

ARKANSAS DEPARTMENT OF EDUCATION
Special Education Unit

IN RE:

XXXXXXXXXXXXXXXXXXXX, Parents of
XXXXXXX, Student

PETITIONER

VS.

CASE NO. H-24-10

Magnet Cove School District, District

RESPONDENT

HEARING OFFICER'S FINAL DECISION AND ORDER

ISSUES PRESENTED:

Whether the Magnet Cove School District (hereinafter "District" or "Respondent") denied XXX (hereinafter "Student") a free, appropriate, public education (hereinafter "FAPE") between August 18, 2021 and August 17, 2023 in violation of certain procedural and substantive requirements of the Individuals with Disabilities in Education Act of 2004, 20 U.S.C. §§ 1400-1485, as amended (hereinafter referred to as "IDEA"), which requires an analysis of the following sub-issues:

- (1) whether the District provided Student an IEP that was reasonably calculated to allow Student to make appropriate progress in light of his individual circumstances for the 2021-2022 and 2022-2023 school years;
- (2) whether the District allowed parents to meaningfully participate in Student's educational planning in the 2023-2024 IEP;
- (3) whether Student's proposed IEP for the 2023-2024 school year is reasonably calculated to allow Student to make appropriate progress in light of his individual circumstances;
- (4) whether Pediatrics Plus is an appropriate placement for Student.

PROCEDURAL HISTORY:

On August 18, 2023, Petitioner filed a request for a due process hearing pursuant to the Individuals with Disabilities in Education Act (“IDEA”). On August 18, 2023, the Arkansas Department of Education (hereinafter referred to as “Department”) received a written request to initiate due process hearing procedures from the XXXX (“Father”) and XXXX (“Mother”) XXXX (hereinafter jointly referred to as “Parents” or “Petitioners”), the Parents and legal guardians of Student. The IDEA requires “[a] parent or agency [to] request an impartial due process hearing within two years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint . . .” 20 U.S.C § 1415(f)(3)(c). The State of Arkansas recognizes this same limitations period. *Ark. Dept. of Educ. Special Educ. And Related Services*, 10.00 Mediations and Hearings, § 10.01.4.6(A). The Eighth Circuit Court of Appeals also applies a two-year statute of limitations period under the IDEA. *See In the Matter of Minnetonka v. M.L.K., by and through his Parents, S.K.*, 2021 U.S. Dist. LEXIS 37609, 2021 WL 780723, at *6 (D. Minn. Mar. 1, 2021). “Any claim of a breach falling outside of the IDEA’s two-year statute of limitations would be untimely.” *Indep. Sch. Dist. No. 283 v. E.M.D.H.*, 960 F.3d 1073, 1083 (8th Cir. 2020). Thus, the time period from August 18, 2021 to August 17, 2023 is at issue.

Parents requested the hearing because they believed that District failed to comply with the IDEA, as well as regulations set forth by the Department, from August 18, 2021 to August 17, 2023 by failing to provide Student with appropriate supports and services to address Student’s deficits in communication, social and behavioral skills. *See* Petitioners’ Complaint. Parents seek a compensatory education in the form of private school placement. *Id.*

In response to Parents' request for hearing, the Department assigned the case to an impartial hearing officer who initially scheduled the due process hearing in Case H-24-10 for September 19-21, 2023 with a prehearing conference on September 18, 2023 after the parties failed to reach resolution at their resolution conference held August 30, 2023. On the record at the prehearing conference, Petitioner requested a continuance based on a scheduling conflict with another, the District had no objection, and the continuance was granted for good cause. Thereafter, following continuances granted for good cause, March 26-28, 2023 was set as the date on which a hearing would commence if the Parents and District failed to reach resolution prior to that time.

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, Debby Linton Ferguson, J.D., Hearing Officer for the Arkansas Department of Education, conducted a closed impartial hearing. The hearing began as scheduled, and testimony was heard on March 26-28, April 4, and 9, 2024.

Parents were represented by Theresa Caldwell and District was represented by Phillip Brick. Also, present for the hearing were both Parents, Audie Alumbaugh ("Parent Advocate"), Karen Harris ("LEA"), Danny Thomas ("Superintendent"). The following witnesses testified in this matter: LEA, Superintendent, Brittany Warren ("Special Education Teacher"), Nelda Hicks ("Paraprofessional"), Stephanie Spadoni ("General Ed. Teacher"), Crystal Tanner ("Former LEA"), Lori McJunkins ("Middle School Principal"), Kelsey Clark ("Pediatrics Plus BCBA"), Hope Wofford ("Pediatrics Plus Therapy Director"), Cynthia Rogers ("Special Ed. Consultant"), Jessica Polk ("Former Special Education Teacher"), and each of the Parents. Both parties were offered the opportunity to provide

post-hearing briefs in lieu of closing statements, and both parties submitted a timely brief for consideration.

FINDINGS OF FACT:

In the role of factfinders, special education hearing officers are charged with the responsibility of making credibility determinations of the witnesses who testify. *Independent Sch. Dist. No. 283 v. S.D. ex rel. J.D.*, 88 F.3d 556, 561 (8th Cir. 1996); *Parrish v. Bentonville Sch. Dist.*, No. 5:15-CV-05083, at *8 (W.D. Ark. March 22, 2017). 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 deemed to be intentionally deceptive. Any inconsistencies were minor and did not play a role in this hearing officer's decisions. The weight accorded the testimony, however, is not the same as credibility. Some evidence, including testimony, was more persuasive and reliable concerning the issues to be decided.

The findings of fact were made as necessary to resolve the issues; therefore, not all of the testimony and exhibits were explicitly cited. 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.

1. As of the dates of the hearing in March and April 2024, Student was a thirteen-year-old nonverbal male (born in December 2009) in the eighth grade that lives in Malvern, Arkansas but has attended the District via school choice since second grade. See P. Ex. p. 1-2; Tr. V p. 8, 78.¹ Parents have never resided in the District. Tr. Vol. V p. 94.

¹ P. Ex. means Parent exhibit, D. Ex. means District exhibit, and Tr. Vol. means transcript volume.

2. District never agreed to provide transportation to Student; Parents always provided transportation. Tr. Vol. V. p. 79. District has never provided transportation for students outside of the District. Tr. Vol. V p. 350-51.

3. Student's Autism diagnosis was suspected in 2012, and Student was placed in a full-day developmental preschool. P. Ex. p. 115. Despite the intervention, Student made "little to no progress over . . . 8 months." P. Ex. p. 115. In February of 2013, at age three, Student was diagnosed with features consistent with Autism Spectrum Disorder (hereinafter "Autism") by Dennis Developmental Center; and the best measure of Student's IQ at that time was 59, which is in the mildly impaired/delayed average range of intelligence. P. Ex. p. 112-19.

4. Student was re-evaluated at age five at Easter Seals Arkansas on May 20, 2015 to assist with Student's transition to kindergarten and his educational programming for kindergarten, his Autism diagnosis was maintained, and his nonverbal IQ was measured at 47, which is in the intellectually disabled range of intelligence. P. Ex. p. 107-108. At that time, Student was receiving ABA therapy, speech, occupational therapy, physical therapy and developmental therapy services at Malvern First Step. P. Ex. p. 107. Student was unable to complete any task on the Kaufman Test of Educational Achievement, III (KTEA), and Student did not appear to understand the prompts to complete the Peabody Picture Vocabulary Test, IV (PPVT). P. Ex. p. 107. Student's Vineland-II Adaptive Behavior Scales Interview Edition reflected that all domains were in the low range. P. Ex. p. 108.

5. ABA therapy was recommended by a BCBA and was implemented in December of 2018 with programming using the ABLLS. P. Ex. p. 96. Paraprofessional was trained to perform Discrete Trials as a part of ABA therapy for Student. Tr. Vol. II p. 151.

6. As Student is nonverbal, a communication modality assessment was completed on

10/30/2019, which resulted in an Augmentative or Alternative Communication (“AAC”) device being 100% the recommended communication modality. P. Ex. p. 47. Testimony established that Student’s fine motor skills deficits impair his ability to utilize American Sign Language, and the signs he does use are modified for his use. Tr. Vol. III p. 20-21.

7. Student’s IEP for his upcoming fifth grade that ran from 5/7/2020 to 5/7/2021 (“May 2020 IEP”) reflected that Student was in the self-contained class, and he could communicate by reaching/pointing for items he desires and used some modified American Sign Language (“ASL”) for eat, drink, i-page, bathroom with prompting by asking “what do you want.” P. Ex. p. 73. Student had begun learning to use an AAC with the Go Talk Now app and was using 8 real pictures to communicate drink, eat, swing, ball, outside, bathroom, yes, and no. P. Ex. p. 73, 96; Tr. I. p. 21, 168-69. Student could self-feed, urinate independently but needed support with washing and drying his hands, he was working on brushing his teeth, changing clothes, and putting on socks and shoes. P. Ex. p. 73. The ABLLS was used for Student’s programming and that programming would be continued for the 2020-2021 school year. Student would display behaviors of biting himself on his hand, displaying aggressive behavior to adults when demands were placed, spitting on others when a demand was placed or to gain access to an item or for attention; Student had a Behavior Intervention Plan (“BIP”) in place and a sensory chew necklace for redirection. P. Ex. p. 73. Student had a paraprofessional 2055 minutes weekly and 60 minutes of OT weekly. P. Ex. p. 77.

8. District never sent Student’s AAC home. Although District documented that Parents offered the use of their iPad and District offered to install the Go Talk Now application on Parents’ selected device and train Parents of the use of the Go Talk Now application, Father testified that arrangement was discussed and then declined by Parents because Parents

were uncomfortable sharing access to their Apple password. Tr. Vol. III p. 68; Tr. Vol. V p. 12-13, 65-69; P. Ex. 24, 43, 46, and 70. Parents never brought the device for the installation. Tr. Vol. III p. 68; Tr. V p. 69; P. Ex. 24, 43, 46, 70.

