

**STATE OF MICHIGAN  
MICHIGAN ADMINISTRATIVE HEARING SYSTEM**

**IN THE MATTER OF:**

\_\_\_\_\_,  
Petitioner

v

Warren Consolidated Schools,  
Respondent

**Docket No.: 16-000898**

**Case No.: 16-00011**

**Agency: Education**

**Case Type: ED Sp Ed Regular**

**Filing Type: Appeal**

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**Issued and entered  
this \_\_\_\_ day of April, 2016  
by: Christopher S. Saunders  
Administrative Law Judge**

**DECISION AND ORDER**

**PROCEDURAL HISTORY**

Appearances: Petitioner \_\_\_\_\_ appeared on her own behalf. Attorney Michelle Eaddy appeared on behalf of the Warren Consolidated Schools, Respondent.

This matter concerns a due process hearing request/complaint under the Individuals with Disabilities Education Act (IDEA) 20 USC 1400 *et seq.*

On January 13, 2016, Petitioner filed a due process request/complaint with the Michigan Department of Education on behalf of her son (Student)<sup>1</sup>. It was forwarded to the Michigan Administrative Hearing System and assigned to Administrative Law Judge (ALJ) Christopher S. Saunders.

A prehearing conference was held on January 27, 2016, wherein the issues for hearing were delineated and the hearing was scheduled for February 29, 2016; March 1, 2, and 3, 2016.

The hearing was convened on February 29, 2016 at the administrative offices for the Warren Consolidated Schools, located in Warren, Michigan. The Petitioner was present on her own behalf. Anne Donato, Director of Special Education, and Kendall Giovannini, Supervisor of Special Education, were present on behalf of Respondent District. Respondent District was represented by attorney Michelle Eaddy.

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<sup>1</sup> To protect the privacy of the minor child, Student is substituted for the child's name.

The hearing continued on March 1 and 2, 2016. The hearing concluded on March 2, 2016.

The following are exhibits that were offered by Petitioners and admitted into evidence:

1. Petitioners Exhibit A is a Wardle Medical Laboratory report pertaining to Student consisting of 9 pages and dated 9/26/2013.
2. Petitioner's Exhibit B is a final report regarding an MRI of the brain without contrast for Student.
3. Petitioner's Exhibit C is a copy of the curriculum vitae for Dr. Stephen M. Camarata.
4. Petitioner's Exhibit D is a PEDS SLP Assessment prepared and signed by Jennifer Vick and dated December 4, 2013.
5. Petitioner's Exhibit E is a copy of the curriculum vitae of Dr. Robin L. Billings, Ph. D.
6. Petitioner's Exhibit F is a psychological evaluation of Student performed and prepared by Dr. Billings and dated February 17, 2016.

The following are exhibits that were offered by Respondent and admitted into evidence or not offered by Respondent:

1. Respondent's Exhibit 1 is an Individualized Education Program (IEP) for Student with an IEP meeting date of 11/19/2015 and an amendment date of 1/8/2016.
2. Respondent's Exhibit 2 was not offered into evidence.
3. Respondent's Exhibit 3 was not offered into evidence.
4. Respondent's Exhibit 4 is a multidisciplinary evaluation team eligibility recommendation dated 11/19/2015.
5. Respondent's Exhibit 5 was not offered into evidence.
6. Respondent's Exhibit 6 was not offered into evidence.
7. Respondent's Exhibit 7 was not offered into evidence.

8. Respondent's Exhibit 8 was not offered into evidence.
9. Respondent's Exhibit 9 was not offered into evidence.
10. Respondent's Exhibit 10 was not offered into evidence.
11. Respondent's Exhibit 11 was not offered into evidence.
12. Respondent's Exhibit 12 was not offered into evidence.
13. Respondent's Exhibit 13 was not offered into evidence.
14. Respondent's Exhibit 14 was not offered into evidence.
15. Respondent's Exhibit 15 was not offered into evidence.
16. Respondent's Exhibit 16 is a psychological evaluation report pertaining to Student and dated 9/6/2012.
17. Respondent's Exhibit 17 was not offered into evidence.
18. Respondent's Exhibit 18 is a Warren Consolidated Schools Positive Behavior Support Plan for Student dated 1/22/2016.
19. Respondent's Exhibit 19 is a Warren Consolidated Schools Functional Behavioral Assessment for Student dated 1/6/2016.
20. Respondent's Exhibit 20 is behavioral data gather pertaining to Student.
21. Respondent's Exhibit 21 was not offered into evidence.
22. Respondent's Exhibit 22 was not offered into evidence.
23. Respondent's Exhibit 23 was not offered into evidence.
24. Respondent's Exhibit 24 was not offered into evidence.
25. Respondent's Exhibit 25 was not offered into evidence.
26. Respondent's Exhibit 26 is a teacher/primary provider interview pertaining to Student.
27. Respondent's Exhibit 27 was not offered into evidence.

28. Respondent's Exhibit 28 was not offered into evidence.
29. Respondent's Exhibit 29 was not offered into evidence.
30. Respondent's Exhibit 30 was not offered into evidence.
31. Respondent's Exhibit 31 is an occupational therapy report pertaining to Student and dated 2/1/2016.
32. Respondent's Exhibit 32 contains examples of Student's class work.
33. Respondent's Exhibit 33 was not offered into evidence.
34. Respondent's Exhibit 34 was not offered into evidence.

