

ARKANSAS DEPARTMENT OF EDUCATION

Special Education Unit

XXXXXXXXXX, Parent of

XXXXXXXXXXXX

PETITIONER

VS.

CASE NO. H-21-36

GREENBRIER SCHOOL

DISTRICT

RESPONDENT

HEARING OFFICERS FINAL DECISION AND ORDER

ISSUE PRESENTED:

1. Did the District Deny Student a FAPE between October 8, 2020- November13, 2020?
Additionally, it must be determined whether the parent is entitled to tuition reimbursement for Student’s placement at Compass Academy.¹

Procedural History:

On May 27, 2021, the Arkansas Department of Education (hereinafter referred to as the “Department”), received a request to initiate a due process hearing from XXXXXXXXXX (hereinafter referred to as “Parent”, “Petitioner” or “mom”), the parent and legal guardian of XXXXXXXXXX (hereinafter referred to as “Student”). Parent requested the hearing because she believed the District failed to comply with the Individuals with Disabilities Education Act of 2004, 20 U.S.C. 1400-1485, as amended (hereinafter referred to as “IDEA”) and the regulations set forth by the Department by not providing Student an appropriate special education services, as noted Supra in the statement of issues.² The first due process request filed by Parent was ADE H-21-11, which was on October 8, 2020 (hereinafter “Hearing #1 or ADE H-21-11). This Hearing Officer issued a Final Decision an Order on May 12, 2021, finding that the District had failed to provide FAPE to Student between October 8, 2018-October 8, 2020.³ By agreement of the parties, ADE H-21-11 is incorporated in its entirety into ADE H-21-36.

In response to the Parent’s request for a Due Process hearing, the Department assigned the case to an impartial hearing officer. Thereafter, a prehearing conference was scheduled for July 6, 2021, and the hearing was scheduled for July 7-9, 2021. On June 30, 2021, Respondent

¹ See Due Process Complaint H-21-36.

² See hearing officer File-Petitioner Complaint.

³ See Hearing Officer Decision H-21-11.

filed an unopposed motion to continue stating that the District's LEA, a key witness is unavailable during July 7-9, 2021. On July 7, 2021, this Hearing Officer issued an order granting Respondent's motion for a continuance, and giving the parties until July 19, 2021, to provide new hearing dates. On July 19, 2021, the parties provided August 30-31, 2021, as hearing dates. On July 19, 2021, this Hearing Officer issued an order scheduling the pre hearing conference for August 27, 2021 and setting the Due Process hearing for August 30-31, 2021. A prehearing conference was conducted, via zoom, on August 27, 2021⁴ Counsel for both the Parent and the District participated in the prehearing conference. During the prehearing conference, the parties discussed unresolved issues to be addressed at the hearing, as well as the witnesses and evidence which would be necessary to address the same.⁵

Thereafter the due process hearing in this matter began as scheduled on August 30, 2021. Because the parties incorporated ADE H-21-11 into the record, testimony was brief and completed on August 30, 2021.

Present for the Hearing were Theresa Caldwell, attorney for Petitioner, Jay Bequette, Attorney for the District, Audra Alumbaugh (zoom), advocate, Christina Lock (zoom), advocate, XXXXXXX, parent, Lisa Huffmaster, LEA, and Cheryl Reinhart, new ADE hearing officer was present for observation. Because of COVID-19, the hearing officer participated by Zoom.

The following witnesses testified in this matter: Lisa Huffmaster, LEA, XXXXXXX, Parent, and Courtney Williams, Director of Compass Academy.⁶

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

⁴ Pre-Hearing conference transcript.

⁵ Id.

⁶ Trial Transcript, Vol. 1. Pg. 1.

impartial hearing. Parent was represented by Theresa Caldwell (Little Rock, Arkansas) and District was represented by Jay Bequette (Little Rock, Arkansas).

Both parties were offered the opportunity to provide post-hearing briefs in lieu of closing statements, and both timely submitted briefs in accordance with the deadline set by this Hearing Officer.⁷

Findings of Fact

Background

Student is a 10 year-old male who currently attends Compass Academy, a private school in Conway Arkansas.⁸ Student is the youngest of five children. Around age two or three mom noticed that Student was different from her other four children. He would line things up for hours. He would play with just a box of crayons and line them up, mess them up, and continue until he got them just right. Every third crayon might have to be blue. Mom said Student just didn't "fit in the box" like her other children.⁹ Even at the young age of three Student suffered from severe separation anxiety.¹⁰ In February of 2016, at the age of four, student was involved in a boating accident with his father and sister. Everyone was ejected from the boat. Student and his sister had life vests on but their father did not. The children watched their father drown and suffered extensive hyperthermia.¹¹ Very likely Student suffered some trauma or damage to the brain because of the extensive time he went without oxygen. When he was rescued his heart rate was around 41, and his whole body was purple.¹² Student experienced severe trauma as a result

⁷ See Hearing Officer File-post hearing briefs.

⁸ Trial Transcript Vol. 1 p. 92.

⁹ ADE H-21-11, Trial Transcript Vol. VII p. 26.

¹⁰ Id. at 27.

¹¹ ADE H-21-11, Trial Transcript Vol. VII, pg. 26-27.

¹² Id. at 28.

of the boating accident and has suffered PTSD as a result.¹³ Student was enrolled in the Greenbrier School District starting in kindergarten and continuing through the first half of 4th grade. On November 13, 2020, Parent moved Student to Compass Academy, a private school in Conway Arkansas.¹⁴

Kindergarten year 2016-2017

1. Student began his kindergarten year in the fall of 2016, in the regular classroom setting without an IEP.
2. Student was referred for special education September 16, 2016, by Angie Betancourt, Assistant Principal. According to the referral form, Student gets frustrated when asked to perform a task that he does not exceed at. He is very unsure of himself. He says that he is afraid, and that noise bothers him. He will run and hide under tables, then crawl around on the floor making noises at the children if he is ignored. He had also moved desks, kicked desks, and turned over chairs. He gets angry and becomes aggressive (kicking, hitting, pinching, biting and yelling). In addition, his MAP testing was below cut off benchmark in reading and math.¹⁵
3. On September 27, 2016, a referral meeting was held and the committee determined that due to behavior difficulties in the classroom a comprehensive evaluation was indicated.¹⁶
4. On October 31, 2016, a speech and language evaluation was conducted and all components were found to be within normal limits at this time and speech therapy was not recommended.¹⁷
5. The psychoeducational evaluation was conducted over several days. October 20, 21, 31 & November 15, 2016. The Kauffman Test of Educational Achievement III was given. Students

¹³ Id.

¹⁴ Parent Exhibit, p. 24.

¹⁵ ADE H-21-11, District Exhibit pgs. 11, 36.

¹⁶ Id. 16.