9. Student's May 2020 IEP goal in math was to increase math skills by mastering 3 out of 4 objectives with 90% accuracy by the end of the 2020-2021 school year with the following objectives: 1) sort up to six non-identical objects with 100% accuracy across 3 consecutive sessions with a one week retention by the end of the 2020-2021 school year (ABLLS B8), 2) sort six non-identical pictures with 100% accuracy across 3 consecutive sessions with a one week retention by the end of the 2020-2021 school year (ABLLS B8), 3) correctly place 5 blocks on a block on block design card with 100% accuracy across 3 consecutive sessions with a one week retention during the 2020-2021 school year (ABLLS Z5), and 4) correctly place 10 blocks on a block on block design card with 100% accuracy across 3 consecutive sessions with a one week retention during the 2020-2021 school year (ABLLS Z5). P. Ex. p. 78. No progress or mastery was noted. *Id.*

10. Student's May 2020 IEP language goal was to increase comprehension skills by mastering 3 out of 4 objectives with 100% accuracy by the end of the 2020-2021 school year with the following objectives: 1) request 5 items when asked "What do you want?" by using his chosen form of communication across 3 consecutive sessions with a one week retention by the end of the 2020-2021 school year (ABLLS F3), 2) request 10 items when asked "What do you want?" by using his chosen form of communication across 3 consecutive sessions with a one week retention by the end of the 2020-2021 school year (ABLLS F3), 3) request 2 items independently by using his chose form of communication across 3 consecutive sessions with a one week retention by the end of the 2020-2021 school year (ABLLS F5), and 4) request 5

items independently by using his chosen form of communication across 3 consecutive sessions with a one week retention by the end of the 2020-2021 school year (ABLLS F5). P. Ex. p. 79. No progress or mastery was noted. *Id.*

11. For Student's May 2020 IEP, his adaptive goal was to increase functional skills by mastering 3 out of 4 objectives with 100% accuracy by the end of the 2020-2021 school year with the following objectives: 1) follow steps to wash his face with 100% accuracy across 3 consecutive sessions with one week retention by the end of the 2020-2021 school year (ABLLS W3), 2) follow steps to urinate independently without challenging behavior with 100% accuracy across 3 consecutive sessions with one week retention by the end of the 2020-2021 school year (ABLLS X3), 3) follow 50% of the steps to brush his teeth with 100% accuracy across 3 consecutive sessions with a one week retention by the end of the 2020-2021 school year (ABLLS W6), and 4) follow 100% of the steps to brush his teeth with 100% accuracy across 3 consecutive sessions with a one week retention by the end of the 2020-2021 school year. P. Ex. p. 80. No progress or mastery was noted. *Id.*

12. Student's most recent evaluation was given by the District on December 15, 2020. P. Ex. Vol. I p. 96. Student was receiving services based on a classification of Autism, Student had been dismissed from physical therapy services, and Student remained nonverbal. P. Ex. Vol. I p. 96-106. The licensed psychological examiner noted Student was receiving 60 minutes weekly of occupational therapy, noted Student appeared to have been dismissed from physical therapy although physical therapy of 30 minutes weekly was recommended, noted 90 minutes weekly of speech therapy was recommended. P. Ex. p. 98. Student's performance on the nonverbal subtests of the RIAS-2 indicated his IQ score was 40, which is in the very low range. P. Ex. Vol. I p. 102. In December of 2018, Student did not demonstrate

an understanding of object permanence, was unable to sequence order of daily activities, was unable to associate a clock with telling time, was able to utilize various writing instruments but was unable to copy letters or numbers, was toilet trained, could self-feed, responded to his name when called, and could turn knobs to open doors. P. Ex. p. 103-104.

13. Student's IEP for his upcoming sixth grade year that ran from 5/7/2021 to 5/7/2022 ("May 2021 IEP) reflected that Student was in the self-contained class, he could communicate by independently using his AAC which is an iPad with the Go Talk Now app., and he mastered 20 of the 79 introduced icons. P. Ex. p. 47. District noted that, during the covid closure from March to August of 2020, Student did not have a communication device because he did not have one at home. *Id.* During the 2020-2021 school year, Student added 10 more ASL signs (all done, ball, candy, help, brushing, open, puzzles, go, and break) to the four he learned in 2019-2020 (eat, drink, iPad, and bathroom). *Id.* The IEP notes Student only used ASL with prompting ("What do you want?) and did not mand for anything independently. *Id.* The Paraprofessional and teacher use ALS to communicate with him while verbally speaking. *Id.* Student could self-feed, urinate independently, wash and dry his hands; he was working on brushing his teeth and changing clothes. P. Ex. p. 47. The ABLLS, Essential For Living, and TeachTown were utilized for Student's programming and that programming would be continued for the 2020-2021 school year. *Id.* Student would display behaviors of biting himself on his hands, displaying aggressive behavior to adults in the forms of biting, kicking, hair pulling, pinching, grabbing others' clothes, pulling and scratching when demands were placed; he displayed self-stimming behavior including kicking the back of his calf, hitting his hands, wrists, foot on objects such as the table or iPads. *Id.* Student had a Behavior Intervention Plan ("BIP") in place, a sensory chew necklace for

redirection, and was not allowed to have leisure time on the iPad due to the self-injurious stimming behavior. P. Ex. p. 47. Student had 150 minutes of direct instruction in literacy weekly, 60 minutes of direct instruction in science weekly, 150 minutes of direct instruction in math weekly, 60 minutes of direct instruction in social studies weekly, 90 minutes of direct instruction in speech/language weekly, 580 minutes of direct instruction in functional, social, and behavior skills, 60 minutes of OT weekly and a paraprofessional 2055 minutes weekly. P. Ex. p. 50-51.

14. The May 2021 IEP stated Student's goal in math was to increase math skills by mastering 3 out of 4 objectives with 90% accuracy by the end of the "2020-2021" school year with the following objectives: 1) sort up to six non-identical objects with 100% accuracy across 3 consecutive sessions with a one week retention by the end of the 2020-2021 school year (ABLLS B8), 2) sort six non-identical pictures with 100% accuracy across 3 consecutive sessions with a one week retention by the end of the 2020-2021 school year (ABLLS B8), 3) correctly place 5 blocks on a block on block design card with 100% accuracy across 3 consecutive sessions with a one week retention during the 2020-2021 school year (ABLLS Z5), and 4) correctly place 10 blocks on a block on block design card with 100% accuracy across 3 consecutive sessions with a one week retention during the 2020-2021 school year (ABLLS Z5). P. Ex. p. 52. It was noted that on December 7, 2021 objective 1 of sorting six non-identical objects accurately and objective 3 of correctly placing 5 blocks on a block-on-block design card accurately were mastered; the remaining objectives were continued. *Id.*

15. Student's May 2021 language goal was to increase comprehension skills by mastering 3 out of 4 objectives with 100% accuracy by the end of the "2020-2021 school year" with the following objectives: 1) request 25 items when asked "What do you want?" by using his chose

form of communication across 3 consecutive sessions with a one week retention by the end of the 2020-2021 school year (ABLLS F3), 2) request 30 items when asked "What do you want?" by using his chosen form of communication across 3 consecutive sessions with a one week retention by the end of the 2020-2021 school year (ABLLS F3), 3) request 35 items when asked "What do you want?" by using his chosen form of communication across 3 consecutive sessions with a one week retention by the end of the 2020-2021 school year (ABLLS F3)., P. Ex. p. 53. On October 15, 2021, progress toward these goals was noted to be 38%, 30%, and 25% respectively, and on December 17, 2021, progress toward these goals was noted to be 40%, 33%, and 28% respectively. *Id.*

16. Student's May 2021 adaptive goal was to increase functional skills by mastering 3 out of 4 objectives with 100% accuracy by the end of the "2020-2021" school year with the following objectives: 1) follow steps to wash his face with 100% accuracy across 3 consecutive sessions with one week retention by the end of the 2020-2021 school year (ABLLS W3), 2) follow steps to urinate independently without challenging behavior with 100% accuracy across 3 consecutive sessions with one week retention by the end of the 2020-2021 school year (ABLLS X3), 3) follow 50% of the steps to brush his teeth with 100% accuracy across 3 consecutive sessions with a one week retention by the end of the 2020-2021 school year (ABLLS W6), and 4) follow 100% of the steps to brush his teeth with 100% accuracy across 3 consecutive sessions with a one week retention by the end of the 2020-2021 school year. P. Ex. p. 54. On September 19, 2021, it was noted that Student mastered objective 2, progress toward objective number 1 was 22% on 5/7/21 and zero after that; progress toward objective 3 was 20% on 5/7/21 and zero after that; and objective 4 was not initiated. *Id.*

17. In the May 2021 IEP, a speech goal was added that: given auditory and visual stimuli, Student would develop improved overall language skills (receptive and expressive) through a variety of informal and formal situations by completing 80% of the objectives by the end of this IEP with the following objectives given multisensory cuing Student would: 1) use any communication system to name body parts with 80% accuracy across 3 consecutive data days, 2) use any communication system to name and identify spatial concepts or by performing an action given verbally the spatial/prepositional concept with 80% accuracy across 3 consecutive data days, 3) use any communication system to request a preferred item or activity that is within view, but not accessible in 4 out of 5 trials for 3 consecutive data days, 4) utilize any form of communication to name and identify simple basic and/or descriptive concepts (i.e. color, size, etc.) with 80% accuracy across 3 consecutive data days, 5) utilize any form of communication to respond to questions verbally presented by clinician given pictures, books and object stimuli if appropriate for the given task with 80% accuracy across 3 consecutive data days, 6) during a functional routine or activity, follow 1-2 step commands without adverse behaviors with 80% accuracy across 3 consecutive data days, and 7) during structured and non-structured classroom activities, use any form of communication to increase vocabulary skills by identifying, and utilizing 7-10 nouns, verbs or modifiers with 80% accuracy across 3 consecutive data days. P. Ex. p. 55. Progress toward these objectives was reported at 10%, 30%, 2/5, 30%, 45%, 40%, and 3/5 respectively on 10/20/2020 and all objectives were discontinued on 3/18/2021. P. Ex. p. 56-58.

18. On March 18, 2021, a new speech goal was initiated that given auditory and visual stimuli. P. Ex. p. 57. The goal states Student will demonstrate receptive language skills at a level expected for his age and grade as evident on standardized assessment tools and clinical

observations with the following objectives: 1) given a variety of pictures and/or objects, Student will demonstrate an understanding of semantics by grouping the pictures/objects into major categories (animals, food, clothing, vehicles, etc.) and minor categories (colors, shapes, function), 2) given a picture of object, Student would demonstrate the understand of spatial concepts by identifying the target location by pointing or gesturing and/or placing an object in target location, 3) demonstrate semantic skills by identifying pictures and/or objects by target category, 4) demonstrate knowledge of basic cognitive skills by identifying upper case letters, lower case letters, numbers and arranging letters and numbers in order.

P. Ex. p. 57. Progress toward these objectives was reported on 3/18/21 to be 56%, 45%, not initiated, and 17% respectively, on 10/15/21 to be 55%, 29%, 28%, and 22% respectively, and on 12/17/21 to be 52%, 31%, 46%, and 22% respectively. *Id.*

19. Also on March 18, 2021, a second new speech goal was initiated that, given auditory and visual stimuli, Student will demonstrate an increase in communication skills to a level expected for his age and gender as evident by performance on standardized assessments and clinical observations. P. Ex. p. 58. The objectives were that: 1) giving a greeting, Student will greet and take leave with a “hi” or “bye” using signs, pictures and/or his voice output device with mastery at 3x on 3 consecutive data days; 2) given a set of objects and/or pictures, Student will use a word of description to state size (big, small), color (primary and secondary colors) and shape of target objects/pictures with master when data reaches 70% on 3 consecutive data days; 3) given a set of pictures and/or objects, Student will indicate the name of the group by using signs, pictures and or a voice output device with mastery when the data reaches 70% on 3 consecutive data days; and 4) given pictures, Student will demonstrate increase in use of his voice output device by naming pictures with his device

with mastery when the data reaches 70% on 3 consecutive data days. P. Ex. p. 58. Progress was noted on 10/15/2021 to be 1.5x, 2%, not initiated, and 37% respectively and on 12/17/21 to be 1.5x, 2%, not initiated, and 30% respectively. *Id.*

20. In the fall semester of Student's sixth-grade year, Former Special Education Teacher, who was training to become a Board Certified Behavior Analyst ("BCBA") continued to utilize ABLLS, an assessment for learning and language skill, to guide Student's instruction. Tr. Vol. V p. 269-270. Former Special Education Teacher testified the ABLLS is appropriate for use in programming for a Student with Autism. *Id.* at p. 270-271, 290-291.