The following individuals testified in this matter:

1. Elizabeth Bauer: Consultant
2. Petitioner: Student's mother
3. [REDACTED]: Student's father
4. Sarah Darling: Special Education Teacher, Warren Consolidated Schools
5. Timothy Clarke: Special Education Teacher, Warren Consolidated Schools
6. Christine Stone: General Education Teacher, Warren Consolidated Schools
7. Kayla Marcial: School Social Worker, Warren Consolidated Schools
8. Nicole Honore: Occupational Therapist, Warren Consolidated Schools
9. Kathryn Combs: School Psychologist, Warren Consolidated Schools
10. Rebecca Hunt: Speech and Language Pathologist, Warren Consolidated Schools
11. Dr. Stephen Camarata: Professor of Hearing and Speech Sciences at Vanderbilt University School of Medicine.
12. Dr. Robin Billings: Child Adolescent Clinical Psychologist

At the conclusion of the hearing, Ms. Eaddy made a request to permit the filing of post-hearing briefs. The request was denied due to the fact that Petitioner appeared *in propria persona*. The record was closed at the conclusion of the hearing.

### **ISSUES**

1. Is Student eligible for special education and related services under the wrong eligibility category for the November 19, 2015 IEP, and if so, does the category of eligibility operate to deny Student a Free and Appropriate Public Education (FAPE)?
2. Does the November 19, 2015 IEP operate to place Student in the least restrictive environment (LRE)?
3. Does the November 19, 2015 IEP provide an appropriate amount of time for Student to receive speech and language services?
4. Does the November 19, 2015 IEP provide an appropriate amount of time for Student to receive occupational therapy services?
5. Should the November 19, 2015 IEP call for Student to receive one on one paraprofessional support?
6. Should the November 19, 2015 IEP call for Student to attend a resource room and if so, how much time should Student spend in the resource room?

### **APPLICABLE LAW**

The petitioner-parent, as the party challenging the District's determination or implementation of special education and related services, has the burden of proof by a preponderance of the evidence for all claims raised in this matter. *Schaffer v Weast*, 546 US 49; 126 S Ct 528; 163 L Ed 2d 387 (2005); *Doe v Defendant I*, 898 F2d 1186 (CA 6, 1990).

The Code of Federal Regulations, 34 CFR 300.39 defines "special education" as follows:

Special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including— (i) Instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and (ii) Instruction in physical education. 34 CFR 300.39(a)(1).

Michigan Administrative Rule for Special Education, R 340.1701c(c) defines “special education” as follows:

"Special education" means specially designed instruction, at no cost to the parents, to meet the unique educational needs of the student with a disability and to develop the student's maximum potential. Special education includes instructional services defined in R 340.1701b (a) and related services.

The Federal Regulations define “specially designed instruction” as follows:

Specially designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction—

- (i) To address the unique needs of the child that result from the child's disability; and
- (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children. 34 CFR 300.39(b)(3).

Students protected by the provisions of IDEA are entitled to be appropriately identified, evaluated, placed, and provided a free appropriate public education (FAPE) that includes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 20 USC 1400(d); 34 CFR 300.1.

Under 20 USC 1415(f)(3)(E), it may be found that FAPE has been denied to a disabled student based on either substantive or procedural violations of the Individuals with Disabilities Education Act (IDEA or Act). To find a denial of FAPE based on procedural violations of the Act, it must also be found that the procedural violation impeded the student's right to FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE to their child, or caused a deprivation of educational benefits.

In *Board of Education of Hendrick Hudson Central School District v Rowley*, 458 US 176, 102 S Ct 3034, 73 L Ed 2d 690 (1982), the U.S. Supreme Court articulated the two bases for assessing the provision of FAPE. The first was whether the school district had complied with the procedural requirements of the Act, and the second was whether the student's Individualized Educational Program (IEP) was "reasonably calculated" to enable the student to receive educational benefits. *Id.*, at 206-07.

In assessing whether a student's IEP was reasonably calculated to enable the student to receive educational benefits under *Rowley's* second basis above, our Sixth Circuit Court of Appeals noted that nothing in *Rowley* precludes the setting of a higher standard than the provision of "some" or "any" educational benefit, and held that the IDEA requires an IEP to confer a "meaningful educational benefit gauged in relation to the potential of the child at issue." *Deal v Hamilton County Bd of Ed*, 392 F3d 840, 862 (CA 6, 2004).

Nevertheless, the IDEA requirement that school districts provide disabled children with a free appropriate public education does not require that a school either maximize a student's potential or provide the best possible education at public expense. *Doe v Tullahoma City Schools*, 9 F3d 455 (CA 6, 1993); *Fort Zumwalt Sch Dist v Clynes*, 119 F3d 607, 612 (CA 8, 1997), *cert den*, 523 US 1137 (1998).

The primary responsibility for formulating the education to be accorded a disabled child, and for choosing the educational method most suitable to the child's needs, was left by IDEA to state and local educational agencies in cooperation with the parents or guardians of the child. Reviewing courts may not substitute their own notions of sound educational policy for those of the school authorities which they review. *McLaughlin v. Holt Pub Schs*, 320 F3d 663 (CA 6, 2003).

The Michigan Administrative Rule for Special Education (MARSE), Rule 340.1715 shows the criteria used to assess a student's eligibility for special education under the Autism Spectrum Disorder. Rule 340.1715 states as follows:

R 340.1715 Autism spectrum disorder defined; determination.

