



**Before The  
State of Wisconsin  
DIVISION OF HEARINGS AND APPEALS**

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In the Matter of [Student]

**DECISION**

v.

DHA Case No. DPI-22-0002

DPI Case No. LEA-22-0002

[School District]

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The Parties to this proceeding

are: [Student], by

[Student's Parent]

[District], by

[District's Attorney]

**PROCEDURAL HISTORY**

On February 1, 2022, the Wisconsin Department of Public Instruction (DPI) received a request for a due process hearing under Wis. Stats. Chapter 115 and the federal Individuals with Disabilities Education Act (IDEA) from [Parent] on behalf of [Student] (the Student) against the [District] (the District). DPI referred the matter to the Wisconsin Division of Hearings and Appeals for hearing, and Administrative Law Judge (ALJ) Sally Pederson was duly appointed.

On February 8, 2022, the ALJ provided the parties with written notice via electronic mail (email) and U.S. mail of a prehearing telephone conference scheduled for March 1, 2022. The notice sent by U.S. mail to the Parent was returned as undeliverable. Also on February 8, 2022, the District sent the Parent a written response to the hearing request. On February 22, 2022, the

Parent contacted DHA and requested that a [Language] language interpreter be present at the prehearing conference to interpret for her. The prehearing telephone conference was rescheduled to March 7, 2022, to grant the District additional time to hire an interpreter for the Parent.

On March 2, 2022, the District filed a motion for summary judgment with a supporting affidavit. The District moved for dismissal of the hearing request as a matter of law, arguing that it was time-barred by Wisconsin's one year statute of limitations for filing due process hearing requests. On March 4, 2022, the Parent filed a reply to the District's response to the hearing request, as well as a motion to strike the District's response. On March 7, 2022, the Parent filed a motion to strike the District's motion for summary judgment and attached affidavit, arguing that the District never provided her with procedural safeguard notices in her native language of Polish.

A prehearing telephone conference was held on March 7, 2022, with the parties and a Polish language interpreter. During the telephone conference, the ALJ denied the Parent's motion to strike the District's response to the hearing request, noting that the District was statutorily required to send the Parent a written response to the hearing request, and the Parent cited no valid legal basis for striking the response. After extensive discussion, the ALJ requested that the parties file additional information related to the summary judgment motion and scheduled another telephone conference for March 10, 2022.

On March 9, 2022, the District filed a second affidavit with attached documentation in support of its motion for summary judgment. On March 10, 2022, the Parent filed a request to dismiss the District's motion, as well as additional requests regarding the due process hearing.

A telephone conference was held with the parties and a [Language] language interpreter on March 10, 2022 to address the motions. The ALJ denied the District's motion for summary judgment on the grounds that the District did not provide procedural safeguard notices to the Parent in her native language of [Language], and therefore, the exception to Wisconsin's one-year statute of limitations was triggered by the failure to provide the Parent with legally sufficient notice of her rights.

Another prehearing telephone conference was held on April 11, 2022, for the purposes of scheduling the hearing and establishing pre- and post-hearing deadlines. The hearing was scheduled for May 17-19, 2022.

At the request of the District, another telephone conference was scheduled for May 12, 2022, to address questions and concerns related to the Parent's witness and exhibit lists. During the telephone conference, the [Language] language interpreter quit the job because of the Parent's statements that the interpretation was inaccurate. Consequently, the hearing was rescheduled to May 19-20 and May 25-26, 2022 to accommodate the need to hire a new interpreter.

A prehearing conference was held in person with the parties and a [Language] language interpreter on May 18, 2022 to address issues related to witnesses. The due process hearing began on May 19, 2022 at the [District]. Later dates of the

hearing were rescheduled in order for the District, by request of the Parent and order of the ALJ, to have exhibits translated into [Language] by an expedited, certified translation service. In order to complete the hearing and accommodate the schedules and needs of the parties, ALJ, and witnesses, hearing dates were further rescheduled and added. The hearing was continued on June 22-24, July 5, July 7, July 13-14, and July 18, 2022. The record closed on August 22, 2022. At the request and agreement of the parties, the decision deadline was extended for cause, pursuant to Wis. Stat. § 115.80(6), to September 16, 2022.

## ISSUES

Since January 31, 2020, has the District violated the Student's right to a free, appropriate public education by failing to:

1. refer the Student for an educational reevaluation because their disability classification of (Student's Disability) does not adequately identify their communication needs; and
2. provide appropriate related and/or supplementary aids and services sufficient to meet the Student's communication needs?