21. Student made progress in sixth grade on his May 2021 IEP goals. Former Special Education teacher testified in detail how Student progressed in his sixth-grade year, and her testimony was supported by ABLLS data. Tr. Vol. V p. 272-74, 283; Parent Ex. p. 52-54. Student improved in dressing himself, using the restroom independently, eating and cleanliness, grooming, following directions, making requests on his AAC device and using sign language, and participating in group instruction. Tr. Vol. V p. 274-75. Former LEA, who was candid in her testimony, supported that Student progressed and received FAPE in the sixth grade. Tr. Vol. III p. 66. Father confirmed Former Special Education Teacher worked diligently with Student in the sixth grade. Tr. Vol. V p. 17-18.

22. Student's IEP for his upcoming seventh grade year ran from 5/7/2022 to 5/7/2023 ("May 2022 IEP"), although it states that it is for fifth grade and runs from 2021-2022. P Ex. p. 24. The Present Level of Academic Achievement and Functional Performance ("PLAAFP") states Student communicates by independently using his AAC which is an iPad with the Go Talk Now app., that a communication modality assessment completed on 10/30/2021 resulted in the AAC being 100% the recommended communication modality, and Student

had mastered 36 of the 79 introduced icons on the AAC. P. Ex. p. 25. Student could self-feed, urinate independently, wash and dry his hands; he was working on brushing his teeth and changing clothes. P. Ex. p. 25. It was reported that Student's programming continued using the ABLLS, Essential For Living, and TeachTown for his programming in 2021-2022 and that programming would be continued for the 2022-2023 school year. *Id.* Student displayed behaviors of biting himself on his hands, displaying aggressive behavior to adults in the forms of biting, kicking, hair pulling, pinching, grabbing others' clothes, pulling and scratching when demands were placed; he displayed self-stimming behavior including kicking the back of his calf, hitting his hands, wrists, foot on objects such as the table or iPads. *Id.* Student had a Behavior Intervention Plan ("BIP") in place, a sensory chew necklace for redirection, and was not allowed to have leisure time on the iPad due to the self-injurious stimming behavior. P. Ex. p. 47. Student had 150 minutes of direct instruction in literacy weekly, 60 minutes of direct instruction in science weekly, 150 minutes of direct instruction in math weekly, 60 minutes of direct instruction in social studies weekly, 90 minutes of direct instruction in speech/language weekly, 580 minutes of direct instruction in functional, social, and behavior skills, 60 minutes of OT weekly and a paraprofessional 2055 minutes weekly. P. Ex. p. 50-51.

23. Student's May 2022 IEP goal in math was identical to the 2021-2022 math goal and was to increase math skills by mastering 3 out of 4 objectives with 90% accuracy by the end of the "2020-2021" school year with the following objectives: 1) sort up to six non-identical objects with 100% accuracy across 3 consecutive sessions with a one week retention by the end of the 2020-2021 school year (ABLLS B8), 2) sort six non-identical pictures with 100% accuracy across 3 consecutive sessions with a one week retention by the end of the 2020-

2021 school year (ABLLS B8), 3) correctly place 5 blocks on a block on block design card with 100% accuracy across 3 consecutive sessions with a one week retention during the 2020-2021 school year (ABLLS Z5), and 4) correctly place 10 blocks on a block on block design card with 100% accuracy across 3 consecutive sessions with a one week retention during the 2020-2021 school year (ABLLS Z5). P. Ex. p. 31, 52. It was noted that on December 7, 2021 objective 1 of sorting six non-identical objects accurately was mastered and on December 8, 2021 objective 3 of correctly placing 5 blocks on a block-on-block design card accurately was mastered, and the remaining objectives were noted as not initiated and continued. *Id.* at p. 31.

24. Student's May 2022 language goal was identical to the 2021-2022 language goal and was to increase comprehension skills by mastering 3 out of 4 objectives with 100% accuracy by the end of the "2020-2021 school year" with the following objectives: 1) request 25 items when asked "What do you want?" by using his chose form of communication across 3 consecutive sessions with a one week retention by the end of the 2020-2021 school year (ABLLS F3), 2) request 30 items when asked "What do you want?" by using his chosen form of communication across 3 consecutive sessions with a one week retention by the end of the 2020-2021 school year (ABLLS F3), 3) request 35 items when asked "What do you want?" by using his chosen form of communication across 3 consecutive sessions with a one week retention by the end of the 2020-2021 school year (ABLLS F3). P. Ex. p. 32, 53. The progress notes repeated that on October 15, 2021, progress toward these goals was noted to be 38%, 30%, and 25% respectively, and on December 17, 2021, progress toward these goals was noted to be 40%, 33%, and 28% respectively. *Id.* at p. 32.

25. Student's May 2022 adaptive goal was identical to the 2021-2022 adaptive goal and

was to increase functional skills by mastering 3 out of 4 objectives with 100% accuracy by the end of the “2020-2021” school year with the following objectives: 1) follow steps to wash his face with 100% accuracy across 3 consecutive sessions with one week retention by the end of the 2020-2021 school year (ABLLS W3), 2) follow steps to urinate independently without challenging behavior with 100% accuracy across 3 consecutive sessions with one week retention by the end of the 2020-2021 school year (ABLLS X3), 3) follow 50% of the steps to brush his teeth with 100% accuracy across 3 consecutive sessions with a one week retention by the end of the 2020-2021 school year (ABLLS W6), and 4) follow 100% of the steps to brush his teeth with 100% accuracy across 3 consecutive sessions with a one week retention by the end of the 2020-2021 school year. P. Ex. p. 33, 54. The progress notes repeated that on September 19, 2021 Student mastered objective 2, progress toward objective number 1 was 22% on 5/7/21 and zero after that; progress toward objective 3 was 20% on 5/7/21 and zero after that; and objective 4 was not initiated. *Id.* at p. 33, 54.

26. Student’s May 2022 speech goal was identical to the speech goal from 2021-2022 and was that: given auditory and visual stimuli, Student would develop improved overall language skills (receptive and expressive) through a variety of informal and formal situations by completing 80% of the objectives by the end of this IEP with the following objectives given multisensory cuing Student would: 1) use any communication system to name and identify body parts with 80% accuracy across 3 consecutive data days, 2) use any communication system to name and identify spatial concepts or by performing an action given verbally the spatial/prepositional concept with 80% accuracy across 3 consecutive data days, 3) use any communication system to request a preferred item or activity that is within view, but not accessible in 4 out of 5 trials for 3 consecutive data days, 4) utilize any

form of communication to name and identify simple basic and/or descriptive concepts (i.e. color, size, etc.) with 80% accuracy across 3 consecutive data days, 5) utilize any form of communication to respond to questions verbally presented by clinician given pictures, books and object stimuli if appropriate for the given task with 80% accuracy across 3 consecutive data days, 6) during a functional routine or activity, follow 1-2 step commands without adverse behaviors with 80% accuracy across 3 consecutive data days, and 7) during structured and non-structured classroom activities, use any form of communication to increase vocabulary skills by identifying, and utilizing 7-10 nouns, verbs or modifiers with 80% accuracy across 3 consecutive data days. P. Ex. p. 34, 55. Progress notes repeated that on 10/20/2020 progress was at 10%, 30%, 2/5, 30%, 45%, 40%, and 3/5 respectively, and all objectives were discontinued on 3/18/2021. *Id.* at p. 35, 56.

27. The May 2022 IEP also repeated the speech goal that was initiated on 3/18/2021 that, given auditory and visual stimuli, Student will demonstrate receptive language skills at a level expected for his age and grade as evident on standardized assessment tools and clinical observations with the following objectives: 1) given a variety of pictures and/or objects, Student will demonstrate an understanding of semantics by grouping the pictures/objects into major categories (animals, food, clothing, vehicles, etc.) and minor categories (colors, shapes, function), 2) given a picture of object, Student would demonstrate the understand of spatial concepts by identifying the target location by pointing or gesturing and/or placing an object in target location, 3) demonstrate semantic skills by identifying pictures and/or objects by target category, 4) demonstrate knowledge of basic cognitive skills by identifying upper case letters, lower case letters, numbers and arranging letters and numbers in order. P. Ex. p. 36, 57. The progress noted on the objectives was identical to that from the 2021-

2022 IEP that on 3/18/21 to be 56%, 45%, not initiated, and 17% respectively, on 10/15/21 to be 55%, 29%, 28%, and 22% respectively, and on 12/17/21 to be 52%, 31%, 46%, and 22% respectively. *Id.* The sole addition to the May 2022 IEP on this speech goal is that progress was noted on 3/11/22 to be 42%, 33%, 45%, 22% respectively. *Id.*

28. The May 2022 IEP also repeats the second speech goal that was initiated on 3/18/2021 that, given auditory and visual stimuli, Student will demonstrate an increase in communication skills to a level expected for his age and gender as evident by performance on standardized assessments and clinical observations. P. Ex. p. 37. The objectives were that: 1) giving a greeting, Student will greet and take leave with a “hi” or “bye” using signs, pictures and/or his voice output device with mastery at 3x on 3 consecutive data days; 2) given a set of objects and/or pictures, Student will use a word of description to state size (big, small), color (primary and secondary colors) and shape of target objects/pictures with mastery when data reaches 70% on 3 consecutive data days; 3) given a set of pictures and/or objects, Student will indicate the name of the group by using signs, pictures and or a voice output device with mastery when the data reaches 70% on 3 consecutive data days; and 4) given pictures, Student will demonstrate increase in use of his voice output device by naming pictures with his device with mastery when the data reaches 70% on 3 consecutive data days. P. Ex. p. 37, 58. Progress was noted on 10/15/2021 to be 1.5x, 2%, not initiated, and 37% respectively and on 12/17/21 to be 1.5x, 2%, not initiated, and 30% respectively. *Id.* The sole addition to the May 2022 IEP on this speech goal is that progress was noted for 3/11/22 at 1.5x, 26%, not initiated, and 30% respectively. *Id.*

29. In seventh grade (2022-2023 year), Student had two special education teachers; LEA and Special Education teacher. Tr. Vol. I p. 20-21, 23. LEA testified Student’s IEP goals

incorporated his use of the AAC device and notes progress with the AAC device, in noting Student mastered 20 of 79 introduced icons. Tr. Vol. I p. 172; Tr. Vol. V p. 280; P. Ex. p. 47. Student was primarily in a self-contained classroom and had the assistance of a Paraprofessional on a one-on-one basis during seventh grade. Tr. Vol. I p. 22, 32-34. Also, during seventh grade, District shortened Student's school day asking parents to pick Student up early (2:45) so that Paraprofessional could work as a bus monitor, which was done with no IEP meeting. Tr. Vol. V p. 27.