¹⁷ Id. 21-23.

skills in letter/word identification were Low Average. His skills in passage comprehension, was Average. Student's scores in math calculations ere in the low average, and in applied problems in the average range. Students score on the writing samples subtest was low average. The Gilliam Autism Rating Scale suggested that behaviors attributable to autism were present, the Student did not meet the criteria for autism on the Autism Diagnostic Observation Schedule (ADOS). Although student exhibited some deficiencies in adaptive behavior, his adaptive skill quotient was in the average range.¹⁸ The evaluator indicated that Students test results did not indicate a disability consistent with PL 94-142 as amended. But that a Student could benefit from the development and implementation of a behavior plan.

6. November 30, 2016, the team met to review evaluation results and determined that evaluation data does not substantiate the existence of a disability consistent with state and federal regulations under IDEA.¹⁹

7. On January 26, 2017, Student kicked a teacher and had to be removed from the classroom and restrained. The restraint started at 130pm and continued for 30 minutes until 200pm. Mother was called to come take student home.²⁰

8. On February 6, 2017, Student was paddled and placed in another hold due to his behavior. Initially student was with a therapist out in the hallway and kept running away from her and growling at her when she tried to speak with him. A timer was set for student to return to the class. After the timer went off student began to scream and hit and kick. Student was paddled for this behavior and the behavior escalated. Student began to headbutt, hit, kick and bite and was placed in a sitting hold. This hold lasted forty minutes from 2:20pm to 3:00pm. Student was released twice during this time but continued to pinch and bite.²¹ Again, student was

¹⁸ ADE H-21-11 District's Exhibits., at 46

¹⁹ Id., at 34.

²⁰ Id. at 50.

sent home with mom.

9. Mom took Student to Conway Psychological Assessment Center (CPAC) for an independent evaluation.

10. The evaluation report is dated February 19, 2017. The assessment instruments used were Behavior Assessment Scale for Children (BASC3), Gilliam autism Rating Scale (GARS-3), Children's Self report Projective Inventory (CSRPI), Conners Kiddie Continuous Performance Test (Conners K-CPT 2), and NEPSY-II; a developmental test of neuropsychological Assessment. The evaluator concluded that Student met the criteria for Generalized Anxiety Disorder, Frontal lobe and executive function deficit, and other specified trauma and stressor related disorder. The evaluator explains these diagnosis as:

"According to these evaluation results, Student meets criteria for Generalized Anxiety Disorder (GAD). GAD involves excessive worry about several life areas and frequent need for reassurance. Children with GAD may have headaches, muscle tension, restlessness, eating problems, and/or concentration difficulties that accompany their worries. Their worries often concern possible catastrophic events (like having a car accident), or performance in school and/or social activities. The worry is unrealistic, largely uncontrollable, and distressing. They may ask a lot of "what if..." questions and want reassurance that everything will be okay.

Children manifest this disorder in different ways. The focus of worry may shift, but the inability to control the worry persists. Because children with GAD have a hard time "turning off" the worrying, their ability to concentrate, process information, and engage successfully in various activities may be impaired. Further, children with GAD often seem overly perfectionistic and self-critical. They may insist on redoing even insignificant tasks several times to get them "just right" or they avoid them altogether if they believe they may fail. This excessive structuring of one's life is used as a defense against the generalized anxiety related to the concern about the individual's overall and specific performance. Oversensitivity to the environment is a common theme in children with GAD. There are typically reports of strained relationships when the child's anxiety contributes to irritability, noncompliance, demanding behavior, and/or chronic reassurance seeking. These individuals may come off as rude or difficult in their attempts to decrease their anxiety. Often, the approach they take to decrease their anxiety is learned by getting reinforcement from people close to them.

Additionally, Student's pattern of inattention, impulsivity, poor emotional dysregulation, and difficulty with cognitive flexibility is consistent with Frontal lobe and executive function deficit. Children with frontal lobe deficits and executive dysfunction have symptoms consistent with attention-deficit, mood dysregulation, and challenges surrounding behavior. Although not always, some children are often prone to temper tantrums, aggression, emotional outbursts, poor impulse control, and may have difficulties using appropriate judgment. They may be either overly impulsive (e.g., acting without thinking about the consequences of their misbehaviors) or significantly lack initiation or motivation to carryout daily life tasks or participate adequately in school and stay on task. Social problems are often present, such as lacking understanding of appropriate social boundaries and others may describe them as "socially immature." Although these children may demonstrate relatively

²¹ Id., at 51

intact neurocognitive abilities, they very often struggle applying their knowledge to new situations or lack understanding of *what* to do or *how* to behave in specific situations, which often impacts classroom functioning. These children are often described as "smart yet scattered." This deficit also explains Student's oversensitivity and emotional dysregulation.

Finally, Student is still struggling with the trauma of the boating accident. Although he may be having a post-trauma reaction, it is difficult to determine in a child as young as Student. His emotional behavior following the accident has improved, but it continues to create difficulties for him. Therefore, he meets criteria for Other specified trauma- and stressor-related disorder.”²²

In addition, the evaluator makes eight recommendations, including the completion of an occupational evaluation, a goal of preventing meltdowns rather than reacting to them when they happen, structure and routine, sensory self-regulation strategies, individual therapy, verbal cues, and programming without requiring putting hands on student only as a last resort.²³

11. On February 23, 2017, at the request of mom, a referral conference was held to discuss the independent evaluation from CPAC. It was in this conference that Student was identified as a child in need of special education services under IDEA and the eligibility category of emotional disturbance.

12. On February 24, 2017, a physical restraint was applied to student for ten minutes for hitting, biting, pushing. Student was trying to throw chairs, and then kicked a student and hit a teacher. The hold was a standing hold with a modified take down. After ten minutes the Student calmed down.²⁴

13. On March 8, 2017, an Occupational evaluation was completed, and Student qualified for Occupational therapy.²⁵

14. On March 14, 2017, the initial IEP for Student was developed and implementation began. The IEP included placement in an academic self-contained classroom, 165 minutes of special education services in Language Arts and Math, 5x per week, and 60 minutes of school based

²² ADE H-21-11 District's Exhibits pgs. 53-66.

²³ Id. at 66

²⁴ Id. at 74-75.

²⁵ Id. at 79.

mental health services two times per week. There is somewhat of a behavior plan developed for the initial IEP. However, it is unclear exactly how this plan was to be implemented, if anyone was trained on how to implement it, and exactly how it was going to address/prevent Student's aggressive behaviors.²⁶ Although documentation shows that Student qualified for Occupational Therapy, it is not included as a service on the IEP. The IEP includes two English Language Arts goals, one math goal, and 12 goals related to sensory processing which appear to be added some time after the IEP meeting.