## FINDINGS OF FACT

1. The Student is a #-year-old (d.o.b. ##/##/####) child who resides in the District. They have been medically diagnosed with (Student's Disability) and (Student's Disorder). (Ex. N)
2. The Student first began attending school in the District in March 2018 as a 4K (pre-kindergarten) student. In May 2018, the District conducted a special education reevaluation of the Student (he was first evaluated in 2016 in (City, State) public schools), and their individualized education program (IEP) team determined that they met the eligibility criteria for autism but not for speech and language impairment. (Ex. 112, pp. 4-5; Tr. 35)
3. The Student attended #### Elementary School in the District for kindergarten (2018-2019) and first grade (2019-2020).
4. The Student's first grade IEP(s) indicated that they had the following disability-related areas of need: social/peer engagement, literacy, written language, emotional/behavioral regulation, social communication, safety (related to transportation and medication), and sensory processing/attention/focus. (Exs. 97, 100, 101)
5. Accordingly, the Student's IEP contained four annual goals related to literacy, written language, social/emotional/behavioral skills, and social communication, and it included special education, related services, supplementary aids and services, and supports for school personnel. In terms of special education services, the IEP called for 25 minutes per day of academic instruction in reading, 25 minutes per day of academic instruction in

written language, and 20 minutes twice per day of behavioral/social skills instruction.

The Student also was to receive the following related services: occupational therapy for 20 minutes three times per week; speech and language services for 20 minutes three times per week; and transportation to and from school twice per day. (Ex. 100)

6. In addition, the IEP listed and described numerous supplementary aids and services to be provided to the Student, including the following:
  - test accommodations and modifications,
  - visual cues and/or schedules,
  - safety precautions,
  - transition services,
  - extended time,
  - behavior intervention plan (BIP),
  - sensory accommodations,
  - social stories,
  - foreshadowing,
  - access to resource room, and
  - adult assistance in regular education setting.

The IEP also included consultation between regular education classroom teachers and the special education teacher, the speech and language therapist, the occupational therapist, and the school nurse. (Exs. 100, 101)

7. In the fall of 2019, the Student began to exhibit an increase in problematic behaviors, such as throwing materials and refusing to do work, so the District convened an IEP meeting on October 17, 2019 to review/revise the IEP and discuss ways for staff to proactively respond to and try to mitigate such behavior. The Parent attended the IEP meeting and provided considerable input to the IEP team. As a result, the Student's daily schedule and expectations were adjusted to reduce triggers and to aim for continued progress academically and behaviorally. In addition, the IEP team agreed to have a behavioral/autism consultant observe the Student in school and collaborate with staff. (Ex. 101, pp. 2-3, 5; Tr. 438, 676-678)
8. On November 7, 2019, one sentence in the IEP was amended at the request of the Student's father to more accurately reflect his input at the October IEP meeting, and the revised IEP was implemented on November 13, 2019. (Ex. 100, pp. 20-21) This IEP was in effect on January 31, 2020, the initial date relevant to the issues in this matter.
9. At the request of the Parent, the District held another IEP team meeting on January 30, 2020. The Parent and her attorney attended the IEP team meeting. The IEP team discussed the Parent's concerns that the Student: (1) had speech and language deficits that were not appropriately addressed by their IEP goals; (2) needed more adult supervision throughout the school day to reduce unregulated behavior; (3) needed more time in the

special education resource room; (4) needed more “down time” or breaks between academic tasks; and (4) needed a revised BIP that would include data collection. In addition, the IEP team reviewed and discussed an evaluation report that the Parent provided to the District from the Student’s private speech and language pathologist. (Ex. 97, pp. 2-3, 5)

10. The IEP team revised the IEP, effective February 11, 2020, to increase the amount of time the Student spent in special education rather than the regular education setting, provide a segmented, visual schedule that can be continually adjusted, change the social communication annual goal to a functional communication goal, and decrease academic expectations of the Student. (Ex. 97; Tr. 445-449, 678-684) The Student continued to receive speech and language and occupational therapy, as well as transportation, as related services. In addition to the existing list of supplementary aids and services in the Student’s IEP (see Finding of Fact #6), the following were added:

- visual schedules (distinct from visual cues/schedules),
  - assignment modifications,
  - access to individualized work space,
  - tangible rewards, and
  - second adult support in special education environment.
- (Ex. 97)

11. The Parent did not request that the District evaluate or reevaluate the Student for speech and language or any other disability at either the October 2019 or the January 2020 IEP meetings. (Tr. 466, 685)

12. Speech and language pathologist [Speech and language pathologist] was a member of the Student’s IEP team. She provided speech and language services to the Student when they was in kindergarten and first grade and until her retirement in June 2020 after working as a speech and language pathologist for 36 years. (Tr. 11, 422) She did not refer the Student for a speech and language evaluation in January 2020 because she did not think it was needed for several reasons: the Student had been making progress towards their four annual goals as of December 2019; the IEP team reviewed information in the private speech and language pathologist’s evaluation report and considered that information when revising the Student’s IEP at the January 2020 IEP meeting; and the Student’s three-year reevaluation would be conducted by the District during next school year. (Ex. 97, pp. 12, 14, 16, 19; Tr. 452, 454, 466-467)