*Rule 15.*

- (1) Autism spectrum disorder is considered a lifelong developmental disability that adversely affects a student's educational performance in 1 or more of the following performance areas:
  - (a) Academic.
  - (b) Behavioral.
  - (c) Social.

Autism spectrum disorder is typically manifested before 36 months of age. A child who first manifests

the characteristics after age 3 may also meet criteria. Autism spectrum disorder is characterized by qualitative impairments in reciprocal social interactions, qualitative impairments in communication, and restricted range of interests/repetitive behavior.

- (2) Determination for eligibility shall include all of the following:
  - (a) Qualitative impairments in reciprocal social interactions including at least 2 of the following areas:
    - (i) Marked impairment in the use of multiple nonverbal behaviors such as eye-to-eye gaze, facial expression, body postures, and gestures to regulate social interaction.
    - (ii) Failure to develop peer relationships appropriate to developmental level.
    - (iii) Marked impairment in spontaneous seeking to share enjoyment, interests, or achievements with other people, for example, by a lack of showing, bringing, or pointing out objects of interest.
    - (iv) Marked impairment in the areas of social or emotional reciprocity.
  - (b) Qualitative impairments in communication including at least 1 of the following:
    - (i) Delay in, or total lack of, the development of spoken language not accompanied by an attempt to compensate through alternative modes of communication such as gesture or mime.
    - (ii) Marked impairment in pragmatics or in the ability to initiate, sustain, or engage in reciprocal conversation with others.
    - (iii) Stereotyped and repetitive use of language or idiosyncratic language.
    - (iv) Lack of varied, spontaneous make believe play or social imitative play appropriate to developmental level.

- (c) Restricted, repetitive, and stereotyped behaviors including at least 1 of the following:
  - (i) Encompassing preoccupation with 1 or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus.
  - (ii) Apparently inflexible adherence to specific, nonfunctional routines or rituals.
  - (iii) Stereotyped and repetitive motor mannerisms, for example, hand or finger flapping or twisting, or complex whole body movements.
  - (iv) Persistent preoccupation with parts of objects.
- (3) Determination may include unusual or inconsistent response to sensory stimuli, in combination with subdivisions (a), (b), and (c) of subrule 2 of this rule.
- (4) While autism spectrum disorder may exist concurrently with other diagnoses or areas of disability, to be eligible under this rule, there shall not be a primary diagnosis of schizophrenia or emotional impairment.
- (5) A determination of impairment shall be based upon a full and individual evaluation by a multidisciplinary evaluation team including, at a minimum, a psychologist or psychiatrist, an authorized provider of speech and language under R 340.1745(d), and a school social worker.

Additionally, the Federal Regulations state:

§ 300.8 Child with a disability.

- (d) Definitions of disability terms. The terms used in this definition of a child with a disability are defined as follows:
  - (1) (i) Autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in

- repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.
- (ii) Autism does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance, as defined in paragraph (c)(4) of this section.
  - (iii) A child who manifests the characteristics of autism after age three could be identified as having autism if the criteria in paragraph (c)(1)(i) of this section are satisfied.

A school district is required to ensure that a disabled student is educated in the least restrictive environment (LRE); to the maximum extent appropriate with children who are non-disabled. Removal of a disabled student from the general education environment is to occur only if the nature or severity of the student's disability is such that education in the general education classroom with the use of supplementary aids and services cannot be achieved satisfactorily. 20 USC 1412(a)(5)(A); 34 CFR 300.114.

20 USC 1412(a)(5)(A) presumes that the first placement option considered for each child with a disability is the regular classroom in the school the child would attend if not disabled, with appropriate supplementary aids and services to facilitate such placement. Thus, before a child with a disability can be placed outside the regular educational environment, the full range of supplementary aids and services that could be provided to facilitate the child's placement must be considered. Following that consideration, if a determination is made that a particular child with a disability cannot be educated satisfactorily in the regular educational environment, even with the provision of the appropriate supplementary aids and services, that child could be placed in a setting other than the regular classroom. Federal Register, Vol. 71, No. 156, at p. 46588.

The Sixth Circuit has found that the Act's requirement that mainstreaming be provided to the maximum extent appropriate indicates a very strong congressional preference for the placement of disabled students in the general education environment. *Roncker v Walter*, 700 F2d 1058, 1063 (CA 6, 1983). The court also held, however, that the Act does not require mainstreaming in every case, and cited three situations in which education in a segregated special education setting may be necessary: (1) when a disabled student would not benefit from mainstreaming, (2) when any marginal benefits derived from mainstreaming are outweighed by benefits gained from services which cannot feasibly be provided in the general education environment, or (3) when the student is too disruptive to the education of the other general education students. *Id.*

It is a substantive denial of FAPE for an IEP to provide for education of a student in a more restrictive environment than that in which it could otherwise be achieved satisfactorily with any needed supplementary aids and services. In saying this, though, it must also be emphasized that the Act expressly acknowledges that the nature or severity of a student's disability may be such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, and Congress has thus recognized that despite the LRE preference, general education classrooms simply are not a suitable setting for the education of many disabled students. *Rowley*, 458 US at 181, n 4.

In determining whether the District provided a free appropriate public education in the least restrictive environment for the student in this case, it must first be asked whether the District has complied with the procedures set forth in the IDEA in developing the IEP, and second, whether the IEP developed through those procedures was reasonably calculated to enable the student to receive a meaningful educational benefit gauged in relation to his potential. *Rowley*, 458 US at 206-07; *Deal*, 392 F3d at 862.