15. The Student was referred for special education services because his behavior impeded his ability to learn, was identified as in need of services, an IEP developed and when asked on the IEP if positive behavioral interventions and supports and other strategies to address behavior were considered the District checked no.²⁷

16. On April 13, 2017, Karen Luck, OTR/L, reviewed the independent evaluation completed by Pediatrics Plus, and determined that Student should receive Occupational therapy one time a week for thirty (30) minutes.²⁸

First Grade year 2017-2018

17. On April 14, 2017, an Annual Review meeting was held and an IEP developed for August 14, 2017 to June 1, 2018. This IEP is almost the mirror image to that of the initial IEP with one glaring exception, the sensory processing, self-regulating goals were not a part of this IEP, even though progress reporting from the previous IEP show the majority of these goals as continuing. There is no explanation from documents or testimony as to why these goals were not included in the IEP, or why some of the goals appear to not be continued after May of 2017 even

²⁶ ADH H-21-11 District's Exhibits pgs. 99-100.

²⁷ Id., at 87.

²⁸ Id., at 106.

though they were not mastered.²⁹ There is no discussion about whether Student's behavior has improved because of the behavior plan implemented. The District again checks no when asked if positive behavioral interventions and supports were considered to address behavior.³⁰ On the schedule of services page, the District made some changes but because they drew lines through the previous times and wrote over some times, the hearing officer cannot be sure of how much time the Student was to receive in special education services in literacy, social studies and math. The student was to receive special education instruction in science forty minutes five times a week. All instruction was to take place in the self-contained special education classroom. In addition, Student was to receive sixty minutes of mental health services one time per week and thirty minutes one time per week of occupational therapy.³¹ By May of 2018, Student had mastered two out of three English language arts goals, three out of three math goals and one science goal. Extended year was considered, and the team determined that Student did not qualify. During Student's first grade year he received Corporal Punishment seven times. And at least three restraints.

9-7-17 restrained for twenty-five minutes because student crawled into classroom office and began biting self and hitting teacher.

9-11-17 restrained for five minutes for sitting in chair upside down, climbing on shelf and kicking.

9-18-17 restrained for 10 minutes for shutting down, isolating, throwing objects and biting self.³²

18. On October 20, 2017 committee met to determine if Student will take the state

²⁹ Id., at 95-98.

³⁰ Id., at 110.

³¹ Id., at 111.

³² Id., at 138-149.

and district wide tests with accommodations. Committee determined Student would participate in state and district wide assessments. Again, behavior was not addressed.³³

19. On January 11, 2018, an occupational therapy reevaluation was conducted by Pediatrics plus. The evaluator concluded that although progress had been made, Student still had difficulty with busy environments and transitions within his day affecting his participation within his daily tasks and within his ability to socially engage with others. Student still needs to improve sensory processing skills, emotion identification abilities and coping skills and improve social skills and ability to participate with others his age. Evaluator recommended Student receive ninety (90) minutes per week of occupational therapy.³⁴

20. On March 2, 2018, committee met to determine if Student continues to qualify for Occupational therapy at school. After considering the reevaluation from Pediatrics Plus, the committee chose to discharge Student from Occupational therapy because his needs could be met with support from staff in the classroom.³⁵

21. On April 16, 2018, the committee met to review Students Progress for the 2017-2018 school year. Student has shown progress in general education setting for lunch, block and recess. Therefore, the committee decided to add thirty minutes a day of general education instruction in social studies. Student had mastered eleven of seventeen objectives for the 2017-2018 school year. Student is still working to write two or more complete thoughts. The KTEA II was given on March 12, 2018, and Student was average in Reading composite, written language composite, and sound symbol composite. Student was above average in Math composite.³⁶ There are two behavior plans included in

³³ ADE H-21-11 District's Exhibits, pg. 153.

³⁴ Id., at 155-160.

³⁵ Id., at 166-167, 170-171.

³⁶ Id. at 190.

documents with the 2017-2018 IEP. Both behavior plans say draft-revised. Only one behavior plan says accepted May 22, 2018 and is signed by what appears to be members of the committee. However, it appears to have been accepted on May 22, 2018, but the date on the behavior plans both says May 23, 2018. This causes concern for the hearing officer because although behavior has been a constant and steady issue for Student, the development and implementation of an appropriate, clear and concise behavior plan doesn't appear at the forefront for the District. Again, the behavior plan doesn't appear to be associated with a functional behavior assessment, or a behavior interventionist or board-certified behavior analyst in its development.

Second Grade Year 2018-2019

22. Student's second grade IEP says that his needs are primarily in the area of behavior. Student screams, hits, bites due to frustration, lack of coping with transitions and change. He has difficulty developing relationships with same age peers and does not complete assignments efficiently. Student was given the Behavior Evaluation Scale (BES) and the results indicated:

Learning problems-significant level of concern

Interpersonal difficulties- significant level of concern

Inappropriate behavior-serious level of concern

Unhappiness/depression-significant level of concern

Physical fears/symptoms-serious level of concern

Student has an impaired ability to build and maintain relationships with peers, teachers and does not work or play with others cooperatively. He shows extreme negative reactions to minor failures and needs intensive supports and strategies to maintain control of his behaviors and

reactions to surrounding environments.³⁷ For the first time since the Student has been receiving special education services when the IEP asks about positive behavior supports and other strategies to address behavior the District checks yes and indicates the committee met to review the behavior plan and make any necessary changes.

23. The second grade IEP provided special education instruction in the following:

Reading/social	40mins	5x/week	SpEd classroom
Writing/behavior	40mins	5x/week	SpEd classroom
Behavior/Social	30mins	4x/week	SpEd classroom

There were no related services listed on the IEP.³⁸

24. There is a behavior plan that has written in pencil at the top reviewed 4/11/19.

Looks exactly like every other behavior plan during Student's time in the District.

Doesn't purport to make any significant changes or any changes at all. The Behavior plan says it was accepted in 5/22/18.

25. During Student's second grade year he received corporal punishment two times.

26. There are 20 pages of a communication log that appears to have been sent home to mom. These logs start the week of 8-15, and the hearing officer is guessing this is the first week of Student's second grade year because the first entry states, great 1st day.

These communication logs continue until 3-11-19.³⁹

27. On April 12, 2019, a notice of action form is provided to mom. The explanation of action states that committee met to review Student's current progress for 2018-2019 school year. The committee discussed placement options and presented the idea for ALE and the benefits that this would have for Student to be in a more therapeutic setting.⁴⁰

³⁷ Id., at 228.

³⁸ Id., at 237.

³⁹ Id., 204-224.

Student's third grade IEP was developed but mom was given time to think about the proposed ALE placement.

28. On April 22, 2019, student was restrained twice in succession. The first time being seven minutes from 145pm to 152pm, and the second being from 2:05pm to 2:17pm. Student was hiding under teacher desk. He refused to come out and started shouting, throwing furniture and head butting.