13. As a result of the COVID-19 pandemic, Wisconsin schools were closed by gubernatorial order on March 13, 2020. (Tr. 467, 686) District schools were fully closed for a week of spring break, plus an additional week, in March 2020. After that, the District offered instruction via Seesaw, an online platform on which teachers posted instruction and assignments for students to complete at home, and this included speech and language activities for the Student posted by [Speech and language pathologist]. (Tr. 468, 1233-1234)

14. On approximately April 1, 2020, the Student's special education teacher [Student's special education teacher] contacted the Parent via email to obtain consent to provide virtual instruction to the Student, but she did not receive a response. Eventually, about a month later, the Parent requested virtual instruction for the Student, which the District provided via Zoom, including individualized direct instruction in reading three times per week and individualized related services of speech and language and occupational therapy twice per week through the end of the school year. (Tr. 468, 687-688) The Student was also able to attend a virtual half-hour group "morning meeting" on Fridays via Zoom with their regular education teacher and first grade classmates, but they did not participate well in those sessions. (Tr. 1234-1236)
15. The June 3, 2020 progress reports indicate that, with regard to their annual IEP goals, the Student had not met their literacy and social/emotional/behavioral goals and had made progress towards but not met their written language and functional communication goals. (Ex. 97) After school closure in March 2020, the Student did not have opportunities for peer interaction needed to achieve some of the objectives related to the social/emotional/behavioral and communication goals. (Ex. 97, pp. 17, 20; Tr. 456)
16. On June 3, 2020, the District held the Student's annual IEP team meeting, and the meeting continued on June 9, 2020. The IEP was written to reflect services that the Student would receive when attending school virtually and also those he would receive when schools re-opened for in-person attendance. The Parent attended the IEP meeting, and the IEP contains three pages that set forth her concerns. At the meeting, the Parent requested that the Student's three-year reevaluation, which was due in 2021, be conducted early and that they be evaluated for a speech and language impairment. The IEP team agreed to conduct the reevaluation early, as soon as schools re-opened. (Ex. 96; Tr. 473)
17. The June 2020 IEP provided that the Student would receive the related services of occupational therapy and speech and language therapy (noting in both virtual and in-person instructional settings) and transportation (in-person only). The IEP set forth many supplementary aids and services, including:
  - test accommodations and modifications,
  - visual cues and/or schedules,
  - safety precautions,
  - extended time,
  - behavior intervention plan (BIP),
  - sensory accommodations,
  - social stories,
  - foreshadowing,
  - access to resource room,
  - second adult for assistance in regular education setting,
  - visuals and visual schedules,

- assignment modifications,
- access to individualized work space, and
- transition services.

The IEP also included consultation between special education and classroom teachers and consultation with the speech and language clinician, occupational therapist, and school nurse, as well as collaboration and consultation by the case manager with the family and/or colleagues to support the Student during school closure. (Ex. 96)

18. The Student began second grade on September 1, 2020, with the District continuing to provide virtual instruction to its students. Their virtual instruction was provided by staff at ##### Elementary School, a newly built school in the District whose boundaries the Student resided within. As in first grade, they received individualized direct instruction in reading and individualized related services of speech and language and occupational therapy, as well as supplemental aids and services such as visual aids, social stories, visual schedules, extended time, and assignment modifications. (Ex. 96; Tr. 233-234, 347, 638-639)
19. Although District schools had not re-opened, the Parent informed the District on September 4, 2020 that she wanted assessments of the Student's receptive and expressive language completed sooner than agreed upon previously. On September 16, 2020, the Parent provided the District with a release of information so that they could review previous assessments of the Student to help ensure that they would not conduct duplicative or unnecessary assessments as part of their reevaluation. (Ex. 31; Tr. 237-239)
20. On September 28, 2020, the District sent the Parents formal, written Notice of Reevaluation of the Student. (Ex. 81)
21. School psychologist [School psychologist] conducted a review of existing data as part of the Student's three-year reevaluation. She had experience conducting such records reviews as part of reevaluations and utilized the DPI's form for review of existing data in completing the task. (Ex. 34; Tr. 242, 1075-1076)
22. The District scheduled and held an IEP meeting on October 7, 2020 to review and discuss the review of existing data report. Prior to the meeting that day, the Parent sent an email to the District's Director of Student Services, [Director of Student Services] stating that there was incorrect information and omissions of data in the report. The meeting was held on October 7, but because [Director of Student Services] was unable to attend, she scheduled another meeting for October 12 to further discuss the Parent's concerns. (Exs. 33, 51; Tr. 242-244)
23. [School psychologist] reviewed the existing data report and realized that, as a new District employee, she had missed a neuropsychological report from a couple years prior because she had looked at the District's new online platform for storing special education records,

unaware that there was a previous platform where older records were still located. She also determined that some of the information that the Parent wanted included was new information that was not in existing records (meaning it was not an error for it not to be included in the records review) and that other omissions or inaccuracies in records were pre-existing in the documents, such as those from other school districts, or were not actually errors as claimed by the Parent. [School psychologist] revised her report of existing data, correcting any omissions or errors that were on the part of the District, and it was provided to the Parent. (Ex. 127; Tr. 1075, 1108-1109)