### **FINDINGS OF FACT**

Based on the entire record in this matter, including the testimony and admitted exhibits, the following findings of fact are established:

1. Student was born on [REDACTED] and is currently 7 years old. (Resp. Exhibit 1)
2. Respondent found Student to be eligible for special education services as a student with Autism Spectrum Disorder (ASD) and found speech and language impairment to be a secondary area of eligibility. The November 19, 2015 IEP states that the following qualifying criteria were used to determine Student's eligibility as a student with ASD: usage of nonverbal behaviors, peer relationship development, social or emotional reciprocity, pragmatics or lack of conversational interactions, stereotyped, repetitive motor mannerisms, and stereotyped and repetitive or idiosyncratic language. (Resp. Exhibit 1).
3. On November 19, 2015, the MET team made the determination that Student is eligible for special education as a student with ASD. The MET team included Kathryn Combs, school psychologist; Rebecca Hunt, speech language pathologist; and Kayla Marcial, school social worker. (Resp. Exhibit 4).

4. Student is currently placed in a self-contained classroom for students with a mild cognitive impairment (MICI Classroom) at Wilde Elementary located within the Warren Consolidated Schools. (Resp. Exhibit 1, Tr. Vol. I, page 23).
5. Student is currently in first grade. He also attended kindergarten through Warren Consolidated Schools where he was placed in the MICI program (Tr. Vol. I, pages 24-25).
6. Student still wears pull-ups as he does not defecate independently. (Tr. Vol. I, page 40).
7. An IEP meeting was conducted for Student on November 19, 2015 wherein the following individuals participated: Student's mother; Student's father; Anne Donato, Director of Special Education; Tim Clarke, Resource Room Teacher; Matt Guinn, Principal; Kendall Giovannini, District Representative; Christine Stone, First Grade General Education Teacher; Sarah Darling, Special Education Teacher; Rebecca Hunt, Speech Language Pathologist; and Kayla Marcial, Social Worker. (Resp. Exhibit 1).
8. Subsequent to the meeting, an IEP was created for Student on November 19, 2015 and amended on January 8, 2016. (Resp. Exhibit 1).
9. The November 19, 2015 IEP calls for Student to spend between 1,770 to 1,820 minutes per week in the MICI classroom. It also calls for Student to spend up to 150 minutes per week in the general education classroom. The IEP also calls for Student to spend between 100 and 200 minutes per week in the elementary or secondary level resource room. The IEP additionally calls for Student to receive direct services with the school social worker for 20 to 30 minutes per session for 2 to 4 sessions per month. It also calls for Student to receive direct speech and language services for 20 to 30 minutes per session for 16 to 20 sessions per month. (Resp. Exhibit 1).
10. The November 19, 2015 IEP provides that assistive technology is necessary for Student. It states that Student will use picture symbols to support his oral communication. (Resp. Exhibit 1).
11. The November 19, 2015 IEP states that Student will fully participate with Students who are non-disabled in the general education setting except for the time spent in separate special education program/services provided outside the general education classroom as specified in the IEP. (Resp. Exhibit 1).

12. Student spends time outside of the MICI classroom for his allotted time in the general education classroom, for his time in the resource room, for his specials (i.e. music and art), and at recess. (Tr. Vol. I page 26).
13. The IEP calls for Student to receive Occupational Therapy services on a collaborative basis in the MICI classroom. (Resp. Exhibit 1).
14. The IEP states that Student has mastered 3 academic goals since September 19, 2015. The mastered goals are as follows: Reading goal, Student will identify 26 upper case letters; Reading goal, Student will identify 26 lower case letters; Math goal, Student will identify 11 colors. (Resp. Exhibit 1).
15. The IEP shows that Student is progressing in the following goals: Math goal, Student will identify numbers 1-20; Writing goal, Student will attempt to color within the lines 3 out of 5 times; Writing goal, Student will trace a diagonal line, crisscross shape, circle, and X 3 out of 5 times. (Resp. Exhibit 1).
16. The IEP states that Student is making limited progress in the goal of Student sitting and participating with the group in a structured learning activity for up to 10 minutes when given verbal, visual, and gestural prompts. He is also making limited progress in the goal of Student sitting and participating during a back and forth turn taking activity with staff for a minimum of 5 turns when given verbal, visual, and gestural prompts. (Resp. Exhibit 1).
17. The IEP states that Student is progressing as expected in the goal of Student improving his ability to attend to a speaker with appropriate eye contact, gestures, and responses that indicate good listening. It states that Student is making limited progress in the goal of Student improving his ability to initiate conversations with peers given visual and verbal prompts. (Resp. Exhibit 1).
18. From September 21, 2015 through December 19, 2015, data was collected pertaining to Student's behaviors and a resultant Functional Behavioral Assessment (FBA) was prepared on January 6, 2016. (Resp. Exhibit 19).
19. On January 22, 2016, a Positive Behavior Support Plan (PBS) was created for Student. (Resp. Exhibit 18).
20. In December of 2013, Student was evaluated by Stephen Camarata, Ph.D. Student was evaluated by Dr. Camarata at Vanderbilt University in Tennessee. As part of the evaluation, Dr. Camarata conducted expressive language, receptive language, and speech production tests. Dr. Camarata

also performed naturalistic observations of Student; observing him interact with family and with his staff. No cognitive tests were performed due to Student's age at the time (5 years old). (Tr. Vol. II, pages 268-274).