29. On April 29, 2019 a psychoeducational evaluation on Student was conducted by Pediatric plus.⁴¹The evaluator found:

Testing results indicate Student's general cognitive ability is in the average range (FSIQ=105, 63rd percentile). He demonstrated a very strong performance in verbal comprehension, and strong performances in visual spatial functioning and fluid reasoning. Student was administered subtests that comprise the General Ability Index (GAI). This ancillary index score provides an estimate of general intelligence that is less impacted by weaknesses in the executive functions of working memory and processing speed. His GAI of 113 is at the 81st percentile. This score is somewhat advanced for his age and indicates strong cognitive abilities, suggesting Student should be able to be a successful student. However, the discrepancy between his FSIQ of 105 and his GAI of 113 indicates his weaknesses in working memory and processing speed, are negatively impacting his ability to demonstrate his knowledge and are lowering his overall IQ score. Students with weaknesses in working memory and processing speed tend to learn best in small group learning environments, where the presentation of information can be modified, where there are lots of opportunities for repetition of information, and where new learning can be related to prior learning to increase chances of retention. Just based on his cognitive profile, Student would do best in a specialized/alternative learning environment. When that is coupled with trauma, high level of anxiety, and emotional and behavior regulation difficulties, the busy, stimulating typical classroom would seem to be too much for his. However, Student is a very bright little boy, and there needs to be an environment where he can learn and reach his potential without being overwhelmed.

Student's performance also indicates the presence of learning disabilities in reading and written expression. Math scores are in the high average to average ranges, so that even with all he is dealing with, he is able to produce results in math. Testing results in reading indicate he is picking up some of the basic reading skills; however, he is struggling to use these skills to become a fluent reader. He demonstrates very few sight words, and his decoding skills lack efficiency. Evaluation results indicate significant difficulty with the rapid and automatic recognition of words in print. Student demonstrates some ability to sound out words, but has difficulty with the ability to automatically and effortlessly recognize words in print. He must painstakingly break words down into individual phonemes, and this results in slow and labored reading. Student meets the diagnostic criteria for Specific Learning Disability in Reading-Dyslexia. Test results indicate concerns with written expression. Student seems to struggle with both the content of written expression, the mechanics of writing, and the physical act of writing. His handwriting is poor and seems effortful. He struggles with letter formation and staying on the line, as well as with spelling. As a result of these weaknesses, he tends to write as little as possible, and what he produces is often illegible. Student demonstrated that the alphabet isn't fully automatic at this point. His written expression is significantly weaker than his oral expression. Testing results support Specific Learning Disability in Written Expression-Dysgraphia.

⁴⁰ Id., at 253.

⁴¹ ADE H-21-11, Parent Exhibit p. 168, District Exhibit pg. 259.

The diagnostic impressions were that background history, parent and teacher ratings, behavioral observations and psychometric tests results support a diagnosis of Specific Learning Disability. In addition, Student was given the following DSM diagnosis:

Dyslexia
Dysgraphia
Generalized anxiety disorder
Frontal lobe and executive function deficits
Other Specified Trauma-and-Stress related disorder, by history
Sensory processing disorder, by history
Developmental Disorder, by history

The evaluator makes numerous pages of recommendations regarding Student's diagnosis of Dyslexia and Dysgraphia.

30. On June 10, 2019, an Occupational Therapy Addendum to 2019 evaluation was conducted by Pediatric Plus. Evaluator concluded that Student is struggling greatly with handwriting. With his diagnosis of dyslexia, handwriting is a challenge for him with various needed intervention to empower Student and teach modifications for legible written work. Evaluator recommended that Student receive sixty minutes per week to address these needs.⁴²

31. On June 18, 2019 a meeting was held to discuss change in placement, FAPE, and review and revise the IEP and behavior plan. The committee reviewed the Pediatric plus evaluation obtained by mom. After reviewing the evaluation, the District agreed to provide a functional behavior assessment with data collection in the general education and special education settings, and an ecological inventory in those settings as well. The IEP team will meet again in September to consider the FBA and develop an appropriate behavior plan with measurable goals, incentive/rewards, and strategies for Student control actions, increase his ability to resist acting on impulses and self-monitor the effect of his behavior on others.⁴³ This is the very first time since Student entered the District that there is discussion about the development of an appropriate behavior plan, using an FBA, and measurable goals. This hearing officer cannot find any documentation that

⁴² ADE H-21-11, District Exhibit pg. 279.

⁴³ ADE H-21-11, District exhibit pg. 294.

would suggest any of the previous behavior plans included using an FBA or developing measurable goals by collecting data.

Additionally, although there was testimony by Ms. Uyeda, Student's self contained teacher, that she provided Dyslexia services with the connections program starting sometime in 2018 or 2019. However, there was nothing except Ms. Uyeda's testimony that the Dyslexia interventions were done with fidelity or contained progress monitoring. Although this hearing officer believes that Ms. Uyeda provided some type of intervention/services for Dyslexia, I am not convinced that the interventions were done with fidelity or contained any progress monitoring. Ms. Uyeda testified that Dyslexia services were covered under the goals in the IEP.⁴⁴

32. A functional Behavior Assessment was conducted from August 21, 2019 to October 4, 2019.⁴⁵

33. On October 9, 2019, an IEP meeting was held to discuss provision of FAPE, the functional behavior assessment/report and to discuss the behavior plan.

The team reviewed the Occupational Therapy evaluations from Pediatrics Plus 3/2018 and 11/2019. Mom informed the team that Student will have another OT evaluation from Pediatrics Plus on October 21. The district offered to perform the evaluation, but mom said that she would proceed with the outside evaluation. Sensory breaks that were delivered and outcomes from the feelings chart before and after were explained to the team by the district OT. Another evaluation will be performed by Dennis Developmental to determine additional areas of need.

Further the team reviewed the functional behavior assessment and completed the FBA analysis. The behavior plan will include: Sensory breaks and safe spaces, social stories, and self monitoring tool rating himself 1-4 (1 being calm and 4 being at his worst level of self-control).

Crisis team will continue, parent changed mental health services to an outside agency. Video calls messages with mom to remain connected to home and know that mom is doing well (Classroom Dojo), Social stories that show the consequences (positive & negative) his behaviors, a photo of mom that he has access to at all times, continued safe-space and sensory breaks. Student mis-perceives that a hold for his safety social story about when Professional Crisis Management has to be used and makes sure why it is used and how to avoid it. Dedicated 1-1 long-term sub para to support Student. Ms Uyeda will introduce the

⁴⁴ ADE H-21-11, Trial Transcript Vol. II 135, 210-218.

⁴⁵ ADE H-21-11, District exhibit pgs. 396-407.

individual as someone that she has chosen. The school psychologist will make weekly visits and check-ins.⁴⁶

34. On October 18, 2019, a report of consultation impressions and recommendations was completed on Student by Dennis Developmental Center. The impressions were as follows:

- Previously diagnosed with Anxiety Disorder, followed by local mental health
- Fine Motor delay and sensory challenges, receiving out patient OT
- Student was evaluated by a multidisciplinary team and found by the team not to meet the DSM-V diagnostic criteria for Autism Spectrum Disorder.
- Previously diagnosed with Dyslexia.
- Pragmatic skill assessment showed average skills
- Genetic testing in 2018 showed variant of unknown clinical significance single copy gain on chromosome 12q12.12.