24. The Parent continued to contact the District with complaints about the review of existing data and filed a discrimination complaint against [School psychologist]. (Exs. 1, 26, 27, 104) The District found no evidence of discrimination by [School psychologist] but had a different school psychologist replace her on the Student's reevaluation team. (Tr. 252-253, 1111)
25. Because the Parent expressed many concerns to District staff about the Student's education and requested changes to services during the fall of 2020, [Student Services Director] and the Student's special education teacher contacted the Parent about scheduling an IEP team meeting to review/revise the Student's IEP or revising it without an IEP meeting via an I-10 form. However, the Parent expressed that she did want an IEP meeting before the reevaluation was completed. (Exs. 30, 50; Tr. 254-257, 840-841)
26. Although not legally required, in an effort to communicate clearly and easily with the Parent, the District held a meeting with the Parent on October 7, 2020 about the assessments of the Student that would be conducted by the District as part of the reevaluation. The District also had additional follow-up contact with the Parent about the reevaluation and assessments on October 13 and 14, 2020. (Exs. 3, 102, Tr. 842-845)
27. The District and Parents ended up participating in mediation with the Wisconsin Special Education Mediation System (WSEMS) in order to reach an agreement about various aspects of the Student's reevaluation. As part of the mediation agreement, they agreed to evaluate the Student in the disability areas of autism, speech and language, and other health impairment (OHI) and to extend the timeline to complete the reevaluation to January 31, 2021. (Ex. F; Tr. 261-264)
28. District IEP team members conducted assessments of the Student and presented their evaluation reports at IEP reevaluation meetings on December 22, 2020 and January 27, 2021, which the Parent attended. The IEP team determined that the Student met the eligibility criteria for autism, speech and language, and OHI. (Exs. 111, 112; Tr. 264-266, 847-853)
29. A few days after the reevaluation, on February 1, 2021, the Parent requested that the District evaluate the Student for a specific learning disability (SLD). The District responded to the request with a Prior Written Notice letter, in accordance with Wis. Stat. §§ 115.792(1)(b) and (2), stating that it was not rejecting the Parent's request but that the



request would be discussed with the IEP team when it convened to review/revise the Student's IEP. (Ex. 109; Tr. 274-275)

30. Throughout the 2020-2021 school year, the Parent made several similar requests of the District, including: in January 2021, requesting that the District provide the student with auxiliary aids and services immediately (before the reevaluation was completed) under Title II of the Americans with Disabilities Act; in March 2021, requesting that the District refer the Student for an evaluation under Section 504 of the Rehabilitation Act of 1974; also in March 2021, requesting an independent education evaluation (IEE) of the Student by an ALTA-certified academic language therapist; and in April 2021, requesting that the District conduct an additional assessment of the Student, specifically, the Test of Semantic Reasoning. The District responded to these various requests through Prior Written Notice letters, a formal Notice of Response to an Activity Requested by a Parent, by providing the assessment, and by looking into providing an IEE as requested. (Exs. V, 108, 109, 110, 114; Tr. 273-278, 584, 858-859) In terms of the IEE request, [Special Education Director] contacted ALTA-certified therapist but could not find one willing to do the diagnostic test, so she contacted the Parent with alternative options, but the Parent did not respond until bringing it up again at the June 2021 IEP meeting. The Student Service Coordinator then looked into it through Northwestern University and emailed the Parent about it, but again the Parent did not respond. (Tr. 584-586) Overall, [Special Education Director] and other District staff received hundreds of emails and frequent, sometimes daily communications from the Parent. (Exs. 3, 30; Tr. 256-257, 586-587, 681-682, 840-841, 870)
31. In February 2021, the District allowed families and students to choose between 100% virtual instruction and hybrid instruction that included half virtual and half in-person instruction. The Parents chose to have the Student continue to receive 100% virtual instruction, which required the Student to be placed in a different regular education classroom with [regular education teacher] the regular education teacher assigned to the fully virtual second grade class at ##### Elementary School. (Tr. 107-108, 854-855) In addition to providing individualized speech and language related services to the Student, the speech and language therapist [Speech and language therapist] observed the Student in virtual small group instruction for literacy and math in order to provide support to [Special education teacher], the special education teacher, and [regular education teacher] regarding the Student's language needs, and she consulted with them about supplementary aids and services. The Parent filed a bullying and harassment complaint against [Speech and language therapist] , [Special education teacher], and [regular education teacher], alleging that they were bullying the Student during small group virtual instruction, so they did not continue in small groups. The District determined that the complaint was unsubstantiated.(Tr. 122-123, 854-858)
32. On March 17 and April 8, 2021, the District held IEP team meetings to review/revise the Student's IEP as follow-up to the reevaluation. (Tr. 279) The Parent attended the meetings and shared numerous concerns about the Student's educational services. She noted that she felt the Student needed one-on-one academic instruction in order to learn, rather than small group instruction, and that she believed they progressed more in second