21. The December 2013 evaluation was the only time that Dr. Camarata has evaluated or otherwise seen Student. At the time the evaluation was conducted, Dr. Camarata did not review any school reports, did not speak with any of Student's teachers, and did not observe Student in a school setting. (Tr. Vol. II, pages 284-286).
22. Based on his evaluation of Student, Dr. Camarata diagnosed Student with Mixed Expressive Receptive Language Disorder (MERLD). (Tr. Vol. II, pages 273-274).
23. Dr. Camarata recommended that Student receive daily speech and language support services, use of augmentative support (not necessarily computerized devices but pictures and visual supports), a positive behavior intervention plan, and that Student receive inclusion in the general education environment. Dr. Camarata did not recommend that Student receive full-time instruction in a general education environment, but that Student start with subjects such as math and science and then that more subjects be added as Student became acclimated to the general education environment. Dr. Camarata also stated that Student should be exposed to general education peers at recess and at lunch. (Tr. Vol. II, pages 274-278, 287-293).
24. Student was also evaluated by Robin Billings, Ph.D., child adolescent clinical psychologist. Dr. Billings met with and evaluated Student on February 10, February 15, and February 17, 2016. (Tr. Vol. III, pages 374-375).
25. Dr. Billings testified that he was unable to procure an IQ score for Student as Student would not cooperate with the assessment. Dr. Billings did procure a standard score of 75 on the expressive vocabulary test, which is in the fifth percentile. Additionally, Dr. Billings was able to procure an expressive language score of 55 (Respondent District had a score of 50). Dr. Billings testified that he has not ruled out Student as being a student with ASD, but did find that Student is suffering from a severe expressive language disorder. (Tr. Vol. III, pages 378-389, Petitioner's Exhibit F).
26. Dr. Billings noted in his diagnostic impressions that he was unable to complete psychological and psychoeducational assessments due to Student's difficulties with cooperation. In his diagnostic impressions,

Dr. Billings noted Student to show signs of social (pragmatic communication disorder), language processing disorder (severe), features of an autistic spectrum disorder, and clinical evidence of an attention deficit/hyperactivity disorder. (Petitioner's Exhibit F).

27. Dr. Billings recommended that the following supports be provided to Student: speech and language therapy, school social work, and occupational therapy. He also recommended that Student be exposed to his general education peers, that he be assigned a paraprofessional to assist him in the general education setting, that he be given preferential seating, and that he receive a modified work load. Dr. Billings also recommended the use of augmented assistive technology. Dr. Billings specifically recommended that Student receive an hour per day, five days per week of speech language services for Student. (Tr. Vol. III, pages 376-382, Petitioner's Exhibit F).
28. Christine Stone is a first grade general education teacher at Wilde Elementary. Student spends his allotted time in the general education classroom in Ms. Stone's classroom. Student began the 2015-2016 school year spending 30 minutes per day in Ms. Stone's class for science. Ms. Stone testified that Student had difficulty remaining in his seat and that she had difficulty keeping him focused on the lessons pertaining to science. (Tr. Vol. I, pages 146-148).
29. Ms. Stone testified that Student was then switched to calendar time, in an effort to allow Student to participate in a more socially focused area of the general education classroom. Student currently attends calendar time in Ms. Stone's classroom for 45 minutes per day. (Tr. Vol. I, pages 146-150).
30. Ms. Stone testified that even after switching Student to calendar time, Student continues to have behavioral issues and trouble remaining seated and engaging in the lessons. She testified Student will stand when he is supposed to sit and that there is a lot of moving around, she testified Student will shout and spit as well. She further testified that Student will crouch down on the floor and pull his hands at the back of his neck. Ms. Stone testified that Student does not interact with the other students in her class even when an interaction is initiated by other students. (Tr. Vol. I, pages 150-154).
31. Sarah Darling is a special education teacher at Wilde Elementary. She teaches the MICI classroom where Student is currently assigned. The classroom consists of herself, 13 students and two aides. Student has been

placed in Ms. Darling's classroom since September of 2015. (Tr. Vol. I, pages 84-86).

32. Ms. Darling testified that she feels that Student is progressing towards the goals contained in his IEP, but that his attention and willingness to do his academic work are interfering with the completion of those goals. She also testified that she has seen an improvement in Student's attention since he started the year in her classroom. (Tr. Vol. I, pages 93-95).
33. Ms. Darling testified that Student is engaged in the activities that he is attending to most of the time, but when he is not, that is when Student's problem behaviors manifest themselves. Ms. Darling testified that Student will run away from the table, fall to the floor, kick and spit. She testified that she will use a "first then" strategy to help calm him down and that she will also let Student go to his calming corner to calm down. (Tr. Vol. I, pages 95-107).
34. Ms. Darling testified that she has seen Student persevere on objects and topics such as New York City and the planets. (Tr. Vol. I, pages 98-99).
35. Ms. Darling testified that Student does not really engage in relationships with other students in her class and that he prefers to engage with the adults in the classroom. She testified that Student will only call his peers by their first names and shake their hands when prompted to do so. (Tr. Vol. I, page 99).
36. Ms. Darling testified that Student leaves her room for speech and language services but that he also receives speech and language services while he is in her classroom. She also testified that student receives occupational therapy services while in her classroom. (Tr. Vol. I, pages 99-100).
37. Ms. Darling testified that the two aides she has present in her classroom have a difficult time redirecting Student and that she did not think that an aide in the general education classroom would be able to satisfactorily redirect him. (Tr. Vol. I, pages 106-108).
38. Ms. Darling testified that students in the general education classroom are working on addition and subtraction, writing their numbers, and computing numbers. She stated that Student is working on rote counting and identifying numbers. She testified that work being performed by the general education first grade students is too difficult for Student. (Tr. Vol. I, pages 114-115).