The evaluation team recommended intensive services with appropriate placement and programming, continue to follow with local mental health, and continue primary care. In addition, look to other reports, psychology, speech etc., for additional recommendations.⁴⁷

35. On October 21, 2019, another occupational evaluation was conducted by Pediatrics Plus. Diagnosis included, generalized anxiety disorder, frontal lobe and executive Function Disorder, SPD, PTSD, OCD, Dyslexia and Dysgraphia.

Diagnosis specific to treatment of Student included, decreased motor

⁴⁶ Id., at 409.

⁴⁷ Id., at 434-439.

coordination skills, social functional delay, sensory processing delay, decreased functional hand strength and endurance. Again, the recommendation was occupational therapy 60 minutes per week to address areas of delay.⁴⁸

36. On February 11, 2020, student was restrained for twenty-nine minutes, for throwing objects and shutting down and refusing to complete task. Student did not want to work so teacher worked with another student and Student threw a chair at the paraprofessional.⁴⁹

37. On February 14, 2020, IEP meeting was held to discuss FAPE and EDR. The committee met to conduct an existing data review because it was time for Student's 3-year reevaluation. The committee reviewed the OT evaluation from pediatric plus and thirty minutes of direct OT was added to the IEP. The committee also discussed the reinforcement inventory that will be used to prevent Student from going into crisis. They added special factors so that when general education teacher is absent Student can choose to pick up work and go to smaller special education setting. Also, a nurse will do a wellness check on student anytime a hold is used.⁵⁰

38. March 2, 2020, a restraint was used two times in succession first one from 1:55pm-2:08pm and the second restraint was from 2:15pm.-2:21pm. Student was biting, pushing and trying to knock over furniture. Continue to implement behavior plan.⁵¹

39. March 9, 2020 a restraint was used for four minutes because Student was

⁴⁸ ADE H-21-11, District Exhibits, pgs. 440-444.

⁴⁹ Id. at 462.

⁵⁰ Id., at 467.

⁵¹ Id., at 487.

pushing staff, and shutting down and refusing to complete task. Student was kicking computer during testing.⁵²

40. April 2020, because of COVID 19, the District went to virtual learning.

41. On May 21, 2020, meeting was held to discuss extended year data and services. The committee found that Extended year services were appropriate but because of COVID-19, direct services were not possible. Student was provided a six week program that consisted of online reading program four times a week for twenty minutes. Weekly check ins with a teacher and biweekly progress reports will be provided via parent email. Up to forty minutes one time a week working on social stories and conflict resolution in preparation to return to school.

Fourth Grade Year 2020-2021

42. Ten months after the completion of the functional behavior assessment a Behavioral Intervention plan was developed using the FBA and collected data. Again, this behavior plan lacked measurable goals and preventative services. And it was developed after the Student had been out of school for almost eight months. Additionally, under review schedule, the behavior team will meet to review, assess, and revise the BIP on or before 8/18/2021.⁵³

43. There is an IEP that says grade four on some pages and grade three on some pages. While the hearing officer understands that the meeting was held through alternative means because of COVID-19, the District in most of its annual reviews changes dates on pages of its IEPs. It makes it confusing when a

⁵² Id., at 488.

⁵³ Id., at 499-501

hearing officer is reading an IEP and gets to a page of services or goals and the grade changes.

Nevertheless, it appears that the fourth grade IEP under guardian input, mom makes it clear that Student is going to have a difficult time returning to school, and she wants assistance in helping prepare Student to transition back into school again.

The IEP noted that strategies to address behavior:

Student uses a 1~5 rating scale for his anxiety/frustration. Student will be provided with behavioral accommodations and supports in order to help prevent him from reaching a 3 or higher. When at a 3 or higher or when the antecedent of the behavior occurs (head down, crawling, etc) an adult will offer Student a structured break from his list of preferred reinforcements. Should both Ms. Uyeda, or his one on one paraprofessional be absent on the same day, Parent will be notified and may choose to keep him home and arrangements for compensatory time will be determined by school and parent. When the general education teacher is absent, Student will be given the option to pick up his work and complete it in a smaller setting. The crisis team can be called if Student is in a situation that is a risk to his safety or the safety of others. Data collection methods for duration, frequency and ABC data will be used as documentation. In the event of a crisis, a nurse will do a wellness check after PCM has been used and mom will receive documentation within 24 hours.⁵⁴

44. The beginning of fourth grade was as hard for Student as mom had suggested it was going to be. Between September 13, 2020, and September 28, 2020, Student was restrained on the ground nine times for approximately ninety-two minutes.⁵⁵ And there was no suggestion the IEP team meet and discuss why the behavior plan wasn't working, if there needed to be another FBA conducted and maybe a behavior consultant, or BCBA brought in to help do hands on training on how to develop and implement an appropriate behavior plan.⁵⁶

45. On October 6, 2020, an IEP committee meeting was held because Student's teacher had three concerns. 1. Reinforcers in the BIP are no longer effective for motivation, deescalation/crisis prevention. 2. Student can recite the steps and concepts regarding emotional regulations but does not demonstrate use of them during pending crisis. 3. Student is refusing to participate in activities he once enjoyed.⁵⁷ It was decided that a referral to an alternative

⁵⁴ ADE H-21-11, Parent exhibit pg. 22.

⁵⁵ ADE H-21-11, Parent's exhibits, pgs. 273, 276, 279, 282.

⁵⁶ ADE, H-21-11, District exhibit pgs. 521-532.

⁵⁷ Id., at 548.

education setting (ALE) would be made by the district and that the student could remain in his current placement until an intake meeting was scheduled and a start date determined. Mom vehemently disagreed with the decision to move Student to the ALE. Mom also had an advocate present for this meeting and other alternatives were discussed. Possibly a 1 to 1 paraprofessional, or teacher, homebound instruction or the District paying for Student to attend Compass Academy, a private school for children with learning differences.⁵⁸

47. On October 8, 2020, ADE H-21-11, Parent's first Due Process Hearing request was filed.

48. No formal referral was made for Student to go to the ALE.

49. On November 13, 2020, mother enrolled Student in Compass Academy, a private school.

50. On November 17, 2020, Courtney Williams, Director of Compass Academy sent correspondence to the District explaining that Student was enrolled.⁵⁹

51. On November 27, 2020, Parent's counsel sent a letter to District's superintendent, Scott Spainhour, informing him that Parent rejected Student's placement proposed by the Greenbrier School District to provide FAPE to Student at the Crossroads alternative learning environment ("ALE"). The letter further stated that Parent disagreed with the proposed Student's placement at the ALE and the District failed to make a FAPE available to Student within a reasonable amount of time and feels that placement in a private school is urgent to meet his needs. Parent's counsel indicated that Parent intended to enroll Student in a private school at public expense.⁶⁰

52. On May 12, 2021, this Hearing Officer found the District denied Student a FAPE between October 8, 2018, and October 8, 2020.⁶¹

53. On May 27, 2021, Parent filed this Due Process hearing request, stating that the District

⁵⁸ Id.