grade (during virtual instruction) than they had in kindergarten and first grade. (Ex. 135, pp. 1-3) However, the District IEP team members all felt that the Student should be attending school to receive in-person instruction to meet their educational needs. (Ex. ~~135~~) The IEP changed speech and language therapy from a related service to special education instruction and increased it from 20 minutes twice per week to 25 minutes three times per week. In addition, the functional communication annual goal was replaced with an expressive/receptive language goal. New goals were also added in the areas of math and decoding/encoding. (Ex. 135, pp. 17, 27, 29, 37) The IEP provided for related services of assistive technology, occupational therapy, and transportation. The supplementary aids and services in the IEP included:

- test accommodations and modifications,
- extended time,
- behavior intervention plan (BIP),
- sensory accommodations,
- social stories,
- foreshadowing,
- assignment modifications,
- visuals and visual schedules,
- decodable texts,
- modified schedule for meals, medication and bathroom routine,
- general education support,
- assistive technology; external microphone for voice volume,
- transition visits to buildings,
- system of least prompts, and
- adherence to health order for timing meals, medication, and bathroom use.

The IEP also included consultation between special education and classroom teachers and consultation with the speech and language clinician, occupational therapist, school nurse, and assistive technology. (Ex. 135, pp. 38-41)

33. Adhering to DPI's guidance to school districts about the needs of special education students following school closures due to the pandemic, the IEP team also discussed providing the Student with extra educational services to make up for loss of instruction and any deficits resulting from school closure. As a result, the IEP included in-person speech and language services for the Student for 60 minutes four times per week during the summer from June 21 to July 29, 2021. The District agreed to provide the specific program requested by the Parent, which was Visualizing and Verbalizing through Lindamood-Bell, and paid to have Traci Hendricks, a speech and language therapist at Pope Farm Elementary, trained in the program. (Exs. 56, p. 31, 135, p. 37; Tr. 285-287, 582-583, 804)
34. The District held two IEP team meetings for the annual review and revision of the Student's IEP on May 27 and June 1, 2021 and had a private facilitator from the WSEMS

participate in the meetings. The Parent attended the meetings with an attorney, and the IEP team discussed the Parent's concerns which she provided to the team in a 13-page document. The Parent wished the Student to continue receiving virtual instruction from the District. The speech and language direct instruction to the Student was to be provided for 25 minutes three times per week, as in the April 2021 IEP. (Exs. 56, 84; Tr. 865-867, 869) The annual goal related to speech and language was broken down and expanded into three goals, namely, vocabulary/expressive and receptive language, expressive language/oral narration, and narrative comprehension/expressive and receptive language. The related services in the IEP included 30 minutes of occupational therapy-direct service twice weekly, occupational therapy-direct observation 30 minutes per month, school nursing and health services (annual creation, updating, and management of a health plan), and daily transportation. Some new supplementary aids and services were added, with the entire list as follows:

- health services (alternate ways to express need to visit health office and frequent offers to us the bathroom),
- language (picture supported reading software and/or applications; picture symbols),
- emotional and sensory regulation,
- executive functioning,
- social scaffolds,
- literacy (specialized reading and writing software and/or app.),
- adult support in writing,
- least to most prompt hierarchy,
- testing accommodations,
- adult support to monitor health, communication, sensory, emotional regulation, and executive functioning,
- access to single, and
- private bathroom.

The IEP also required the following consultation by staff: between special education and classroom teachers; between special education and regular education teachers and the speech and language therapist and occupational therapist; assistive technology with the team; school nurse consultation with the team and team training on the health plan; and training staff who work directly with the Student on specialized, explicit instruction for comprehension and individualized reading skills. (Exs. 56, 84)

35. During the summer of 2021, the Student attended only half (12 out of 24) of the Visualization and Verbalizing sessions with [speech and language therapist] that had been provided for in the IEP and requested by the Parent. (Exs. 84, 124, 135; Tr. 813)
36. Prior to the start of the 2021-2022 school year, [special education teacher] the Student's special education teacher for third grade at [##### Elementary School], sent emails to the Parents in preparation for the Student attending school in person. The emails included a welcome email, an email with bus route information, an email about the Student having a transition visit at the school, and a video of the Student's classroom. [special education teacher]received no

response from the Parent, and the Student did not attend a transition visit at the school. (Ex. X, pp. 10-11; Tr. 215-216) [special education teacher] had the Clickr assistive technology device installed on her computer to use with the Student and was going to be trained on its use. (Tr. 207-208, 212)