39. Timothy Clarke is a resource room teacher at Wilde Elementary. Student attends Mr. Clarke's resource room five days a week for 15 to 30 minutes per day. (Tr. Vol. I, pages 120-121).
40. Mr. Clarke works with Student on counting skills, one-to-one correspondence, basic letter identification, writing his name, and number recognition. For the majority of the time Student is in the resource room, it is in a one on one capacity with Mr. Clarke. Once a week, Mr. Clarke brings Student in with other students to be able to see him working with his peers. (Tr. Vol. I, page 122).
41. Mr. Clarke testified that Student will not initiate a greeting with the other students in the resource room unless prompted to do so. He further testified that he will not receive eye contact from Student unless such is demanded. (Tr. Vol. I, pages 124-125).
42. Mr. Clarke testified that Student has difficulty maintaining focus and attention to the tasks he is presented with. He also testified that if Student does not want to do the activity presented to him, he will walk off or yell out. Mr. Clarke also testified that he has seen Student persevere on topics such as New York City. (Tr. Vol. I, pages 122-128).
43. Mr. Clarke testified that he thinks it would be extremely difficult for Student to be successful in the first grade general education classroom even with the assistance of an aide. (tr. Vol. I, pages 126-127).
44. Kayla Marcial is a school social worker with Warren Consolidated Schools. She began working with Student in September of 2015. She sees Student two times per week in the MICI classroom. Ms. Marcial testified that she is working with Student on his IEP goals of sitting for up to ten minutes in a group setting and the goal of Student doing a turn take up to five times of reciprocal interaction back and forth. (Tr. Vol. II, pages 186-188).
45. Ms. Marcial testified that she assisted in drafting Student's FBA and PBS. She also testified that she prepared a report for the Multidisciplinary Evaluation Team (MET) Team Evaluation Recommendation. (Tr. Vol. II, pages 191-199).
46. As part of her assessment, Ms. Marcial found Student to be below average on the Social Skills Scale in the following areas: communication, cooperation, assertion, empathy, engagement, self-control, and responsibility. On the problem behaviors scale, Ms. Marcial found Student to be average in relation to bullying and internalizing. She found him to be

above average in relation to externalizing hyperactivity/inattention, and autism spectrum. Generally, Ms. Marcial found Student to be well below average in terms of social skills and problem behaviors. (Resp. Exhibit 4).

47. Ms. Marcial testified that she agreed with the recommendation that Student be qualified for special education and related services as a student with ASD. (Tr. Vol. II, page 206).
48. Nicole Honore is an occupational therapist employed by the Warren Consolidated Schools. On January 28, 2016, Ms. Honore conducted an evaluation of Student and created a report based on her evaluation on February 1, 2016. Ms. Honore concluded that Student would most benefit from receiving occupational therapy services in the collaborative model. (Resp. Exhibit 31).
49. Ms. Honore testified that she is providing Student with occupational therapy services on a weekly basis in the collaborative model. (Tr. Vol. II, pages 240-242).
50. Kathryn Combs is a school psychologist employed by the Warren Consolidated Schools. In October and November of 2015, Ms. Combs evaluated and administered several tests to Student. As a result of said evaluation and tests, Ms. Combs prepared a report that was shared with the MET team. (Tr. Vol. II, pages 298-313, Resp. Exhibit 4).
51. Ms. Combs administered the Wechsler Nonverbal Scale of Intelligence and the Kauffman Assessment Battery for Children for which she was unable to procure a standardized score due to Student not remaining on task for the assessments. Ms. Combs did administer the Stanford-Binet Intelligence Scale and was able to obtain an abbreviated IQ score of 50. Ms. Combs also noted that this score should be interpreted with caution as she struggled to keep Student on task while completing the assessment. (Tr. Vol. II, pages 300-303, Resp. Exhibit 4).
52. Ms. Combs additionally observed Student in the classroom setting and administered the Adaptive Behavior Assessment System-Second Addition (ABAS-II), having said evaluation be completed by both Ms. Darling and by Student's parents. The overall score from the assessment completed by Student's parents was a 68. The overall score from the assessment completed by Ms. Darling was a 42. Ms. Combs testified that anything below a 70 is considered extremely low. Ms. Combs also provided the parents and Ms. Darling, respectively, the Gilliam Autism Rating Scale-Second Addition (GARS-2). The result of the parents' assessment showed

an unlikely probability of autism where Ms. Darling's result showed a very likely probability of Autism. (Resp. Exhibit 4).

53. Based on the evaluation completed and the assessments submitted by Ms. Darling and by Student's parents, Ms. Combs concluded that Student should be eligible for special education as a student with ASD. (Resp. Exhibit 4).
54. Rebecca Hunt is a speech language pathologist employed with the Warren Consolidated Schools. She provides direct services to Student four to five times per week for 20 to 30 minutes per session. Ms. Hunt provides those services on a one-on-one basis as well as on collaborative basis in the classroom. The total amount of time Ms. Hunt spends working with Student, both one-on-one and in a group setting is four to five times per week for 20 to 30 minutes per session. (Tr. Vol. II, pages 356-357).
55. In assessing Student, Ms. Hunt administered Student the Peabody Picture Vocabulary Test (Fourth Edition), the Expressive Vocabulary Test (Second Addition), and the Clinical Evaluation of Language Fundamentals-5(CLEF 5). The results of the tests showed that Student is well below average in the areas of receptive and expressive vocabulary and language (Tr. Vol, II, pages 340-342, Resp. Exhibit 4).