30. Student failed to progress in his seventh-grade year (2022-2023). Although LEA testified Student made progress during his seventh-grade year, in math, ELA and behavior, identifying traffic safety signs, and ordering food through his AAC device, there was little to no evidence of progress in Student's seventh grade year. Tr. Vol. I. p. 42-44, 70. LEA testified Student was able to use his AAC appropriately to communicate his need to use the bathroom, select a particular snack, or tell another student to leave him alone; however, it appeared that Student had these skills prior to the 2022-2023 year. Tr. Vol. I p. 58-62. Father testified that he saw no progress in seventh grade. Tr. Vol. V p. 20-21. Paraprofessional testified that Student did not know his upper- and lower-case letters and lacked a variety of kindergarten level skills. Tr. Vol. V p. 151-152, 169.

31. Before the May 2023 IEP meeting, Paraprofessional told Parents that the IEP team was going to take away Student's full-time, one-on-one paraprofessional. Tr. Vol. V p. 30, 70. Parents were concerned Student would be bullied without a full-time, one-on-one paraprofessional and because Student had a history of elopement. Tr. Vol. V. p. 31-33 and P. Ex. p 43.

32. Student's IEP Team met on May 10, 2023 to review and revise his IEP for his eighth-

grade year that would run from 5/10/23 to 5/10/24 for Student's eighth grade year ("May 2023 IEP"). P. Ex. p. 20. 50. Although LEA testified that the IEP team evaluated the goals and changed them based on the information they had, changes to Student's May 2023 IEP were scant. Tr. Vol. I p. 180-81. District failed to have a general education teacher, the speech therapist and the occupational therapist at the meeting. P. Ex. p. 14, 17. Father attended the meeting in person and did not agree to the District's proposed IEP removing Student's full-time, one-on-one paraprofessional; however, the proposed IEP discontinued Student's full-time, one-to-one paraprofessional support over Father's objection and with no information regarding any increase in Student's ability to function independently to support the decision. P. Ex. p. 1, 43; Tr. Vol. V p. 73-78. The May 2023 IEP does reflect this discussion in Parent input section, which notes that "Parents are asking that we continue to provide an aide 100% of the school day." P. Ex. p. 1, Tr. V p. 74. Parents requested applied behavior therapy ("ABA") be included on Student's May 2023 IEP, as recommended by Pediatrics' Plus Outpatient Clinic ("Pediatrics' Plus"). P. Ex. 209-29. The Notice of Action indicates that Parents "agreed to immediate implementation of the action being proposed," but Father testified he did not agree to the proposed IEP and objected. P. Ex. 22; Tr. Vol. V. p. 33-35. Mother's messages with the District reflect her objections as well. D. Ex. p. 126. Parents did not say they wanted the least restrictive environment for Student, although they did not want Student locked away. Tr. Vol. V p. 74, 85-86; P. Ex. p. 1, 34-35. The documentation contains a conflict in that the Notice of Action stated Student qualified for ESY services because of his lack of progress, but the "Extended School Year" form states Parents declined the services stating Student needs a break and will already be receiving speech and OT in Malvern at Pediatrics Plus. P. Ex. p. 21, 22, 43. In a third location in the

paperwork, on the Services Schedule, ESY is checked. P. Ex. p. 5.

33. Student's May 2023 IEP noted that Parents asked the District to continue to provide a paraprofessional 100% of the school day and states that Student will be monitored during his school day in the special education setting and general education classes (music, art, PE, lunch) for academic and functional skills support 100% of the school day. P. Ex. p. 1-2. The PLAAFP was updated to some extent and states Student's academics for math, ELA, Sci, SS is accessed through curriculum-based programs and iPad games including TeachTown, ABC Mouse, Autism Help and any other lessons his teachers find. *Id.* There is a google form in place to monitor progress for all academics; Student is alternately assessed through the Dynamic Learning Maps (DLM). *Id.* Student is able to urinate independently but has been peeing on the floor since Spring Break, which Parents believe is related to his curiosity about puddles. *Id.* Student is able to independently wash and dry his hands but has been throwing water in the floor in the bathroom. *Id.* Student is asked to mop the bathroom space as a consequence when he urinates or spills water on the floor. *Id.* Student is working on brushing his teeth and changing clothes. *Id.* Student displays self-injurious behavior in the form of biting his hands, is aggressive towards staff during demands in the form of biting and/or swinging fists, and forcefully hits his hand/fist on objects such as the table or iPad. There is a behavior intervention plan in place and ABC data is completed for each behavior throughout the day. Student had 150 minutes of direct instruction in literacy weekly, 60 minutes of direct instruction in science weekly, 150 minutes of direct instruction in math weekly, 60 minutes of direct instruction in social studies weekly, 90 minutes of direct instruction in speech/language weekly, 580 minutes of direct instruction in functional, social, and behavior skills, 90 minutes of speech therapy weekly, and 60 minutes of OT

weekly. P. Ex. Vol. I p. 4-6. The Paraprofessional services weekly minutes is omitted. *Id.*

34. In the May 2023 IEP, Student's goal in math was to increase math skills by mastering 3 out of 4 objectives with 90% accuracy by the end of the 2023-2024 school year with the following objectives: 1) sort up to six non-identical objects with 100% accuracy across 3 consecutive sessions with a one-week retention by the end of the 2020-2021 school year (ABLLS B8). P. Ex. p. 8. Progress on the first objective was noted to be 0 on 10/14/2022, 16% on 12/20/2022, 22% on 3/28/2023, and 13% on 12/20/2022. *Id.* The second objective was changed to: Student will identify time on an analog clock to hour, half hour, with 90% accuracy across 3 consecutive sessions with a one-week retention by the end of the 2023-2024 school year. *Id.* Progress on the second objective was noted to be first initiated on 3/28/2023 at 20% and 13% on 12/20/2022. *Id.* The third objective was changed to: Student will count money and make change up to \$5.00 in bills and coins; quarters with 70% accuracy across 3 consecutive sessions with a one-week retention by the end of the 2023-2024 school year. P. Ex. p. 8. There is no progress data for the third objective. *Id.* p. 8.

35. For 2023-2024, Student's language goal was to increase comprehension skills by mastering 3 out of 4 objectives with 100% accuracy with the school year updated to 2023-2024. P. Ex. p. 9. The first objective was changed to: Student will be able to identify words/text and pictures in a book with 90% accuracy across 3 consecutive sessions with a one-week retention by the end of the 2023-2024 school year, and progress was noted to be 38% on 10/15/2021, 40% on 12/17/2021, 25% on 10/14/2022, and 25% on 12/20/2022. *Id.* Objective 2 was updated to: Student will match capitol to small alphabet letters with 90% accuracy across 3 consecutive sessions with a one-week retention by the end of the 2023-2024 school year, and progress was noted to be 30% on 10/15/2021, 33% on 12/17/2021,

25% on 10/14/2022, and 25% on 12/20/2022. *Id.* Objective 3 was updated to: Student will identify nouns using his communication device and match pictures or objects with 90% accuracy across 3 consecutive sessions with a one-week retention by the end of the 2023-2024 school year, and progress was noted to be 25% on 10/15/2021, 28% on 12/17/2021, 25% on 10/14/2022, and 25% on 12/20/2022. *Id.*

36. For 2023-2024, Student's adaptive goal was to increase functional skills by mastering 3 out of 4 objectives with 100% accuracy by the end of the 2023-2024 school year. P. Ex. p. 10. The first objective was updated to: Student will manipulate buttons, zipper, locks with 90% accuracy across 3 consecutive sessions with a one-week retention by the end of the 2023-2024 school year. *Id.* The second objective was the same as it was on the 2021-2022 and 2022-2023 IEPs: Student will follow steps to urinate independently without challenging behavior with 100% accuracy across 3 consecutive sessions with one week retention by the end of the 2023-2024 school year. *Id.* The third objective was updated to: Student will complete simulated cleaning tasks to improve independence with verbal directions with 90% accuracy across 3 consecutive sessions with a one-week retention by then end of the 2023-2024 school year. *Id.* The fourth objective was update to: Student will increase awareness of body to inform assisting staff that may require attention (i.e. "ear is hurting") with 90% accuracy across 3 consecutive sessions with a one week retention by the end of the 2023-2024 school year. The progress notes repeated that on September 19, 2021 Student mastered objective 2 but then added that progress was 25% on 10/14/2022, progress toward objective number 1 was 22% on 5/7/21, zero on 12/17/2021 and then added that progress was 25% on 10/14/2022; progress toward objective 3 was 20% on 5/7/21 and zero after that; and objective 4 was not initiated. *Id.*

37. For 2023-2024, Student's speech goal was identical to the speech goal from 2021-2022 and 2022-2023 and was that: given auditory and visual stimuli, Student would develop improved overall language skills (receptive and expressive) through a variety of informal and formal situations by completing 80% of the objectives by the end of this IEP with the following objectives given multisensory cuing Student would: 1) use any communication system to name and identify body parts with 80% accuracy across 3 consecutive data days, 2) use any communication system to name and identify spatial concepts or by performing an action given verbally the spatial/prepositional concept with 80% accuracy across 3 consecutive data days, 3) use any communication system to request a preferred item or activity that is within view, but not accessible in 4 out of 5 trials for 3 consecutive data days, 4) utilize any form of communication to name and identify simple basic and/or descriptive concepts (i.e. color, size, etc.) with 80% accuracy across 3 consecutive data days, 5) utilize any form of communication to respond to questions verbally presented by clinician given pictures, books and object stimuli if appropriate for the given task with 80% accuracy across 3 consecutive data days, 6) during a functional routine or activity, follow 1-2 step commands without adverse behaviors with 80% accuracy across 3 consecutive data days, and 7) during structured and non-structured classroom activities, use any form of communication to increase vocabulary skills by identifying, and utilizing 7-10 nouns, verbs or modifiers with 80% accuracy across 3 consecutive data days. P. Ex. p. 11, 34, 55. Progress notes repeated that on 10/20/2020 progress was at 10%, 30%, 2/5, 30%, 45%, 40%, and 3/5 respectively; all objectives were discontinued on 3/18/2021; and then added that on 10/14/2022 progress was at 16%, 25%, 25%, 25%, 25%, 25%, and 15% respectively. P. Ex. p. 7, 35, 56.

