp.2d 687, 707 (N.D. Ill. 2010). Compensatory education is an equitable remedy that “should aim to place disabled children in the same position they would have occupied but for the school district’s violation of the IDEA.” *Reid v. District of Columbia*, 401 F.3d 516, 522 (D.C. Cir. 2005). A hearing officer has the authority to award compensatory education. *ZJ v. Bd. of Educ. of Chi.*, 344 F. Supp. 3d 988, 1002 (N.D. Ill. 2018). The testimony and documentary evidence at hearing reflect that the Student experienced a significant loss when he did not receive an evaluation, an IEP, and a placement and related services

from the District beginning at age three. Attendance in the school setting provides the opportunity for experiences and therapies that allow a child to make as much progress as possible in those critical, developmental years. The District conceded this point at hearing. (FF #14-15.) This denial of a FAPE to this Student extends from at least September 30, 2019, through August 19, 2022, which is a period of almost 3 years. (FF #2, 17-18.)

The Student has deficits in the areas of adaptive functioning, personal-social functioning, speech language/communication, fine and gross motor skills, and cognitive functioning. He requires special education and related services in the areas of speech language, occupational therapy, physical therapy, behavioral skills, Applied Behavioral Analysis (ABA) therapy, social and independent functioning skills. (FF #3-5.) When the District failed to evaluate the Student in September 2019, Parent sought outside services in an attempt to meet the Student's needs. Her mother, a retired teacher, provided academic instruction at home. Parent enrolled the Student in a school readiness program at WCT. Further, WCT provided services to the Student in the areas of occupational therapy, speech language therapy, ABA therapy, and physical therapy. WCT evaluated the Student and created goals based upon his unique individual needs. The Student gained skills and made progress toward his goals as established by WCT. (FF #8-13.) The testimony and documentary evidence introduced at hearing was credible, consistent and uncontroverted by the District on this point. Parent paid an out-of-pocket a total of \$19,556.52 to WCT from 2019 through March 6, 2023, for speech language, occupational therapy, ABA therapy and physical therapy services. (FF # 24.) Further, Parent paid \$964.06 for various educational Apps, tablets, and materials to support the Student's academic instruction provided by her mother. (FF #30.) Parent is entitled to reimbursement for these amounts as the District failed to evaluate the Student and provide him with a FAPE for a period of three (3) years. Parent is entitled to

reimbursement for mileage, at the IRS mileage reimbursement rate for round trip travel from her home to WCT over the period at issue. (FF #29, 31-37.)

As the District failed to evaluate the Student in his identified areas of suspected disability from September 30, 2019, through August 19, 2022, the Parent is entitled to Independent Education Evaluations (IEEs) at District expense in those areas: speech language, occupational therapy, visual motor, physical therapy, social emotional learning, academic and cognitive functioning, and functional skills at the prevailing market rate for same. [At the close of the hearing, this IHO asked both Parent's counsel and District counsel what the prevailing market rate was for same and both agreed the range is from \$3,000.00 to \$3,500.00 per evaluation.]

To remediate the Student's speech language deficits, due to the District's failure to provide speech language related services, the Student requires one (1) hour per week of speech language services, for a period of one (1) year with fifty (50) weeks of services per year. The current rate for this speech language therapy is approximately \$150.00 per hour. (FF #25, 38.)

To remediate the Student's fine and gross motor deficits, due to the District's failure to provide occupational therapy related services, the Student requires one (1) hour per week of occupational therapy related services, for a period of one (1) year with fifty (50) weeks of services per year. The current rate for this speech language therapy is approximately \$160.00 per hour. (FF #26, 39.)

To remediate the Student's behavioral deficits, due to the District's failure to provide behavioral therapy related services, the Student requires five (5) hours per week of ABA therapy, for a period of one (1) year with fifty (50) weeks of services per year, supervised by a BCBA at least once per month. The current rate for this ABA therapy is approximately \$40.00 per hour. The cost for BCBA supervision of the ABA therapy is \$100.00 per hour. (FF #27-28, 40.)

To remediate the Student's academic deficits, related to the District's failure to evaluate and provide him with an IEP, the Student requires ten (10) hours per week of 1:1 academic tutoring for one (1) year with fifty (50) weeks of services per year. The current rate for such instruction is approximately \$78.00 per hour with Sylvan Learning Center. (FF# 41.)

The testimony and documentary evidence presented at hearing related to the types of intervention, time required, and costs to remediate the Student's academic, speech language, occupational therapy, and behavioral deficits was uncontroverted by the District at hearing. (FF #42.) This Hearing Officer finds the testimony of Dr. W, Parent, OT, and KK to be credible and persuasive based upon their respective education, training, extensive experience, and work with the Student. This Hearing Officer finds this request to be reasonable and to be supported by the recommendations of Dr. W, OT, and KK and it is so ordered.

CONCLUSION

Based upon the Findings of Fact and Conclusions of Law, the District denied the Student a FAPE when:

- (a) From September 30, 2019, through August 19, 2022, it failed to timely and appropriately identify the Student as a student with a disability pursuant to its Child Find obligation;
- (b) From August 5, 2020, through August 19, 2022, the District failed to provide an IEP for the Student reasonably calculated to enable the Student to make progress in light of his unique circumstances and to receive educational benefit.