37. Because the Student did not attend the first several days of school at ##### Elementary School, [special education teacher] and other District staff called the family but received no response until the District emailed the Parents to say staff would be visiting them to check on their welfare. The Student's father then called [special education teacher] to inform her that the family was fine, that the Student had behavior struggles over the summer which led the Parents to think they would not be successful in school, and that the decision of returning the Student to school was up to the mother. (Tr. 216-218)
38. On September 9, 2021, the District's enrollment office was informed that the family had moved to an apartment in the ##### Elementary School's attendance area. (Tr. 1002) The District sent a school bus to the Student's new residence, and ##### Elementary School staff conferred with ##### Elementary School staff about the Student's needs and their IEP to prepare to educate the Student at ##### Elementary School. (Ex. 25; Tr. 976, 983, 986, 1003) When the Student did not attend ##### Elementary School for several days, the school principal sent a letter to the Parents and scheduled a meeting to discuss the Student's absences and truancy since no excuse was provided by the Parents for more than a limited number of absences. (Tr. 515-516)
39. On December 8 and 14, 2021, the District held facilitated IEP meetings. (Ex. 119) The Parent requested homebound instruction for the Student, which would involve District staff providing in-person instruction to the Student in their home. The IEP team discussed the Parent's request but did not feel that homebound placement would meet their educational needs or be the least restrictive environment for the Student. Further, because the Student had not been attending school, the IEP team did not have accurate, up-to-date information to determine their present level of performance. The Parent did not provide any medical documentation showing that the Student required homebound instruction. (Ex. 119; Tr. 988-990)
40. The Student never attended school in the District during the 2021-2022 school year. (Tr. 746-748, 983)
41. On February 1, 2022, the Parent filed a due process hearing request with DPI against the District.

## DISCUSSION

### Jurisdiction

The undersigned ALJ has authority to preside over this due process proceeding pursuant to Wis. Stat. § 115.80(2).

### Burden of proof

The U.S. Supreme Court has ruled that the burden of proof in an administrative hearing challenging an IEP is on the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). As the complainants in this matter, the burden of proof is on the Parents. The Parents must “cite credible evidence that the choice[s] the school district made cannot be justified.” *Sch. Dist. v. Z.S.*, 184 F.Supp.2d 860, 884 (W.D. Wis. 2001), *aff’d* 295 F.3d 671 (7<sup>th</sup> Cir. 2002).

### Free, appropriate public education

The IDEA requires that all children with disabilities are offered a free, appropriate public education (FAPE) that meets their individual needs. 20 USC § 1400 (d); 34 CFR § 300.1. A FAPE refers to “special education and related services that are provided at public expense and under public supervision and direction ... and are provided in conformity with an individualized education program.” Wis. Stat. § 115.76(7).

In *Andrew F. v. Douglas Co. Sch. Dist. RE-1*, 137 S.Ct. 988 (2017), the U.S. Supreme Court ruled that the IDEA requires a school district to offer an IEP that is reasonably calculated to enable a child to make progress appropriate in light of the child’s unique circumstances, noting that a child should have the chance to meet challenging objectives.

### Reevaluation

The federal regulations implementing the IDEA set forth the following requirements regarding when a child with a disability must be reevaluated by a school district:

A public agency must ensure that a reevaluation of each child with a disability is conducted in accordance with §§ 300.304 through 300.311—

- (1) If the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or
- (2) If the child's parent or teacher requests a reevaluation.

A reevaluation conducted under paragraph (a) of this section—

- (1) May occur not more than once a year, unless the parent and the public agency agree otherwise; and
- (2) Must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary.

34 CFR § 300.303(a) – (b). *See also* Wis. Stat. § 115/782(4)(a)2.

Here, the Parent has alleged that the District denied the Student a FAPE, as of January 31, 2020, by not referring him for a reevaluation, contending that a reevaluation was warranted because their disability classification of [#####] impairment did not adequately identify or meet their communication needs. However, the evidence on the record does not support the Parent's contention.

Several District employees who were members of the Student's IEP team between January 2020 and January 2021, when their reevaluation was completed, testified at the hearing. None of them testified that they believed that the Student's educational needs, specifically their communication/speech and language needs, were not being met due to them being identified as having only an [#####] impairment. Similarly, no witness at the hearing testified that they believed the Student needed to be reevaluated for a speech and language impairment prior to their three-year evaluation in order to receive a FAPE.