38. The 2023-2024 IEP repeated the speech goal that was initiated on 3/18/2021 and

continued in 2022-2023 that given auditory and visual stimuli, Student will demonstrate receptive language skills at a level expected for his age and grade as evident on standardized assessment tools and clinical observations with the following objectives: 1) given a variety of pictures and/or objects, Student will demonstrate an understanding of semantics by grouping the pictures/objects into major categories (animals, food, clothing, vehicles, etc.) and minor categories (colors, shapes, function), 2) given a picture of object, Student would demonstrate the understand of spatial concepts by identifying the target location by pointing or gesturing and/or placing an object in target location, 3) demonstrate semantic skills by identifying pictures and/or objects by target category, 4) demonstrate knowledge of basic cognitive skills by identifying upper case letters, lower case letters, numbers and arranging letters and numbers in order. P. Ex. p. 12, 36, 57. The progress noted on the objectives again matched that from the 2021-2022 and 2022-2023 IEPs that on 3/18/21 to be 56%, 45%, not initiated, and 17% respectively, on 10/15/21 to be 55%, 29%, 28%, and 22% respectively, on 12/17/21 to be 52%, 31%, 46%, and 22% respectively, and on 3/11/22 to be 42%, 33%, 45%, 22% respectively. *Id.*

39. The 2023-2024 IEP also repeats the second speech goal that was initiated on 3/18/2021 and continued for 2022-2023 that given auditory and visual stimuli, Student will demonstrate an increase in communication skills to a level expected for his age and gender as evident by performance on standardized assessments and clinical observations. P. Ex. p. 13, 37, 58. The objectives were that: 1) giving a greeting, Student will greet and take leave with a "hi" or "bye" using signs, pictures and/or his voice output device with mastery at 3x on 3 consecutive data days; 2) given a set of objects and/or pictures, Student will use a word of description to state size (big, small), color (primary and secondary colors) and shape of

target objects/pictures with master when data reaches 70% on 3 consecutive data days; 3) given a set of pictures and/or objects, Student will indicate the name of the group by using signs, pictures and or a voice output device with mastery when the data reaches 70% on 3 consecutive data days; and 4) given pictures, Student will demonstrate increase in use of his voice output device by naming pictures with his device with mastery when the data reaches 70% on 3 consecutive data days. P. Ex. p. 13, 37, 58. Identical progress was noted on 10/15/2021 to be 1.5x, 2%, not initiated, and 37% respectively, on 12/17/21 to be 1.5x, 2%, not initiated, and 30% respectively, and on 3/11/22 to be 1.5x, 26%, not initiated, and 30% respectively. *Id.* Additionally, progress on 10/14/2022 was reported to be 15%, not initiated, 13% and 25% respectively. *Id.*

40. The May 2023 Least Restrictive Environment Considerations state that the child will not participate 100% of the time with non-disabled peers in the general education environments because: the child's acquisition of academic/developmental skills cannot be addressed through modification/adaptation of the general curriculum, small group instruction is necessary for the child to acquire skills specified in the IEP, behavior intervention strategies established in the child's IEP require a degree of structure that cannot be implemented in a large group setting, the child's needs cannot be achieved in the general education/preschool environment even when supplemental aids and supports are provided, the child's behavior significantly impeded his or her learning and that of others, additional individualized instruction is needed to facilitate learning, and a more structured environment is needed than can be provided in the general education setting. P. Ex. p. 15. Student is designated on the continuum of placement was attending regular class less than 40%, and amount of time in general education setting would be 24% of time per week. *Id.*

46. District agreed to provide extended school year ("ESY") services in the summer following Student's seventh grade year, in occupational therapy ("OT") and speech therapy. Tr. Vol. I p. 215-16. Parents requested the services be provided at the Malvern Clinic for KidSource, a District contractor. Tr. Vol. I p. 228. Mother testified the family did not decline services or agree to reducing anything, and her messaging reflects the same. Tr. Vol. V p. 129; D. Ex. p. 126. Mother testified during the summer before Student's eighth grade year that she asked and asked about starting summer therapy and received excuse after excuse. Tr. Vol V. p. 127; D. Ex. p. 112-114. LEA those services were not being provided in June of 2023 and reached out to KidSource around July 31, 2023 as soon she was under contract. Tr. Vol. I p. 225-27; D. Ex. p. 112-113.

47. Parents filed a due process complaint on August 17, 2023. *See* Complaint H-24-10.

48. Parents did not agree to Student's placement in the general education environment for academic classes. Tr. Vol. V p. 34-35. After filing the due process complaint in the fall of 2024, Parents learned Student had been placed in general education classes for the eighth grade. Tr. Vol. V p. 33-34.

49. Parents were provided no explanation of how the change of placement to general education for academics would provide Student educational benefit. Tr. Vol. V p. 34-35. Father testified that Student would get no educational benefit from placement in the general education classroom: "[Student] is not capable of doing any of that work . . . , but he's a disruption to the rest of the classroom" because he will squeal, tear up paper, and spit. Tr. Vol. V p. 42-43, 58. Father reviewed notes taken by Student's paraprofessional during science and history. See P. Ex. 169-170. Father testified he was quite confident that [Student] did not understand the notes; nor could Father see anything Student would benefit

from sitting through that kind of lecture, which is not appropriate for somebody on Student's level. Tr. Vol. V p. 43-44; P. Ex. p. 169-170.

51. LEA admits Parents were not included in the change in Student's placement in the general education setting and stated Parents were informed of Student's inclusive placement and given his schedule. Tr. Vol. I p. 133, 146-47. LEA testified that, based on the directive from the State for more inclusion, the District included Student in more general education classes with the support of special education teachers and paraprofessionals for the 2023-2024 school year. Tr. Vol. IV p. 136. Although LEA admitted academic lessons were above Student's abilities, Student was able to work on his social and behavioral development through inclusion with his non-disabled peers. Tr. Vol. I p. 132-34; Tr. IV p. 139. LEA testified Student obtained his direct instruction in functional, social, and behavior skills in the general education setting. Tr. Vol. IV p. 184. Student would go into the general education classroom for up to 15 minutes but was removed early if he became over-stimulated. Tr. Vol. I p. 148-49. Student would then be taken to the special education classroom with either his paraprofessional or a special education teacher to work on his IEP goals and objectives. Tr. Vol. II p. 61-63. During his time in the general education setting, Special Education Teacher testified Student was able to perform academic work developed by the special education teacher in cooperation with the general education teacher for the co-taught classes. Tr. Vol. II p. 83. Paraprofessional stated Student seemed to enjoy the general education setting, but Student was not able to remain in class for more than 20 minutes due to his disruptive noises. Tr. Vol. II p. 129, 139, 176, 187. Special Education teacher testified Student's interactions with nondisabled peers grew after Student's placement in general education classrooms. Tr. Vol. II p. 116-17.

53. General education teachers testified Student could not benefit from placement in their general education classrooms, and the general education teachers were concerned about confusion resulting from Student being assigned grades in their general education classes and also about being asked to assign grades to Student with no connection between Student's curriculum and their general education curriculum. Tr. Vol. I. p. 198-99; Tr. Vol. II p. 226. In response to concerns of the general education teachers, District contacted the State and held a meeting with the State and the concerned general education teachers. Tr. Vol. I p. 198-201. State worked with the District and the concerned general education teachers to assist the teachers in creating curriculum and assigning grades based on the work Student was doing. Tr. Vol. I p. 198-201.

54. Although paraprofessionals were assigned to Student throughout the day, Student no longer had a dedicated paraprofessional beginning in the eighth grade. LEA testified that Student's paraprofessional was not removed in eighth grade stating that student was still supervised by paraprofessionals throughout the day, but District admits Student no longer had a paraprofessional 100% of the school day. Tr. Vol. I at p. 176-78; Tr. Vol. IV p. 135. Students eighth grade schedules reflect his assignment of paraprofessionals throughout his day. P. Ex. p. 167-68.

55. Student received Speech Therapy at school from the beginning of his eighth-grade year. Tr. Vol. I p. 174. The eighth grade IEP does not reflect that speech therapy was not removed for the first semester but was set for "2" semesters. Tr. Vol. I p. 173-74.

56. Although Parents had direct access to Paraprofessional in the morning at drop off and in the afternoon at pickup during Student's sixth and seventh grade years and his Special Education Teacher in eighth grade, there was a lack of communication from the District to

Parents regarding the content Student was working on. Tr. Vol. II p. 175-76; Tr. Vol. V p. 70-72, 174-76. Paraprofessional testified teachers would send notes home to Parents about Student's Day. Tr. Vol. II p. 147-48. However, the only feedback Parents received from District was whether Student had a "good day" or "bad day"; Parents were not regularly provided with information about Student's academic, behavior, or functional progress. Tr. Vol. V p. 29.

57. Parents did not receive reports of Student goals every 9 weeks. Parents received report cards for Student every nine weeks; however, the report cards did not reflect Student's progress on IEP goals. Tr. Vol. I p. 43. LEA appeared genuine when testifying she kept up with Student's progress in Google forms and would use that progress to provide Student's grades. Tr. Vol. I p. 113-15, 183-85. However, goal progress did not appear to correlate with Student's report card grades. D. Ex. p. 142-148. LEA testified Parents could review Student's progress in a HAC account, which permitted access to Student's eSchool records. Tr. Vol. III p. 169-70. However, Parents had no knowledge of this and could not confirm that Student's progress could be reviewed there. Tr. Vol. V. p. 73. Parents questioned Student's report card and did not believe he earned a "95" in science during the spring of 2023. P. Ex. 172. Parents were told Student needed to get a report card and that Student's work was different. Tr. Vol. V p. 46.

58. Although the District introduced documents as Student's work samples, the documents do not appear to be reliable evidence of Student's abilities. D. Ex. p. 149-573, P. Ex. 399-407. Paraprofessional testifies that she took notes for Student and at times worked with him "hand over hand," which would explain the work samples. Tr. Vol II. P. 132-133. District stated that Student was able to tell time and count money, but testimony from

Pediatrics Plus was Student is “not even close to that yet.” Tr. Vol. I p. 180-81; Tr. IV p. 126; D. Ex. p. 367-96. Further, the work samples do not appear consistent with Student’s OT report dates 11/2/23. D. Ex. p. 614-616. Father testified he never saw progress in Student’s academic skills, that at IEP meetings District would report that they were implementing the IEP, but that Student was not making progress. Tr. Vol. V p. 15-17.

59. Although Parents were told that Student used the AAC device to communicate at school, as of April 2024, Student was unable to independently communicate with peers, extended family, or others not familiar with his sign language. Tr. Vol. V p. 13, 41. District has removed Student’s sister from class to interpret Student’s sign language communications. *Id.* p. 36. Paraprofessional testified and sister reported to Parents that Student was not using an AAC device at school, other than maybe to select his lunch; Student did not carry the AAC device day at school. Tr. Vol. V p. 13-14. To the extent Student communicated with Parents and siblings, Student uses sign language. Tr. Vol. V p. 23.

60. Parents’ goal for Student was for him to live as independent as possible. Tr. Vol. V p. 44. However, Father could not identify a single skill Student learned as school and described how Student is still trying to learn basic on-step instruction. Tr. Vol. V p. 44-45.

61. District does not have an appropriate placement for Student because it does not have a self-contained classroom for middle school or ABA therapy. Tr. Vol. V p. 49. District has had no ABA therapist for Student since Former Special Education Teacher left the District in December of 2021. Tr. Vol. I p. 18-22; Vol. II p. 9-10; and Vol. V p. 313.