⁵⁹ ADE H-21-11 Parent Exhibit p. 481.

⁶⁰ Parent's Exhibit p. 24.

⁶¹ Hearing officer Decision and Order H-21-11.

failed to offer an appropriate program after October 8, 2020, and therefore Parent unilaterally moved Student to Compass Academy, a private school in Conway Arkansas and is seeking reimbursement for private tuition to Compass Academy and transportation costs.⁶²

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

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

In the role of factfinders, special education hearing officers are charged with the responsibility of making credibility determinations of the witnesses who testify. See *J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008). This hearing officer found each of the witnesses who testified to be credible in that they all testified to the facts to the best of their recollection; minor discrepancies in the testimony were not material to the issues to be determined and, in any event, were not deemed to be intentionally deceptive. The weight accorded the testimony, however, is not the same as its credibility. Some evidence, including testimony, was more persuasive and reliable concerning the issues to be decided, discussed as necessary below. In reviewing the record, the testimony of all witnesses and each admitted exhibit's content were thoroughly considered in issuing this decision, as were the parties' post hearing briefs.

⁶² See H-21-36 Due Process Complaint.

Applicable Legal Principles

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

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

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

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

"The IEP is 'the centerpiece of the statute's education delivery system for disabled children.'" *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, U.S. 137 S. Ct. 988, 994, 197 L. Ed. 2d 335 (2017) (quoting *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988)). An IEP is a comprehensive program prepared by a child's "IEP Team," which includes teachers, school officials, the local education agency (LEA) representative and the child's parents, an IEP must be drafted in compliance with a detailed set of procedures. 20 U.S.C. § 1414(d)(1)(B). An IEP must contain, among other things, "a statement of the child's present levels of academic achievement," "a statement of measurable annual goals," and "a statement of the special education and related services to be provided to the child." *Id.* § 1414(d)(1)(A)(i). A FAPE, 24 as the IDEA defines it, includes individualized goals, "specially-designed instruction" and "related services." *Id.* § 1401(9). "Special education" is "specially designed instruction . . . to meet the unique needs of a child with a disability"; "related services" are the support services "required to assist a child . . . to benefit from" that instruction. *Id.* §§ 1401(26), (29). A school district must provide a child with disabilities such

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

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

Pursuant to Part B of the IDEA, states are required to provide a FAPE for all children with disabilities between the ages of three and twenty-one.¹¹⁸ In 1982, in *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, the U.S. Supreme Court addressed the meaning of FAPE and set forth a two-part analysis that must be made by courts and hearing officers in determining whether a school district has failed to provide FAPE as required by federal law.¹¹⁹ Pursuant to *Rowley*, the first inquiry that a court or hearing officer must make is that of whether the State, *i.e.* local educational agency or district, has complied with the procedures set forth in the IDEA. Thereafter, it must be determined whether the IEP(s) developed pursuant to IDEA procedures was reasonably calculated to enable the student to receive educational benefits.⁶³

In the present case petitioner does not allege any procedural violations under IDEA. Therefore, this hearing officer need not address this issue. However, it is now necessary to consider whether the District substantively denied FAPE to Student. Pursuant to *Rowley*, the goal of the IDEA is "more to open the door of public education to handicapped children on

⁶³20 U.S.C. § 1412(a); 34 C.F.R. § 300.300(a).

appropriate terms than to guarantee any particular level of education once inside.” Essentially, an IEP is not required to be designed to “maximize a student’s potential commensurate with the opportunity provided to other children,” thus making the standard that District must meet very minimal.⁶⁴ However, what constitutes educational benefit when dealing with a disabled student must be determined on a case-by-case basis. Specifically, “[t]he IDEA requires public school districts to educate ‘a wide spectrum of handicapped children,’ and the benefits obtainable by children at different ends of the spectrum will ‘differ dramatically.’”⁶⁵

The IDEA also requires that students with disabilities be educated in the least restrictive environment pursuant to 20 U.S.C. §1412(a)(5). There is a “strong preference in favor of disabled children attending regular classes with children who are not disabled,” resulting in a “presumption in favor of public school placement.”⁶⁶ However, the IDEA “significantly qualifies the mainstreaming requirement by stating that it should be implemented to the ‘maximum extent appropriate.’”⁶⁷ Essentially, a disabled student should not be separated from his or her peers unless the services that make segregated placement superior cannot be “feasibly provided in a non-segregated setting.”⁶⁸ The requirement to mainstream is not applicable when it “cannot be achieved satisfactorily.”⁶⁹ As such, it is permissible to remove a disabled child from a mainstream environment when he or she would not benefit from mainstreaming or when the “marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting.”⁷⁰

⁶⁴ *CJN v. Minneapolis Pub. Sch.*, 323 F.3d 630, 68-39 (8th Cir.), *cert. denied*, 540 U.S. 984 (2003).

⁶⁵ *C.B., by and through his parents, B.B. and C.B. v. Special Sch. Dist. No. 1, Minneapolis, MN*, 636 F.3d 981 (8th Cir. 2011) (quoting *Rowley*, 458 U.S. at 202).

⁶⁶ *CJN*, 323 F.3d at 641.

⁶⁷ *Pachl v. Seagren*, 453 F.3d 1064, 1067 (8th Cir. 2006); *see also* 20 U.S.C. § 1412[a](5).

⁶⁸ *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983).

⁶⁹ *Pachl*, 453 F.3d at 1068.

⁷⁰ *Roncker*, 700 F.2d at 1063.

"The IDEA demands more" than this *de minimus* standard. *Endrew F.*, 137 S.Ct. at 997, 1001. "It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.* Accordingly, "[t]o meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.* at 999.

Additionally, where a student's behaviors impede that student learning or the learning of others, the IEP team must consider, and the IEP must contain, "the use of positive behavioral interventions and supports, and other strategies, to address that behavior"⁷¹

In the present case, Parent asserts that the District failed to provide FAPE from October 8, 2020, through November 13, 2020, when Parent moved Student to Compass Academy, a private school in Conway, Arkansas.

In ADE H-21-11, parents first Due Process request, this hearing officer found that the District failed to provide student FAPE from October 8, 2018-October 8, 2020. That decision included a determination that Student's 2020-2021, IEP failed to provide Student FAPE. There was no evidence, testimony or documentary introduced in the present hearing, that suggested the District made any changes to Student's IEP between October 8, 2020-November 13, 2020. Therefore, this hearing officer need only reiterate her findings contained in her May 12, 2021, H-21-11 decision. However, this hearing officer finds it is important to include evaluations of previous IEPs for historical value.