Parent is entitled to the requested relief in its entirety.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered:

Parent is hereby granted the following relief:

- a. The District is hereby Ordered to reimburse Parent for the cost of WCT's occupational therapy, speech therapy, ABA therapy, and physical therapy services from October 30, 2019, through March 6, 2023, in the total amount of \$19,556.52 upon receipt of proof of payment for same;
- b. The District is hereby Ordered to reimburse Parent for mileage for round trip transportation of the Student from Home to WCT in the amount of \$1,821.00 (2019 – 140.4 miles at \$0.58 per mile; 2020 – 1,177.2 miles at \$0.575 per mile; 2021 – 691.2 miles at \$0.56 per mile; 2022 – 756 miles at \$0.585 per mile (January 1 – June 30, 2022) and \$0.625 per mile (July 1, 2022 – December 31, 2022); 2023 – 356.4 miles at \$0.655 per mile);
- c. The District is hereby Ordered to provide compensatory education up to \$7,500.00 in total for speech language therapy by a qualified private provider at a rate not to exceed \$150.00 per hour. Parent shall have two (2) years from the date of issuance of this Final Determination and Order in which to utilize said award;
- d. The District is hereby Ordered to provide compensatory education up to \$8,000.00 in total for occupational therapy by a qualified private provider at a rate not to exceed \$160.00 per hour. Parent shall have two (2) years from the date of issuance of this Final Determination and Order in which to utilize said award;
- e. The District is hereby Ordered to provide compensatory education up to \$39,000.00 in total for one-on-one academic tutoring instruction by a qualified private provider at a rate not to exceed \$78.00 per hour. Parent shall have two (2) years from the date of issuance of this Final Determination and Order in which to utilize said award;
- f. The District is hereby Ordered to provide compensatory education up to \$10,000.00 in total for ABA therapy by a qualified private provider at a rate not to exceed \$40.00 per hour. Parent shall have two (2) years from the date of issuance of this Final Determination and Order in which to utilize said award;
- g. The District is hereby Ordered to provide compensatory education up to \$1,200.00 in total for the above ABA therapy to be supervised by a qualified private Board Certified Behavior Analyst (BCBA) at a rate not to exceed \$100.00 per hour. Parent shall have two (2) years from the date of issuance of this Final Determination and Order in which to utilize said award;
- h. The District is hereby Ordered to reimburse Parent for the cost of educational Apps, tablets, and increased internet bandwidth to accommodate the Student's learning Apps and to access telehealth therapy appointments from October 30, 2019, through

March 6, 2023, in the total amount of \$964.06 upon receipt of proof of payment for same;

- i. The District is hereby Ordered to fund the cost of Independent Education Evaluations in the areas of speech language, occupational therapy, visual motor, physical therapy, social emotional learning, academic and cognitive functioning, and functional skills up to a cost of \$3,500.00 per evaluation (\$21,000.00 in total). Parent shall have two (2) years from the date of issuance of this Final Determination and Order in which to utilize said award.

In the event extenuating circumstances arise, such as prolonged illness documented by a physician, the above timelines for redemption of the compensatory education awarded in paragraphs (a) through (i) above shall be extended in duration up to the length of the illness.

The District shall reimburse Parent, or pay directly, the above ordered costs within 30 calendar days of receipt of proof of same (i.e. statement for services or invoice from provider, facility, or transportation provider).

In accordance with 105 ILCS 5/14-8.02a(h), within **45** calendar days of receipt of this Order, the school district must submit proof of compliance to:

Illinois State Board of Education
Program Compliance Division
100 North First Street
Springfield, IL 62777-0001

NOTICE OF RIGHT TO REQUEST CLARIFICATION

Pursuant to 105 ILSC 5/14-8.02a(h) either party may request clarification of this decision by submitting a written request to the Hearing Officer within five (5) days of receipt of the decision. The request for clarification shall specify the portions of the decision for which clarification is sought. A copy of the request shall be mailed to all other parties and the Illinois State Board of Education, Program Compliance Division, 100 North First Street, Springfield, IL

62777. The right to request clarification does not permit a party to request reconsideration of the decision itself and the Hearing Officer is not authorized to entertain a request for reconsideration.

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Pursuant to 105 ILCS 5/14-8.02a(i), any party aggrieved by this Hearing Officer Determination may 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 one hundred and twenty (120) days from the date the decision is mailed to the party.

Dated: April 26, 2023

[Redacted]

/s/: Janet K. Maxwell-Wickett
Janet K. Maxwell-Wickett,
Impartial Hearing Officer

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

APPENDIX A

[REDACTED] v. Elementary SD [REDACTED]
Case No: 2023-DP-0015

Student	[REDACTED]
Attending School	N/A
District School	N/A
Student's Parent/Petitioner	[REDACTED]
Parent Witnesses:	
Joint Witnesses:	
District Representative for ESD [REDACTED]/Director of Student Services	[REDACTED] (DR)
School Psychologist	Dr. [REDACTED] (Dr. V)
Outside Board Certified Behavior Analyst (BCBA)	[REDACTED] (KK)
Early Intervention Program Coordinator, Easter Seals	[REDACTED] (GC)
Pediatrician	Dr. [REDACTED] (Dr. W)
Outside Occupational Therapist	[REDACTED] (OT)
Schools/Pediatric Therapy Providers:	
[REDACTED] (ES)	
Westside Children's Therapy (WCT)	