62. Because the District placed Student in general education classes for academics and because the District could not provide Student with ABA therapy, Parents informed the District they were looking for a private placement for Student in or about August of 2023.

Tr. Vol. V p. 53-54. Parents requested private placement and now request Student's placement be changed to Pediatrics Plus, where he currently receives therapy, and has someone one-to-one who is teaching him communication skills and utilizes ABA Therapy. Tr. Vol. V p. 50.

63. After reviewing the ability of the local school district, Ouachita, to provide Student's education, Parents placed Student at Pediatrics Plus without consultation with the District in January of 2024. Parents did not feel that Student would benefit as much at Ouachita as he would at Pediatrics Plus. Tr. Vol. V. p. 224-225. At Pediatrics Plus, Student will not receive any academic courses such as math, ELA, science, or social studies, only therapy. Tr. Vol IV p. 120. Pediatrics Plus has no certified teachers, and its therapist are not certified in special education. Tr. IV p. 120-121, 126; D. Ex. p. 367-96. Pediatrics Plus is not accredited by the Arkansas Board of Education and is not required to develop IEPs for students who qualify for specialized instruction and related services. Tr. Vol. IV p. 121. Pediatrics Plus only serves disabled students. Tr. Vol IV p. 119-120.

64. Pediatrics Plus is an appropriate placement for Student. The Speech Therapist for Pediatrics Plus testified that Student needed to focus on functional skills, not academics. Tr. Vol. IV p. 57-58, 126. There, Student would benefit from ABA therapy and teaching communications. *Id.* at p. 91-93.

65. Pediatrics Plus uses a device similar to the AAC utilized by the District with Student in speech therapy, and Pediatrics Plus does not allow the device to be used in other therapy sessions or to be taken home because they are in the trial process to determine the best AAC for Student. Tr. IV p. 65, 80-81, 117-20.

66. Parent reviewed the logs for 2020-2021, 2021-2022, and 2022-2023 school years.

Tr. Vol. IV p. 6. During this time, Student was entitled to receive 90 minutes per week of speech therapy and 60 minutes per week of occupational therapy. P. Ex. 29, 30, 50, 51, 77. A school year being 36 weeks, Student was entitled to 3,240 (90 x 36) minutes of speech therapy and 2,126 (60 x 36) minutes of OT each school year. *Id.* Father reviewed Student's speech therapy and occupational therapy logs and found District had not provided therapy in conformity with the IEP. P. Ex. 299-1024; Tr. Vol. V p. 16.

67. Student should have received 90 minutes weekly of ESY services in speech therapy and 60 minutes weekly in ESY services in OT. P. Ex. p. 39. ESY services typically last six to eight weeks. Tr. Vol. V p. 130. Thus, Student was denied at least 450 (90 x 5) minutes of speech therapy and 240 (60 x 4) minutes of occupational therapy. Speech therapy and OT therapy logs were stipulated to and made a part of the record. Tr. Vol. IV p. 6-7.

68. Student received 2,730 of 3,240 minutes of speech therapy required by his IEP in 2021-2022. P. Ex. 518-704. Student received 2,445 of 3,240 minutes of speech therapy required by his IEP in 2022-2023. P. Ex. 319-516.

69. Student received 1,560 of 2,160 minutes of OT required by his IEP in 2021-2022. Student received 1,770 of 2,160 minutes of OT required by his IEP in 2022-2023. P. Ex. 739-903.

CONCLUSIONS OF LAW AND DISCUSSION:

I. Provision of FAPE

A. Procedural

Pursuant to Part B of the IDEA, states are required to provide a FAPE for all children who are eligible for special education services. 20 U.S.C. § 1412(a); 34 C.F.R. § 300.300(a). FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. §

300.17. In 1982, the U.S. Supreme Court addressed the meaning of FAPE and set forth a two-part analysis that must be made by hearing officers in determining whether a school district has failed to provide FAPE as required by federal law. *See Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-07 (1982). First, a hearing officer must determine whether the State in the form of the local education agency or district, complied with the procedures set forth in IDEA. *Id.* If procedural inadequacies are found, for a child to be denied a FAPE, any procedural inadequacies must (1) impede the student's right to an appropriate education, (2) seriously hamper the [Guardian]'s opportunity to participate in the decision-making process, or (3) cause a deprivation of educational benefits. *See K.E. ex rel. K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795, 804-805 (8th Cir. 2011); 20 U.S.C. § 1415(f)(3)(E)(ii)(I)-(III)

In 2005, the U.S. Supreme Court held that a school district cannot refuse to consider parents' concerns when drafting an IEP and cannot predetermine the educational program for a disabled student prior to meeting with parents. *See Schaffer v. Weast*, 546 U.S. 49, 53 (2005). Predetermination could deprive parents of a meaningful opportunity to participate in the formulation process pertaining to the IEP. *See Lathrop R-II Sch. Dist. v. Gray*, 611 F.3d 419, 424 (8th Cir. 2010). "The IDEA explicitly requires school districts to include parents in the team that drafts the IEP to consider 'the concerns of the parents for enhancing the education of their child' and to address 'information about the child provided to, or by, the parents.'" *M.M. ex rel. L.M. v. Dist. 0001 Lancaster County Sch.*, 702 F.3d 479 (8th Circ. 2012) (citing 20 U.S.C. § 1414(d)(3)(A)(ii), (d)(4)(A)(ii)(III)). However, the IDEA does not require a school district to accede to parents' demands without considering suitable alternatives; a district does not procedurally violate the IDEA simply by failing to grant a parent's request. *Id.*

B. Substantive

After determining whether procedural inadequacies exist, the hearing officer must next determine whether a student's IEP was reasonably calculated to enable to the student to make appropriate progress in light of his individual circumstances. *Paris Sch. Dist. v. A.H.*, 2017 WL 1234151, 4 (W.D. Ark 2017). (citing *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, No. 15-827, 2017 WL 1066260, 580 U.S. 386 (2017), 137 S.Ct. 988 (2017)). The burden of proof falls on the party seeking relief. See *Sneitzer v. Iowa Dep't of Educ.*, 796 F.3d 942, 948 (8th Cir. 2015). In 2017, the United States Supreme Court "rejected the 'merely more than *de minimis*' standard that had previously been the law in the Eighth Circuit." *Paris Sch. Dist. v. A.H.*, 2017 WL 1234151, 4 (W.D. Ark 2017). (citing *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, No. 15-827, 2017 WL 1066260, 580 U.S. 386 (2017), 137 S.Ct. 988 (2017)). In *Endrew F.*, 137 S. Ct. at 1000. The Court stated the following:

It cannot be the case that the Act typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than *de minimis* progress for those who cannot. When all is said and done, a student offered an educational program providing "merely more than *de minimis*" progress from year to year can hardly be said to have been offered an education at all."

Endrew F., 137 S.Ct. at 1001 (citations omitted). The U.S. Supreme Court held that the IDEA requires that students under the Act be provided with an "educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.*

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). Every IEP, pursuant to the IDEA, is required to include the following: (1) a statement of a student's present levels of academic achievement and functional performance; (2) a description of how a student's disability affects his or her involvement and progress in the general education curriculum; (3) annual goals that are measurable, as well as a description as to how progress toward stated goals will be measured; and (4) a description of special education and related services provided to student. 20 U.S.C. § 1414(d)(1)(A)(i)(I)-(IV).

"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. §1409(9)(D). The IEP is the guiding document and primary method for providing special education services to disabled children under the IDEA. *Honig v. Doe*, 484 U.S. 305, 311 (1988). "Through the development and implementation of an IEP, the school provides a FAPE that is 'tailored to the unique needs of a particular child.'" *Paris Sch. Dist.*, 2017 WL 1234151, at *5 (citing *Endrew F.*, 2017 WL 1066260, at *1000). In considering the application of the *Rowley* standard, the U.S. Supreme Court observed that an IEP "is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth." *See Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S.Ct. 988, 999 (2017).

Pursuant to *Endrew F.*, a district "must offer an IEP reasonably calculated to enable

a child to make progress appropriate in light of the child's circumstances." 2017 WL 1066260, at *1000. For most students, to comply with this standard, providing FAPE "will involve integration in the regular classroom and individualized special education calculated to achieve advancement from grade to grade." *Id.* However, in the event that this is not possible, the education of a disabled child still needs to be "appropriately ambitious" in light of a student's individual circumstances. *Id.* A review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal. *Id.*

To review Student's individual circumstances, as detailed above, Student has a diagnosis of Autism, is nonverbal, and has intelligence assessed to be in the very low range of intelligence. He began receiving ABA therapy, speech, occupational therapy, physical therapy and developmental therapy at age three. At age five, Student was unable to complete any tasks on the KTEA II or the PPVT. ABA therapy was recommended for Student by a BCBA in December of 2018, and ABA therapy was implemented for Student at the District. As Student is nonverbal, a communication modality assessment was completed on 10/30/2019, which resulted in AAC device being the recommended communication modality. In December of 2018, Student did not demonstrate an understanding of object permanence, was unable to sequence order of daily activities, was unable to associate a clock with telling time, was able to utilize various writing instruments but was unable to copy letters or numbers, was toilet trained, could self-feed, would respond to his name when called, and could turn knobs and open doors.

In fifth grade, 2020-2021, Student was able to use four modified ASL signs for eat, drink, iPad, and bathroom after a prompt. Student began using the AAC device with the Go Talk Now app and was using 8 real pictures to communicate drink, eat, swing, ball, outside,

and bathroom. His math goals involved sorting and placing block on block designs, his language goals involved increasing the number of items he could request using his chosen communication form, and his adaptive goals were to increase self-care. At the May 2021 IEP meeting, it was noted that Student had then mastered 20 of the 79 introduced icons on his AAC using the Go Talk Now app. A review of Student's background documents and testimony in this matter reflects that Student is able to learn, although slowly. In 2024, the Pediatrics Plus Speech Therapist stated that Student's education should focus on functional goals.

1. FAPE in the May 2021 IEP

a. Failure to Alter Speech Goal

Student's 2021-2022 IEP written May 7, 2021 before student entered sixth grade ("May 2021 IEP) is the first IEP at issue in the current matter. Parents do not take issue with the math or functional goals in Student's May 2021 IEP. However, Parents argue that Student's May 2021 IEP was faulty because it failed to contain a goal that specifically stated the goal was assessing the AAC with the "Go Talk Now app." Parents allege the IEP team committed a procedural violation in failing to revise Student's speech communication goals to address Student's failure to make expected progress. See 20 U.S.C. § 1414(d)(4)(A)(ii)(I) (IEP team shall revise IEP to address lack of expected progress.)