2018-2019 IEP

Here the District's IEP for the 2018-2019 school year was inadequate to address the OT and behavioral needs of the student. As discussed above in the finding of facts, on January 11, 2018, mom obtained an OT evaluation from pediatrics plus. The evaluation stated that "student

⁷¹ 34 C.F.R. 300.324(a)(2)(j).

still needs to improve sensory processing skills, emotion identification abilities and coping skills and improve social skills and ability to participate with others his age.” Evaluator recommended 90 minutes of OT per week. For reasons unknown and without evidence provided, after considering the pediatric plus OT evaluation, the committee chose to discharge student from OT, stating his needs could be met with supports in the classroom. This is a Student who had increasingly aggressive behaviors, associated partly with a sensory processing disorder, which is often addressed through OT. There was nothing, in the exhibits or in the testimony presented that suggested there were other evaluations or evidence that warranted Student’s dismissal from OT.

By all appearance, Student continued to have significant behavioral challenges. There appears to be somewhat of a behavior plan attached to this IEP. However, written in pencil at the top is reviewed on 4/11/19. There is nothing to indicate how this behavior plan was developed. What data if any was used or what mechanism will be used to assess progress and determine the plans effectiveness. The record is woefully absent of any mention of an FBA associated with the development of this Behavior plan. When the IEP asks if positive behavioral interventions and other strategies to address behavior are used, the District checks yes. However, this hearing officer cannot find one instance when the District was using or implementing positive behavioral support system. The evidence fails to support that this behavior plan was developed using evidence-based practices, or that training on the behavior plan was provided to all staff who came in contact with the Student. Further, we know this behavior plan had proved ineffective because it is the identical behavior plan used in previous years and the student’s aggressive behaviors increased. He received corporal punishment, and

was restrained numerous times, yet the IEP team did not reconvene to address the deficits of the behavior plan.

2019-2020 IEP

Here, the District 2019-2020 IEP was inadequate to address Student's behavior, or his Dyslexia and Dysgraphia diagnoses. Prior to the development of the 2019-2020 IEP, the IEP team met to consider changing Student's placement to the Alternative learning environment (ALE). There was very little reason given for the District seeking this change other than Student would be in a more therapeutic setting. Student was subsequently evaluated again by pediatrics plus, at mom's request, and given the following diagnosis:

Dyslexia

Dysgraphia

Generalized anxiety disorder

Frontal lobe and executive function deficits

Trauma

Sensory processing disorder

Developmental disorder

In addition, mom sought out an addendum to the 2019 OT evaluation conducted by pediatric plus. After reviewing the evaluations, the District agreed to a Functional Behavior Assessment (FBA) with data collection in the general education and special education settings, and an ecological inventory. As previous stated the District continued to use the same behavior plan which had shown little to no success, in addition, the IEP lacked appropriate services to address Student's diagnosis of Dyslexia and Dysgraphia. Although there was testimony by Ms. Uyeda that she was providing Dyslexia services with fidelity, those services were not included in the

IEP as a service, nor mentioned on the IEP. Ms. Uyeda testified that she provided those services under the Student's goals in language arts.⁷² The hearing officer believes Ms. Uyeda provided some type of service that she testified was addressing Student's dyslexia but found little documentary evidence to support this assertion. In addition, there was no mention of progress monitoring.

2020-2021 IEP

Here, the Student's IEP was inadequate to address Student's behavior deficits and his dyslexia and dysgraphia diagnosis. The 2020-2021 IEP and previous IEPs fail to include how Student's dyslexia and dysgraphia is going to be addressed. This IEP did provide direct instruction 90 minutes per week in reading, and 40 minutes per week for writing. But again, fails to mention a program designed for dyslexia or indicate fidelity. As for behavior, we have our first behavior plan that is developed using a functional behavior assessment and collected data. Unfortunately, the FBA was conducted 10 months before the behavior plan was developed and the Student had been out of school for almost eight months because of COVID 19. Based on Student's history and diagnosis District should have known that transitioning back to the school environment was going to be difficult for Student and should have planned accordingly. Instead, the District moved forward implementing a behavior plan that may no longer address necessary behaviors. Student had significant behavior episodes during the first 15 days of his fourth-grade year. He was restrained nine different times for approximately ninety-two minutes.⁷³ There were no documents suggesting the IEP met to discuss why the behavior plan was not working, if there needed to be another FBA performed or a behavior consultant or a BCBA brought in to help do hands on training on how to develop and implement an appropriate behavior plan. This was a

⁷² ADE H-21-11, Trial Transcript Vol. III, pgs. 214-218.

⁷³ ADE H-21-11, Parent's exhibits, pgs. 273, 276, 279, 282.

constant theme throughout Student's time at the District. When Student's behaviors escalated the District failed over and over to meet and make the necessary changes to the behavior plan. It is clear that at some point the District knew they needed assistance because Ms. Huffmaster, the LEA, testified that she had sought a behavior consultant from Circuit⁷⁴, but was unable to obtain one.⁷⁵ Nothing in IDEA prevented the District from seeking out assistance from a behavior consultant or a BCBA, for developing and implementing an appropriate behavior plan. We know the behavior plans developed were ineffective because the behaviors continued and worsened. Sheila Barnes, a doctor level board certified behavior analyst, who runs a Clinic, Hope 4 Autism, and a Masters BCBA program at Ouachita Baptist University, although hadn't worked directly with Student, did provide information and guidance as to why these behavior plans weren't successful in addressing Student's disabling behaviors. Her main contention was that the plans were not using evidence-based practices, and as the plans reinforced Student's bad behavior, the bad behavior will continue or increase.⁷⁶ In sum, the district's 2020-2021 IEP continued to deny Student a FAPE between October 8, 2020 through November 13, 2020.

Private School Placement, Tuition Reimbursement and Compensatory Education

Having determined that District denied FAPE to Student during the period covered by ADE H-21-36, this Hearing Officer must now determine whether Student is entitled to tuition reimbursement, as requested by Parent, for attending Compass Academy, a private school in Conway, Arkansas. Student alternatively seeks compensatory damages to the extent necessary to put Student in the position in which he would have been had he been provided FAPE.

⁷⁴ CIRCUIT (Centralized Intake and Referral / Consultant Unified Intervention Team) is a behavior intervention service provided to Arkansas School District by the Arkansas Department of Education. This program is not exclusive and doesn't prohibit the District from seeking a private behavior consultant or BCBA.
<https://arksped.k12.ar.us/sections/CIRCUIT.html>

⁷⁵ ADE H-21-11, Transcript VII, pgs. 221-224.

⁷⁶ ADE H-21-11 Transcript Vol. VI., 58.

A hearing officer has broad discretion regarding the remedy granted in cases where a student is denied FAPE by a school district. The IDEA authorizes tuition reimbursement for placement in private schools in situations where a district is unable to provide an appropriate placement for a student and the private school placement, itself, is deemed appropriate. *Sch. Comm. of Town of Burlington, Mass. v. Dep't. of Educ.*, 471 U.S. 359, 369 (1996). The Eighth Circuit Court of Appeals has previously held that movement to another school district does not prohibit student from seeking compensatory education from a prior school district for violations of FAPE. *Indep. Sch. Dist. No. 283 v. A.C.*, 258 F.3d 769, 774 (8th Cir. 2001). Where a student's case concerns obligations that a prior district owed to student and failed to meet, the remedy sought is compensatory. *Id.* "It does not matter whether the [d]istrict has any present or future obligation to develop a new IEP . . . or to give [a student] further hearings." *Id.* Similarly, regarding compensatory education, "[w]hether District is able to provide FAPE prospectively is irrelevant to an award of compensatory education." *Indep. Sch. Dist. No. 283 v. E.M.D.H.*, 960 F.3d 1073, 1085 (8th Cir. 2020). The purpose of compensatory education is "restorative," and damages are "strictly limited to expenses necessarily incurred to put Student in the education position [he] would have been had the District appropriately provided a FAPE." *Id.* at 1086.