[speech and language pathologist] a speech and language pathologist with 36 years of experience, provided speech and language therapy to the Student as a related service when they was in kindergarten and first grade. She explained that if the Student had been identified as having a speech and language impairment, she would have helped write and plan a speech/language related goal for their IEP, in addition to providing speech and language therapy, but that she provides that therapy and supplementary aids and services to support a child's needs and goals just the same, whether they receives her services as a related service or as special education due to an identified speech and language impairment. [speech and language pathologist] credibly testified that she provided the Student with speech and language therapy and with supplementary aids and services, including nearly daily consultation with classroom staff, that met the Student's educational needs and helped them progress towards their social communication annual goal. Moreover, she convincingly testified that she believed the District proved the Student with a FAPE between January 2020 and her retirement in June 2020 and that if she had thought the Student needed to be referred for a speech and language evaluation, she would have done so in keeping with her ethical obligation. (Tr. 33-34, 431-432, 439-441, 469-470, 479-481, 483)

Similarly, the Student's first grade regular education teacher [regular education teacher] testified that she did not believe that the Student needed to be referred for a functional communication or any other evaluation and that their needs were being met. (Tr. 1219, 1231)

[special education teacher], was the Student's special education teacher, case manager, and a member of their IEP team during kindergarten and first grade. She testified that, in her opinion, the District provided the Student with a FAPE. (Tr. 684-685) She further testified that the Parent did not raise speech and language concerns in October 2019 when they were exhibiting increased problematic behaviors in class or refer the Student for a speech and language evaluation in January 2020 when the IEP team convened to review/revise their IEP. (Tr. 677, 685)

At an IEP team meeting on June 3, 2020, the Parent requested that the Student be evaluated for speech and language. (Tr. 438, 685) In accordance with the law, the District agreed to the Parent's request and to conducting the Student's three-year reevaluation earlier than required when schools had re-opened. However, the Parent informed the District on September

4, 2020 that she wanted the assessments done sooner, even though schools had not re-opened. She provided consent for the release of documents to the District on September 16, 2020.

[speech and language pathologist], the Student's speech and language pathologist since the beginning of second grade in fall 2020, believed that the District provided the Student with a FAPE during the time that she served them. She credibly testified that they made progress in the area of speech and language and towards the speech and language objectives in their IEP. (Tr. 860-864, 869)

The District provided the Parent with written notice seeking parental consent to initiate a reevaluation of the Student on September 28, 2020, which was earlier than the three-year reevaluation was legally required to occur. The parties entered into a mediation agreement regarding the scope of the reevaluation and agreed to extend the deadline to complete the reevaluation. The Student's reevaluation was completed on January 27, 2021, in accordance with the parties' mediated agreement. The IEP determined that the Student met the eligibility criteria for a speech and language impairment.

Since the Student's reevaluation, the amount of speech and language therapy in their IEP has increased somewhat, and more recently, the speech and language goals in their IEP have been expanded. However, these facts are not sufficient to show that the Student was denied FAPE by not being referred for an evaluation between January 31, 2020 and the time that the District began the reevaluation in September 2020.

The credible evidence on the record shows that the Student received speech and language related services and supplementary aids and services from the speech and language pathologists and staff to meet their educational and communication needs. The Parent presented no credible evidence to the contrary. She did not testify at the hearing, nor did the Student's father. Quite simply, the Parent did not meet her burden of proving that the Student was denied a FAPE because the District did not refer him for an evaluation or reevaluation.

#### Related and supplementary aids and services

The related services that may be required in an IEP to provide a child with FAPE "means transportation and such developmental, corrective, and other supportive services as may be required to assist a child with a disability to benefit from special education." Wis. Stat. § 115.76(14); 34 C.F.R. § 300.34(a). *See also* 20 U.S.C. § 1401(26)(A). Also included in the definition of related services are the following:

1. Speech-language pathology and audiology services.
2. Interpreting services.
3. Psychological services.
4. Physical and occupational therapy.
5. Recreation, including therapeutic recreation.
6. Social work services.

7. School nursing services designed to enable a child with a disability to receive a free, appropriate public education as described in the child's individualized education program.
8. Counseling services, including rehabilitative counseling.
9. Orientation and mobility services.
10. Medical services for diagnostic and evaluative purposes only.
11. The early identification and assessment of disabling conditions in children.

Wis. Stat. § 115.76(14)(a).

Supplementary aids and services are defined in federal and state law as aids, services, and other supports provided in general education classes or other education-related settings to enable a student with a disability to be educated with students without disabilities to the maximum extent appropriate. 34 C.F.R § 300.34; Wis. Stat. § 115.76 (16).

With regard to related services, the U.S. Supreme Court has held that school districts are statutorily responsible for offering supportive services that “enable a disabled child to remain in school during the day” noting that such services thereby “provide the student with ‘the meaningful access to education that Congress envisioned.’” *Cedar Rapids Cmty. Sch. Dist. v. Garret F. by Charlene F.*, 526 U.S. 66, 119 S.Ct. 992, 143 L.Ed.2d 154 (1999) (quoting *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 891, 104 S.Ct. 3371, 82 L.Ed.2d 664 (1984)).

The Parent in this case has alleged that the District denied the Student a FAPE since January 31, 2020 by failing to provide related and/or supplementary aids and services sufficient to meet their communication needs. Again, however, the record is bereft of evidence to prove the allegation.