## **DISCUSSION**

In the instant matter, like in most due process hearings, a number of witnesses testified and there were numerous exhibits offered and admitted into evidence. Post-hearing briefs were not permitted. I have reviewed and considered the exhibits and the transcripts of the hearing in making a determination in this matter.

As there are several issues presented for hearing, I will address each issue individually below.

*Is Student eligible for special education and related services under the wrong eligibility category for the November 19, 2015 IEP, and if so, does the category of eligibility operate to deny Student a Free and Appropriate Public Education (FAPE)?*

Petitioner's main area of concern seems to be that she feels that Student is eligible for special education and related services under the wrong category of eligibility. Petitioner has asserted that because Student does not have a clinical diagnosis of ASD, he should not be eligible under that category. However, as stated above, the MARSE rules do not require a clinical diagnosis to make a finding of eligibility under the category of ASD.

As part of her argument, Petitioner points out that Dr. Camarata did not diagnose Student with ASD, but with mixed expressive receptive language disorder (MERLD). Yet Dr. Camarata only evaluated Student one time some three years ago and it appears that the evaluation took place over the course of one day. Dr. Camarata additionally pointed out that he was not familiar with the eligibility criteria for a student to be eligible as an individual with ASD under the Michigan rules, and therefore could not state if those rules are applicable to Student.

Additionally, Dr. Billings, who has evaluated Student over the course of several days and in 2016, could not rule out ASD as a clinical diagnosis of Student. But as stated above, a clinical diagnosis is not necessary for a finding of eligibility under the MARSE rules.

On November 19, 2015, the MET team made the determination that Student is eligible for special education as a student with ASD. The MET team included Kathryn Combs, school psychologist; Rebecca Hunt, speech language pathologist; and Kayla Marcial, school social worker. The evidence presented at hearing shows that Student perseverates on subjects, specifically New York City and the planets; that he will not engage in social interaction with peers unless prompted to do so; that he will engage in behaviors when asked to do a task he does not want to partake in; and that Student has been observed engaging in actions where he is rubbing the back of his head while under stress.

Based on the evidence presented at hearing, I find that Respondent has properly applied the eligibility criteria under the MARSE rules and that the behavior exhibited by Student meets the criteria of eligibility as a student with ASD.

Furthermore, Petitioner asserts that Student should be eligible only under the eligibility category of speech and language impairment. It should be noted that eligibility for special education under the category of speech and language impairment in accordance with the MARSE rules, does not encompass several of the behavioral and social issues that the evidence shows are displayed by Student.

Moreover, it is not the basis for eligibility that determines if a student has been provided a FAPE, rather it is the services offered to said student and whether those services operate to provide the student with a meaningful educational benefit. In the instant case, both Dr. Camarata and Dr. Billings, the two experts called by Petitioner, stated that Student should receive speech and language services, that augmented technology should be used to assist Student, and that Student should be exposed to his general education peers.

Student is currently receiving speech and language services, occupational therapy services, resource room services, and uses visual aids as a means of communication. Student is additionally exposed to general education peers as well. The specifics of these areas will be discussed more thoroughly below.

In summation, I do not find that Petitioner has shown, by a preponderance of the evidence, that Student is eligible for special education under the wrong category, and that the services being offered to Student as a result of that eligibility operate to deny Student a FAPE.

*Does the November 19, 2015 IEP operate to place Student in the least restrictive environment (LRE)?*

I find that based on the evidence presented, Student is currently placed in the least restrictive environment based on his needs and abilities. Petitioner argues that Student should be placed in the general education classroom with paraprofessional support. However, it is clear from the evidence presented that Student is far behind the level needed to access the curriculum of the general education classroom. Any assertion that Student be placed in the general education classroom with hopes that he would just catch up to the rest of the class is patently unfair to Student.

As stated above, the preference for mainstreaming is not a requirement, but a preference. The preference for mainstreaming is looked at in conjunction with practicality. In other words, sometimes a general education classroom is simply not the correct environment for a student based on ability and behavior. Student clearly presents with challenging behaviors which the evidence shows are disruptive to the learning environment of other students.

Additionally, the evidence shows that Student is not at the academic level to be able to participate fully in the general education classroom. Additionally, Student still wears pull-ups and is in first grade. Dr. Billings' testimony, which I find to be very credible, was that he could not make a proper assessment of Student's abilities because he could not get Student to cooperate long enough to complete the assessments. The evidence presented shows that Student is far behind the academic level of his general education peers and would not be able to participate in the general education curriculum.

Petitioner presented lines of questioning suggesting that Student would refuse to complete certain assessments or participate in certain areas of study because they did not interest him. The general education environment is meant to expose students to a wide variety of subjects, regardless of the particular student's interest level in that subject. Students are not given the luxury of only studying areas that interest them and are expected to maintain a level of study regardless of interest.

The recommendations of both Dr. Camarata and Dr. Billings were that Student be exposed to his general education peers. There was no evidence presented that Student should be immersed in a general education classroom full time. Student currently spends 45 minutes per day in the general education classroom. Respondent has made efforts to place Student in an area of the general education environment where he would be most successful; Student was switched from attending science to attending calendar time based on his cooperation level. Additionally, Student is exposed to his general education peers at recess and during his specials.