In the present case, District denied FAPE to Student between October 8, 2020- November 13, 2020. This does not count the period covered by hearing #1, ADE H-21-11. Essentially, Student has been denied FAPE for over 2 years. Given this time period, it is the opinion of this Hearing Officer that District is not able to provide FAPE to Student at this time. As such, it is necessary to determine if the private placement sought by Parent is appropriate for Student.

Parent took Student to Compass Academy on November 13, 2020, for a three-day trial period.⁷⁷ November 27, 2020, Parent's counsel sent a letter to District's superintendent, Scott Spainhour, informing him that Parent rejected Student's placement proposed by the Greenbrier School District to provide FAPE to Student at the Crossroads alternative learning environment ("ALE"). The letter further stated that Parent disagreed with the proposed Student's placement at the ALE and the District failed to make a FAPE available to Student within a reasonable amount of time and feels that placement in a private school is urgent to meet his needs. Parent's counsel indicated that Parent intended to enroll Student in a private school at public expense.⁷⁸

Compass Academy is a private school that operates as a non-profit organization, in Conway, Arkansas. The Director of Compass Academy, Courtney Williams, testified at the hearing of this matter. This Hearing Officer found her testimony to be credible and thorough. Compass Academy provides educational services for disabled Students in grades K-12. Students that attend Compass Academy are typically in need of a smaller setting. There are a total of approximately 87 students and 21 staff members at the school. There is a teacher and a paraprofessional in every classroom, and the maximum number of Students in any given class is ten. Compass has seven special education certified teachers and two regular certified teachers, and three teachers who are not licensed but do have master's degrees.⁷⁹ Compass contracts with organizations that provide a variety of therapy services, including OT, physical therapy, speech therapy, and ABA therapy. Compass Academy operates year-round, reducing the chance that a student will academically regress during summer months. Tuition for a single year at Compass Academy is \$9,200.

⁷⁷ Parent's Exhibit p. 24.

⁷⁸ Id., p. 23.

⁷⁹ Transcript Vol. 1 pgs. 152-153.

When Student began at Compass Academy, he was reading on an early first grade level, reading three letter words and he was in the fourth grade. Ms. Williams, Compass director testified that Student had mastered the whole first level 1 book and ready to move on the second book.⁸⁰ Student was on a third-grade math level when he entered Compass and is now on grade level in math. Aside from making academic progress, Student has been able to remain at school. Student has made friends and has not been suspended or restrained since starting Compass academy.⁸¹ Compass has a quasi-IEP, which contains goals, that include functional behavior goals for every student. They have academic goals, in math, literacy, and written expression. Compass offers, OT, PT, and speech therapy services, along with Applied behavioral services (ABA) available should Student's qualify. Compass also offers school based mental health therapy if warranted.⁸²

Compass academy meets the eligibility requirements by the ADE for participation in the Succeed Scholarship program.⁸³ The Succeed Scholarship Program, Ark. Code Ann. § 6-41-801 et seq., provides a scholarship to an eligible private school for students with disabilities that have an individualized education program (IEP), individualized service plan (ISP), and students in foster care living in a group home or facility that meet eligibility requirements.⁸⁴

Compass academy utilizes the Wilson Reading Program, which is an Orton Gillingham program, for its reading curriculum. All staff and teachers at Compass Academy have been trained in this reading system. Student has responded well to the curriculum at Compass Academy both academically and behaviorally.

⁸⁰ Transcript Vol. 1 pgs. 107-108.

⁸¹ Id., at.

⁸² Id., at 92-113

⁸³ <https://dese.ade.arkansas.gov/Offices/special-education/policy-regulations/succeed-scholarship>

⁸⁴ Id.

Based on these facts, it is the opinion of this Hearing Officer that Compass Academy is an appropriate placement for Student at this time. Although Student will not be with non-disabled peers on a daily basis, the environment at Compass Academy is still less restrictive than the ALE placement where District wanted to place Student. Considering all other factors, including academic growth and social skills growth, as well as the fact that Student is able to attend school for entire days, Compass Academy appears to be an appropriate environment for Student at this time. It is noted that District elicited testimony regarding some behavioral issues that Student has exhibited at Compass Academy. This Hearing Officer acknowledges that Student's behavior has not been without occasional incidents at Compass Academy. The difference between District and Compass Academy, however, is that Compass Academy seems more prepared to handle these outbursts and has not let Student's behavior distract from keeping Student on track for full school days. For all of these reasons, it is the opinion of this Hearing Officer that District has denied Student FAPE, Compass Academy is an appropriate placement, and District should compensate Student by providing tuition reimbursement and expenses to Parent. Because this Hearing Officer is awarding tuition reimbursement to Parent, no additional compensatory education is considered necessary.

Conclusion

The results of the testimony and evidence warrant a finding for the Parents. Specifically, Parents have introduced sufficient evidence in the record to establish by a preponderance of the evidence that District Denied Student a FAPE between October 8, 2020-November 13, 2020 by failing to produce an IEP for Student that was reasonably calculated to enable him to make progress appropriate in light of his circumstances. District is hereby ordered to take the following actions regarding Student:

1. District shall reimburse Parent for any tuition paid or, if not yet paid, tuition owed to Compass Academy for Student's attendance at the school from November 13, 2020, through June 30, 2021.
2. District shall pay Parent mileage, in accordance with mileage rates for other District employees and staff, for all trips made by Parent to and from Compass Academy between November 13, 2020, and June 30, 2021.
3. District is hereby ordered to pay tuition for Student to attend Compass Academy from July 1, 2021, through July 31, 2022. Should Parent receive assistance with tuition through the succeed scholarship or any other means, the District need only pay the portion of tuition not covered. District shall pay Parent mileage, in accordance with milage rates for other District employees and staff, for all trips made by Parent to and from Compass Academy between July 1, 2021, through July 31, 2022. It is noted that the award of tuition reimbursement for the 2021-2022 school year is not prospective in nature. Instead, this award of tuition reimbursement is intended to be a compensatory remedy. Because of the District's denial of FAPE for the past two years, Student is still academically behind his peers. An additional year of tuition reimbursement should serve to compensate Student for that loss and, hopefully, allow him to academically reach the level of his same-aged peers.

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

Finality of Order and Right to Appeal:

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

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

IT IS SO ORDERED.

Dana McClain

HEARING OFFICER

September 28, 2021

DATE