This hearing officer notes that the language goal in the May 2021 IEP contained the objectives to: request 25, 30 and 35 items when asked "What do you want?" using his chosen form of communication. Progress notes in December of 2021 showed slow growth toward those objectives, which was to be expected based on Student's disability and intelligence. The Parent's ability to participate in assessing the effectiveness of the Go Talk Now app for Student was not impaired on the basis that the language goal failed to explicitly state the Go

Talk Now app was being used because testimony established the Go Talk Now app was the only app the District ever used for Student's communication. Thus, this hearing officer concludes that the initial May 2021 IEP was reasonably calculated to enable Student to make progress appropriate in light of the child's circumstances, and that Student did gain educational benefit from the May 2021 IEP to an extent that was expected and appropriate in light of Student's circumstances. District's failure to further revise Student's speech goal in the May 2021 IEP did not result in a deprivation of education for Student, and thus, failure to revise Student's speech goal further in May of 2021 was not a substantive denial of FAPE.

b. Failure to Provide Student with an AAC for Home

Statutorily, District had a duty to provide Student with an AAC for school and home use. 28 C.R.F. §35.160(a)(1) provides, "A public entity shall take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others." 28 C.R.F. §35.160(b)(1) provides, "a public entity shall furnish appropriate auxiliary aids and services where necessary to afford individuals with disabilities, including applicants, participants, companions, and members of the public an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity."

Although the District provided an AAC for Student at school, District did not provide an AAC for Student to use at home. Although District documented that Parents offered to bring an iPad from home and the offer to install Student's Go Talk Now app on Parent's iPad, as well as training Parents in using the app, Parents never brought the iPad to school for the installation of the Go Talk Now app or to receive training on the app. Father states that it was discussed that Parents would bring an iPad from home for the Go

Talk Now app but that, soon after that discussion, Parents let District know that plan was not workable because Parents were not comfortable sharing their Apple passwords with the District. After the second discussion, District should have worked to provide Student with an AAC to take home to work on the transfer of skills in requesting what he wanted on the AAC from the school setting to the home setting.

Based on testimony from the Speech Therapist for Pediatrics Plus, there is no doubt that District's failure to provide Student with an AAC for home use deprived Student of educational benefit. Certainly, this was the case for the months when Student was home in 2020, which caused his skills to regress. Further, Speech Therapist for Pediatrics Plus testified to the importance of transferring skills from the school setting to the home setting, and she testified that Student did not have an AAC for home use as of the hearing date because Student was still in the trial phase. Student did have picture cards for use in requesting his needs in the home setting. This Hearing Officer therefore finds that District denied Student a FAPE in failing to provide him with an AAC for home use.

2. FAPE in the May 2022 IEP

a. Failure to Alter Goals

Student's May 2022 IEP was not reasonably calculated for Student to make appropriate progress. Although Student's progress appeared to stalled toward the end of the May 2021 IEP, the District made no changes to Student's IEP goals or objectives for the May 2022 IEP for Student's upcoming seventh grade year. Student's May 2022 Math Goal was identical to the May 2021 Math Goal: Student had mastered objectives 1 and 3 and objectives 2 and 4 had not been initiated and were continued. The IEP contained progress notes for the math goal from 2021 but not from 2022. Student's May 2022 Language Goal

was identical to the initial 2021 language goal, but it was shown to have been discontinued in March of 2021. Again, there were progress notes on the language goal from 2021 but not from 2022. Student's May 2022 adaptive goal was identical to the 2021 adaptive goal; the adaptive goal was not updated even though goal of urinating independently without challenging behavior was noted as mastered in September of 2021. The May 2022 receptive and expressive speech goals were identical to the May 2021 receptive and expressive speech goals, and based on progress notes, Student's progress in obtaining speech skills had stalled. Still, the IEP team responded to Student's lack of progress on his speech communication goals by repeating them on the May 7, 2022 IEP.

Further, there is little to no testimony or documentary evidence that suggests that Student made educational gains under the May 2022 IEP. As Student's May 2022 IEP was not reasonably calculated for Student to make appropriate progress and as Student appears to have made no educational gains, this hearing officer finds Student was deprived FAPE and educational benefit in the 2022-2023 school year.

b. Failure to Track and Report Progress

In addition to failing to alter the goals in the May 2022 IEP, the progress notes in the May 2022 IEP were duplicated from the May 2021 IEP. This suggests the District was not tracking Student's progress or, even if Student's progress was being tracked, it was not being reported to Parents as required by 20 U.S.C. §1414(d)(4)(A)(ii)(I). Parents testified they did not receive progress reports on Student's goals.

If the District had done progress monitoring and reported it to Parents, the District would likely have noticed Student's lack of progress and been able to adjust Student's services or placement before Student languished for an entire year without the focused goals

that he needed to progress. Parents would have had the opportunity to request changes in the IEP if they had known Student was not progressing in the seventh grade. For these reasons, District's actions in failing to monitor and report progress resulted in a denial of FAPE to Student.

3. FAPE in the May 2023 IEP

a. Procedural Issues

The U.S. Supreme Court held that a school district cannot refuse to consider parent concerns when drafting an IEP and cannot predetermine the educational program for a disabled student prior to meeting with parents/guardians. *See Schaffer v. Weast*, 546 U.S. 49, 53 (2005). Predetermination could deprive parents/guardians of a meaningful opportunity to participate in the formulation process pertaining to the IEP. *See Lathrop R-II Sch. Dist. v. Gray*, 611 F.3d 419, 424 (8th Cir. 2010). “The IDEA explicitly requires school districts to include parents in the team that drafts the IEP to consider ‘the concerns of the parents for enhancing the education of their child’ and to address ‘information about the child provided to, or by, the parents.’” *M.M. ex rel. L.M. v. Dist. 0001 Lancaster County Sch.*, 702 F.3d 479 (8th Cir. 2012) (citing 20 U.S.C. § 1414(d)(3)(A)(ii), (d)(4)(A)(ii)(III)). However, the IDEA does not require a school district to accede to a guardian’s demands without considering suitable alternatives; a district does not procedurally violate the IDEA simply by failing to grant a guardian’s request.

i. Removal of Paraprofessional Services

Parents testified that, prior to the May 10, 2023 meeting, Paraprofessional informed them that the District was going to remove Student’s one-on-one paraprofessional services. Father made these further observations that caused him to conclude the District improperly

predetermined what would be included on Student's 2023-2024 IEP: a) District failed to bring a general education teacher, the speech therapist and the occupational therapist; b) the proposed IEP discontinued Student's full-time, one-to-one paraprofessional support; c) the IEP form appears to have been completed prior to the meeting because it indicated Parents agreed to excuse Principal McJunkins from the meeting, but Parents did not agree to; d) the Notice of Action appears to have been completed prior to the meeting because it indicated that Parents "agreed to immediate implementation of the action being proposed," but Parents did not agree to the proposed IEP, instead they objected. The Parent input section does note that "Parents are asking that we continue to provide an aide 100% of the school day." Although the District argues Student had access to a paraprofessional 100% of the day, the service minutes for the paraprofessional designated for Student were omitted from the May 2023 IEP.

The District improperly predetermined the special education and related services to be included on Student's 2023-2024 IEP. The improper predetermination significantly impeded Parents' opportunity to participate in the decision making process regarding the provision of FAPE to Student, and Student was denied full time access to the Paraprofessional who had known and worked with him back to his time with Former Special Education Teacher. Paraprofessional had been training in testing Student using discrete trials, was familiar with Student's AAC, and knew how to assist Student with frustrations. Student evidenced little to no progress was evidenced in the fall of 2023. Thus, District's predetermination in the May 2023 IEP deprived Student of educational benefit, and as a result, constitutes a substantive denial of FAPE. 20 U.S.C. §1415(f)(3)(E)(ii)(I), (III).

ii. Change in Placement to General Education Classes for Academics

Second, prior to the Student beginning school in August of 2023, Parents were “informed” that Student would be receiving his education in the general education setting. LEA admitted Parents were not included in the change in Student’s placement. This was not addressed in the May 2023 IEP meeting, and there was no subsequent meeting of Student’s IEP team to discuss or determine whether or not this placement would be appropriate for Student. In fact, Parents objected to Student’s placement in general education, and this denied Parent’s ability to participate in Student’s educational planning.

iii. Failure to Revise May 2023 IEP Speech Goal

On May 10, 2023, the District held an IEP meeting for the purpose of reviewing and revising Student’s IEP to address “any lack of expected progress toward the annual goals and in the general education curriculum,” “the results of any reevaluation,” “the child’s anticipated needs,” and “information about the child provided to, or by, parents.” 20 U.S.C. §1414(d)(4)(A)(ii)(I), (II), (III), (IV). Student’s May 2023 IEP was drafted when Student would be entering eighth grade and ran from 5/10/23 to 5/9/2024. Student again failed to make expected progress on his speech communication goals based on the progress notes, but the May 10, 2023 IEP included the same speech communication goal and same four objectives continued from the 2021 and 2022 IEPs. For Student’s eighth grade 2023 IEP, this hearing officer finds District and failed to review and revise it.

b. Substantive FAPE in the proposed 2023 IEP

i. The May 2023 IEP

This Hearing Officer must determine whether the May 2023 IEP was reasonably calculated to provide appropriate progress for Student in light of his circumstances. As discussed above, no paraprofessional minutes were designated in the May 2023 IEP.

Student's May 2023 adaptive goal was merely repeated from the May 2021 and May 2022 IEPs, despite the lack of progress.

Student math goal of sorting up to six items remained, but the goals of telling time on an analog clock and counting money and making change were added. Based on a review of prior goals and lack of progress, as well as the most recent OT report, the goals of telling time on an analog clock and counting money and making change for Student held side by side with the goal of sorting six items highlights that the goals of telling time and counting money were far beyond Student's readiness and were not reasonably calculated to benefit Student to make appropriate progress.

Student's reading goals were likewise not reasonably calculated to benefit Student. Although Student had not yet mastered matching uppercase and lowercase letters in the past two years, which was language Objective number 2, Objective 1 expected him to identify words/text and pictures in a book, and Objective 3 expected him to identify nouns and match pictures. Again, holding the objectives side by side makes it clear that the objectives were not reasonably calculated to help Student make appropriate progress.

Student's May 2023 receptive and expressive speech goals were updated to include the objectives of identifying body parts, identifying spatial concepts, requesting a preferred item, identify descriptive concepts like color and size, respond to verbal questions, follow 1-2 step commands, and identifying nouns, verbs and modifiers. Although some of these objectives appear well intentioned, there is no indication in Students prior performance to indicate that Student could reasonably be ready to learn spatial or descriptive concepts. The May 2023 IEP went on to repeat the receptive and expressive speech goals that were initiated on 3/18/2021 and continued in 2022-2023

with stalled progress, and again, the stalled progress notes from 2021-2022 were repeated in the May 2023 IEP with no new indications of progress.