Based on Student's current abilities and levels of functionality, I find that Student is currently placed in the least restrictive environment based on his unique needs.

*Should the November 19, 2015 IEP call for Student to attend a resource room and if so, how much time should Student spend in the resource room?*

The November 19, 2015 IEP clearly calls for Student to spend time in the resource room at school. The testimony shows that Student is in fact spending 15 to 30 minutes per day attending the resource room. Mr. Clarke testified that he sees Student both individually and with other students while in the resource room. There was no evidence presented to suggest that Student is not actually receiving resource room support. Additionally, there was no evidence presented to suggest that the amount of time that Student spends in the resource room is insufficient to provide Student with a meaningful educational benefit.

*Does the November 19, 2015 IEP provide an appropriate amount of time for Student to receive occupational therapy services?*

Student currently receives occupational therapy services on a collaborative basis. There was no evidence presented to indicate that the type or amount of occupational therapy services being provided to Student are not providing him with a meaningful educational benefit. Accordingly, I do not find that Petitioner has shown, by a preponderance of the evidence, that Student is not receiving the type and amount of occupational therapy services requisite for him to receive a meaningful educational benefit and in turn a FAPE. However, as the IEP does indicate that Student will receive occupational therapy services, the services section of the IEP does not specifically address occupational therapy services and does not allot an amount of time for said services to be rendered. The IEP should be amended to state the specifics of how the occupational therapy services are to be provided.

*Should the November 19, 2015 IEP call for Student to receive one on one paraprofessional support?*

Student is currently in a classroom with 13 students and 2 aides in addition to the classroom teacher. I do not find that Petitioner has shown, by a preponderance of the evidence, that an individual aide would be beneficial to Student. The testimony of the individuals who have witnessed Student in the school environment was consistent in that each individual testified that they did not think that a one-on-one aide would allow Student to be more successful in the classroom.

*Does the November 19, 2015 IEP provide an appropriate amount of time for Student to receive speech and language services?*

The November 19, 2015 IEP calls for Student to receive 20-30 minutes of speech and language services per session for 16 to 20 sessions per month. The evidence clearly shows that Student suffers from a severe expressive and receptive language disorder. The evidence presented by both sides supports this conclusion.

Dr. Billings provided extremely credible testimony in relation to his evaluation and impressions of Student. Dr. Billings' recommendation was that Student receive direct speech and language services for an hour per day five day per week. However, Dr. Billings' report was not available to the IEP team at the time the November 19, 2015 IEP was created, as Dr. Billings did not see and evaluate Student until February of 2016. There was no evidence presented to show that, at the time the November 19, 2015 IEP was created, the amount of time set for Student to receive speech and language services was insufficient to confer a meaningful educational benefit upon Student.

However, with the new information provided by Dr. Billings, I find it would be prudent for the IEP team to reconvene and assess the amount of time the IEP calls for Student to receive speech and language services in light of the new information provided by Dr. Billings.

### **CONCLUSIONS OF LAW**

1. Petitioner did not establish, by a preponderance of the evidence, that Student is eligible for special education under the improper category. Petitioner additionally did not establish that Student was denied a FAPE due to the category of eligibility for which Student receives special education.
2. Petitioner did not establish, by a preponderance of the evidence, that Student is not in the least restrictive environment under the placement contemplated within the November 19, 2015 IEP.

3. Petitioner did not establish, by a preponderance of the evidence, that the amount of time the November 19, 2015 IEP calls for Student to receive occupational therapy services is inappropriate and denies Student a FAPE.
4. Petitioner did not establish, by a preponderance of the evidence, that Student is in need of a full time one on one paraprofessional and that failure of the November 19, 2015 to call for such denies Student a FAPE.
5. Petitioner did not establish, by a preponderance of the evidence, that amount of time the November 19, 2015 IEP calls for Student to spend in the resource room is inappropriate and denies Student a FAPE.
6. Petitioner did not establish, by a preponderance of the evidence, that the amount of time the November 15, 2015 IEP calls for Student to receive speech and language services is inappropriate and denies Student a FAPE.

**ORDER**

**NOW, THEREFORE, IT IS ORDERED:**

1. Petitioner's complaint is denied in part and granted in part.
2. Respondent shall reconvene an IEP team meeting as soon as possible, but not more than 30 days from the date of this order, to reconsider the amount of time Student receives speech and language services. The IEP team shall specifically consider the reports and evaluations provided by Dr. Billings.
3. Respondent shall provide proof of compliance with this order to the Michigan Department of Education within 10 days of completing the actions called for herein.

**IT IS FURTHER ORDERED** that any claims or defenses not specifically addressed herein are dismissed with prejudice.

A party aggrieved by this decision may seek judicial review by filing an action in a court of competent jurisdiction within 90 days of the date of this order.

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**Christopher S. Saunders**  
**Administrative Law Judge**

**PROOF OF SERVICE**

I hereby state, to the best of my knowledge, information and belief, that a copy of the foregoing document was served upon all parties and/or attorneys of record in this matter by Inter-Departmental mail to those parties employed by the State of Michigan and by UPS/Next Day Air, facsimile, electronic submission, and/or by mailing same to them via first class mail and/or certified mail, return receipt requested, at their respective addresses as disclosed below this \_\_\_\_\_ day of April, 2016.

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