As set forth in detail in the Findings of Fact, the District provided a lengthy list of supplementary aids and services to the Student in every IEP in effect since January 2020. The Student's IEPs also required that they receive related services of speech and language therapy, occupational therapy, and transportation. After speech and language was switched from a related service to special education, their IEPs also included assistive technology and school nursing/health services as related services or supplementary aids and services or both. (Exs. 56, 84, 96, 97, 100) Obviously, speech and language as a related service was included in the Student's IEPs to address their communication needs.

Numerous speech and language pathologists, special education teachers and an occupation therapists testified about the related services and supplementary aids and services they provided to the Student. (Tr. 717, 722, 725, 744, 1212, 1230-1231) [occupational therapist] provided occupational therapy as a related service to the Student in kindergarten through second grade. (Tr. 721) She credibly testified that, in her opinion, the services provided to the Student in the Student's IEPs provided them with a FAPE. (Tr. 750) Likewise, [special education teacher] testified that she believed the District provided the Student with supplementary aids and services that met their needs and provided them with a FAPE. (Tr. 684-685)



[speech and language pathologist] explained that many of the supplementary aids and services in the IEP addressed or assisted the Student with their communication and speech and language needs. Examples of supplementary aids that addressed the Student's communication needs included visual cues, visual schedules, extended time, social stories, foreshadowing, adult assistance, and access to resource room. (Tr. 441-444) The consultation that [speech and language pathologist] and [speech and language therapist] provided to the Student's teachers as a supplementary service/program modification also addressed their communication needs. Both [speech and language pathologist] and [speech and language therapist] testified that they observed the Student make progress in speech and language and towards their speech and language/communication goal objectives.

The Parent did not testify about what related services or supplementary aids and services she believes the Student needed but did not receive from the District. In questioning, the Parent asked a witness about the Clickr or a similar assistive technology device not being provided to the Student at home. However, [special education teacher], the special education teacher at ##### Elementary School, testified that she had the Clickr assistive technology device installed on her computer to use with the Student at school, as the Student was expected to attend school in person in the fall of 2021. (Tr. 207-208, 212) In addition, the District arranged for the Clickr device and other supplementary aids and services and related services, including bus transportation, to be available for the Student at ##### Elementary School after staff learned they had moved their residence to that attendance area. (Ex. 25, p. 2; Tr. 960-961, 1003)

The Parent failed to meet her burden of proof. The evidence on the record shows that the District provided the Student with related and/or supplementary aids and services sufficient to meet their communication needs.

#### Findings in support of an award of attorneys' fees to the District

In its post-hearing brief, the District requested that the ALJ make findings to support an award of attorney's fees and costs to the District. The District argued that the Parent filed the due process request for the purpose of harassing the District and its staff, causing unnecessary delays, and causing the District to incur excessive legal fees and costs.

A court may order a parent to pay attorney's fees to a school district that prevails in an action brought under the IDEA if the court finds that the action was brought for an improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation. 34 CFR 300.517(a)(1)(ii).

This tribunal is not a court and lacks the authority or jurisdiction to order attorneys' fees to a prevailing party in this administrative proceeding. While the District is the prevailing party in this matter, the findings that it requests must be made by a court in order to be awarded attorneys' fees. Accordingly, I decline to make such findings.

All of the arguments presented by the parties were carefully considered by the undersigned ALJ. The courts have recognized that an administrative decision-maker "is not required to make findings that respond to every issue the [Complainants] raised in its request."

*Peace Lutheran Church & Acad. v. Vill. of Sussex*, 2001 WI App 139, ¶ 33, 246 Wis. 2d 502, 631 N.W.2d 229. Thus, any arguments and evidence on the record that were not specifically mentioned were determined to not merit comment in the decision.

#### CONCLUSIONS OF LAW

1. Since January 31, 2020, the District did not violate the Student's right to a free, appropriate public education by not referring him for an educational reevaluation.
2. Since January 31, 2020, the District provided the Student with appropriate related and/or supplementary aids and services sufficient to meet their communication needs and afford him a free, appropriate public education.

#### ORDER

It is hereby ordered that the due process hearing request in this matter is dismissed.

Dated at Madison, Wisconsin on September 7, 2022.

STATE OF WISCONSIN  
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By: \_\_\_\_\_

  
Sally J. Pederson  
Senior Administrative Law Judge

APPEAL RIGHTS FOLLOW ON NEXT PAGE

**NOTICE OF APPEAL RIGHTS**

Any party aggrieved by the attached decision of the administrative law judge may file a civil action in the circuit court for the county in which the child resides or in federal district court, pursuant to Wis. Stat. § 115.80(7), 20 USC § 1415, and 34 CFR § 300.512. The court action must be filed within 45 days after service of the decision by the Division of Hearings and Appeals.

It is the responsibility of the appealing party to send a copy of the appeal to the Director of Special Education, Special Education Team, Department of Public Instruction, 125 South Webster Street, Madison, WI 53703. The Department of Public Instruction will prepare and file the record with the court only upon receipt of a copy of the appeal. The record will be filed with the court within 40 days of the date that the Special Education Team at the Department of Public Instruction receives the appeal.