For the above discussed reasons, this Hearing Officer finds Student's May 2023 IEP was not reasonably calculated to provide appropriate progress for Student. Further, there is little to no evidence that Student progressed under the May 2023 IEP, so the May 2023 IEP resulted in educational deprivation for Student and a denial of FAPE.

ii. Failure to Implement Extended School Year Services

The failure to provide speech and occupational therapy in conformity with the IEP is a substantive violation of FAPE. See 20 U.S.C. §1401(9) (FAPE "means special education and related services that are provided in conformity with the [IEP]..") Parent reviewed the logs for 2020-2021, 2021-2022, and 2022-2023 school years. During this time, Student was entitled to receive 90 minutes per week of speech therapy and 60 minutes per week of occupational therapy. A school year being 36 weeks, Student was entitled to 3,240 (90 x 36) minutes of speech therapy and 2,126 (60 x 36) minutes of OT each school year. *Id.* Father reviewed Student's speech therapy and occupational therapy logs and found District had not provided therapy in conformity with the IEP. Speech therapy and OT therapy logs were stipulated to and made a part of the record.

Student should have received 90 minutes weekly of ESY services in speech therapy and 60 minutes weekly in ESY services in OT. ESY services typically last six to eight weeks. Thus, Student was denied at least 450 (90 x 5) minutes of speech therapy and 240 (60 x 4) minutes of occupational therapy. Student received 2,730 of 3,240 minutes of speech therapy required by his IEP in 2021-2022. Student received 2,445 of 3,240 minutes of speech therapy required by his IEP in 2022-2023. Student received 1,560 of 2,160 minutes of OT required

by his IEP in 2021-2022. Student received 1,770 of 2,160 minutes of OT required by his IEP in 2022-2023. Student's failure to receive these minutes is a substantial departure from Student's IEPs and, based on Student's failure to progress during 2021-2022 and 2022-2023, they resulted in a deprivation of educational benefit to Student.

iii. Unilaterally Placing Student in General Education Classes

Although the IDEA does require that students with disabilities be educated in the least restrictive environment pursuant to 20 U.S.C. §1412(a)(5), the principal that IDEA does not sacrifice a student's access to FAPE to have him in a more integrated setting was recently confirmed by the Eighth Circuit Court of Appeals in *J.P. v. Belton School Dist. No. 124*, 40 F.4th 887 (8th Cir. 2022).

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." *See CJN ex rel. SKN v. Minneapolis Public School*, 323 F.3d 630, 641 (8th Cir. 2003). However, the IDEA "significantly qualified the mainstreaming requirement by stating that it should be implemented to the 'maximum extent appropriate.'" *Pachl v. Seagren*, 453 F.3d 1064, 1067 (8th Cir. 2006); *see also* 20 U.S.C. §1412[a](5). 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." *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983). The requirement to mainstream is not applicable when it "cannot be achieved satisfactorily." *See Pachl*, 453 F.3d at 1068. 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." *See Roncker*, 700 F.2d at 1063.

Placing Student in general education resulted in an educational deprivation. During the Student's time in the general education setting, Student would have to removed from the general education classroom due to noises he made when over-stimulated. The Special Education Teacher was co-teaching in the general education classroom and would have to stay in the general education classroom despite Student's removal because other students in the classroom needed her assistance with their special education instruction. Thus, Student was only getting 15-20 minutes per day of special education instruction from a certified special education teacher. Although Student may have made some social gains from being introduced in the general education setting, Student's educational benefit cannot be sacrificed for LRE.

Student needed the small group and more structured setting of the self-contained class in order to focus and make progress toward his educational goals. Placing Student in the general education setting and then with a paraprofessional outside the supervision of a special education teacher gave no educational benefit to Student, as exhibited by Student's failure to progress on his educational goals. Although the Department representative met with teachers to work out the grading and curriculum issues, that does not remedy the fact that Student could derive no benefit from the general education setting. General Education Teacher and Former LEA testified that Student could not benefit from placement in the general education setting. Therefore, this Hearing Officer concludes that Student was denied FAPE in the 2023 IEP and the time he attended the District within the timeframe of the fall of 2023.

5. Private School Placement

As this Hearing Officer has found a denial of FAPE by the District during the timeframe at issue in H-24-10, it is now necessary to analyze whether the Private School placement is appropriate for the Student. 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. *See D.L. by Landon v. St. Louis City Sch. Dist.*, 950 F.3d 1057, 1066 (8th Cir. 2020). ADE Spec. Ed. Rules §10.01.22. *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 a student from seeking compensatory education from a prior school district for violations of FAPE. *Indep. Sch. Dist. No. 283 v. A.C.*, 358 F.3d 769, 774 (8th Cir. 2001). Where a student's case concerns obligations that a prior district owed to a student and failed to meet, the remedy sought is compensatory. *Id.* "It does not matter where 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," but a claim for private school tuition must include proof that the school district cannot prospectively provide a FAPE. *Indep. Sch. Dist. No. 283 v. E.M.D.H.*, 960 F.3d 1073, 1085 (8th Cir. 2020). In *Indp. Sch. Dist. No. 283 v. E.M.D.H. by & Through L.H.*, 357 F. Supp. 3d 876, 891 (D. Minn. 2019), the district court reversed an award of private school tuition as compensatory education finding, "there is scant evidence concerning whether the District can provide a FAPE

prospectively." 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." *Indep. Sch. Dist. No. 283 v. E.M.D.H.*, at 1086.

A claim for private school tuition must include proof that the private school "is an 'appropriate' placement within the meaning of the IDEA." *Sneitzer v. Iowa Dept. of Educ.*, 796 F.3d 942, 948 (8th Cir. 2015) In order to get reimbursement for a private placement, two requirements must be established: that the school failed to provide a FAPE; and that the private school is an "appropriate" placement within the meaning of the IDEA. *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 242–43 n. 9, 129 S.Ct. 2484, 174 L.Ed.2d 168 (2009); *Sch. Comm. of the Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985). An appropriate placement is one that will "provide the Student a FAPE consistent with the IEP." *Id.* A private placement need not satisfy a least restrictive environment requirements to be appropriate. *C.B. ex re. B.B. v. Special Sch. Dist. No. 1, Minneapolis, Minn.*, 636 F.3d 981, 991 (8th Cir. 2001).

Because this Hearing Officer found Student was denied FAPE by the District as a result of the March 18, 2021 goal change, the duplicative May 2022 IEP, the District's predetermined and inappropriate 2023 IEP, and the District's unilateral placement in general education classes, this Hearing Officer must determine whether the District can provide appropriate placement for Student or whether Parent requested placement at Pediatrics Plus is appropriate. As District lacks a self-contained classroom for Student and does not have staff trained in ABA therapy, this Hearing Officer finds the District is unable to provide FAPE for Student.

Regarding the requested placement at Pediatrics' Plus, District is correct that Student will not receive any academic courses such as math, ELA, science, or social studies at Pediatrics Plus. Pediatrics Plus has no certified teachers; its therapist are not certified in special education. Pediatrics Plus is not accredited by the Arkansas Board of Education and is not required to develop IEPs for students who qualify for specialized instruction and related services. Pediatrics Plus only serves disabled students.

On the other hand, Pediatrics' Plus does have ABA therapists and licensed OT and Speech Therapists. Former Special Education Teacher as well as Speech Therapist for Pediatrics Plus identified that Student needs to focus on functional goals. It is difficult to grasp how the District could set goals of Student counting money, when Student was still having difficulty independently expressing his needs. District argued that Student was able to tell time and count money at the District, but Pediatrics Plus' Speech Therapist testified Student is "not even close to that yet." This example illustrates that District fails to grasp how to draft appropriate functional goals for Student.

For the above stated reasons, this Hearing Officer finds that the District is unable to meet the educational needs of Student and that Pediatrics Plus is an appropriate placement. Pediatrics Plus does not have to meet LRE.

6. Transportation

When a hearing officer concludes that a school district failed to provide FAPE and the private placement was suitable, they must consider all relevant factors in determining whether reimbursement for some or all of the cost of the child's private education is warranted. *Forest Grove Sch. Dist. V. T.A.*, 557 U.S. 230, 247, 129 S.Ct. 2484 (2009). Under IDEA, a student's home school district remains responsible for transportation pursuant to

20 U.S.C. §1412(a)(10)(B)(i)(child placed in private school entitled to all IDEA rights); 34 C.F.R. §300.325(c) school district still responsible for compliance with IDEA); 20 U.S.C. §1401(26)(A)(“Related Services means transportation . . . ”); 34 C.F.R. §300.34 (same); ADE Spec. Ed. Rules §2.56 (same). “Transportation includes [t]ravel to and from school and between schools.” 34 C.F.R. §300.34.(c)(16). However, in Arkansas, a transfer student, who attends a school district through school choice, or the transfer student’s parent is responsible for the transportation of the transfer student to and from the school in the nonresident district where the transfer student is enrolled. Ark. Code Ann. § 6-18-1904(d).

This Hearing Officer notes that Student lives in Malvern, Arkansas and has attended the District as school choice student since second grade. Parents have never resided in the District and have always provided transportation for Student. District never agreed to provided transportation to Student.

On the other hand, this Hearing Officer has broad discretion in crafting its remedy, District’s inadequacies detailed above are consequential, and the available compensatory remedies are limited. Student cannot go back and reclaim the quality instruction and therapy minutes lost, Student is currently attending full day therapies, and Student is unlikely to be able to benefit from additional therapy sessions beyond those that he is receiving in his full day therapies at Pediatrics Plus. Therefore, this Hearing Officer grants Parents’ request for reimbursement of transportation expenses as a portion of Parents’ remedy.

FINAL CONCLUSIONS AND ORDERS:

Upon consideration of all the testimony and evidence, this Hearing Officer finds that a preponderance of the evidence warrants the following:

1. This Hearing Officer finds District denied Student FAPE in the May 2022 IEP, in the May 2023 IEP, in predetermining the May 2023 IEP, in unilaterally placing Student in general education classes for academics, in failing to provide necessary therapies, and for other violations of IDEA detailed above between August 18, 2021 through August 17, 2023.
2. This Hearing Officer grants the request for placement at Pediatrics Plus and reimbursement for Parents' deductible and any out-of-pocket expenses (after any insurance coverage is applied) for the number of weekly minutes in any types of therapies (OT, PT, Speech, Developmental, ABA for example) recommended for Student by Pediatrics Plus, as well as out of pocket expenses for equipment or devices Pediatrics Plus recommends for Student's personal use that may be needed to support Student's therapies, such as but not limited to an AAC device for Student's personal use. Upon Parents' provision of receipts for out-of-pocket expenses dated from January 1, 2024 through December 30, 2026, District shall reimburse parents within 60 days.
3. Parents request for reimbursement for transportation expenses is granted. Upon Parents' production of therapy logs to establish the dates of travel and a print out of Google Maps or other reliable resource establishing the number of miles required to transport Student to Pediatrics Plus for therapy each month, District shall pay Parents mileage at the rate of 52 cents per mile for each mile Student was transported to and from Pediatrics Plus for therapy between January 1, 2024 through December 30, 2026.
4. Parents also alleged that the District's conduct constitutes disability discrimination in the Consolidated Case pursuant to §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794(a) or 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*

§10.02.22.1. Therefore, 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.

/s/ Debby Linton Ferguson

HEARING OFFICER

05/17/2024

DATE