

**ARKANSAS DEPARTMENT OF EDUCATION  
SPECIAL EDUCATION UNIT**

**XXXXXXXXXX, Parents of  
XXXXXXXXXXXX, Student**

**PETITIONER**

**VS.**

**NO. H-24-15**

**Cabot School District**

**RESPONDENT**

**HEARING OFFICER'S FINAL DECISION AND ORDER**

**ISSUES PRESENTED:**

Whether the Cabot School District (hereinafter "District" or "Respondent") provided or denied the above referenced student (hereinafter "Student") a free, appropriate, public education (hereinafter referred to as "FAPE") from August 15, 2023 to September 22, 2023, pursuant to 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, who transferred to the District from another school district in Arkansas, FAPE by providing him "services comparable to those described in the child's IEP from the previous public agency" until it "[a]dopts the child's IEP from the previous public agency, or "[d]evelops, adopts and implements and new IEP, if appropriate, that meets the applicable requirements in §§300.324." 34 C.F.R. § 300.323(e) and 20 U.S.C. §1414(d)(2)(C)(i)(II);
- (2) whether the District provided the above referenced parent (hereinafter "Parent" or "Petitioner") meaningful participation in Student's education or whether the District predetermined Student's IEP and failed to consider the most recent evaluations;

(3) whether the District provided an individualized educational program (hereinafter “IEP”) reasonably calculated to provide educational benefit; and

(4) whether District provided Student FAPE in the least-restrictive environment (“LRE”).

**PROCEDURAL HISTORY:**

On October 9, 2023, the Arkansas Department of Education (hereinafter the “Department”) received a written request from Parent to initiate due procedure hearing procedures on behalf of Student (“H-24-15”). Parents requested a due process hearing because they believed that the District failed to comply with IDEA and Department regulations by failing to provide comparable services, failed to develop an IEP that would provide Student FAPE in the LRE, and failing to afford Parent meaningful participation in Student’s education. At the time H-24-15 was filed, Student (male) was six years old and had entered kindergarten in the District via Arkansas’ School Choice laws.

In response to the Parent’s request for a hearing, the Department assigned the case to this impartial Hearing Officer who initially scheduled the due process hearing in Case H-24-15 for November 8-10, 2023 if Parents and District failed to reach resolution. A resolution conference was held on November 1, 2023 between Parent and the District; however, the parties were unable to resolve the matter. Prior to the prehearing conference, Petitioner moved for continuance due to a family emergency and scheduling conflicts with other hearings. This Hearing Officer granted the continuance for good cause shown on November 7, 2023, and after conferring with the parties regarding available dates, rescheduled the hearing for February 27-29, 2024. Prior to the hearing of H-24-15, on February 19, 2024, Petitioner requested a second continuance due to a scheduling conflict with an expedited due process hearing. This Hearing Officer granted the continuance for

good cause shown on February 22, 2024, and after conferring with the parties regarding available dates, rescheduled the hearing for May 8-10, 2024.

A prehearing conference in the matter was held May 6, 2024 via zoom.<sup>1</sup> Counsel for both parties participated and discussed unresolved issues to be addressed at the hearing and the witnesses and evidence to be presented. 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. Parent had the burden of proving the allegations in this case.

The closed hearing began as scheduled and was held on May 8-10, 2023, but additional time was needed to hear the evidence. The hearing was then continued to June 12, 2024 and concluded that day. Present for the hearing were Theresa Caldwell, attorney for Petitioner; Cody Kees, Attorney for the District; Leila Seigrist, In-house Attorney for the District; Audie Alumbaugh, parent advocate; XXXXXX (“Mother”); XXXXXX (“Father”) (Mother and Father are referenced hereinafter together as “Parents”); and Haley Beavert, Special Programs Coordinator for the District. The following witnesses testified in this matter: Angie Gaston (“Special Education Teacher”); Stacey Smitherman (“Dennis Development Center Speech Pathologist”); Alicia Boyles (“Special Education Facilitator”); Haley Beavert (“Special Programs Coordinator”); Glenna Hollis (“Paraprofessional Hollis”); Jessica Harris (“Paraprofessional Harris”); Julia Treadway (“Principal”); Kasi Weathers (“ABA Therapist”) and Mother. At the conclusion on the hearing, both parties were

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<sup>1</sup> See Transcript of Prehearing Conference dated May 6, 2024.

requested to provide post-hearing briefs, and both timely submitted briefs in accordance with the deadline set by this Hearing Officer.

**FINDINGS OF FACT:**

1. For background purposes, Student's APRN first suggested a diagnosis of Autism Spectrum Disorder ("Autism") on February 2, 2023. *See* Parent Ex. p. 77

2. Prior to enrolling in grade school, Student first attended preschool at Kareer Kids, where he exhibited behavior issues of hitting, kicking, biting, and licking, which resulted in Student being sent home frequently from preschool. *See* Tr. Vol. IV p. 19.

3. Next, Parents enrolled Student in pre-school at Sammie Gail Sanders Developmental Center ("Sammie Gail") where Student had a pre-kindergarten IEP for a non-categorical developmental delay. *See* Parent Ex. 49, 69.

4. Whether Student was in a general education setting or in a self-contained setting at Sammie Gail was disputed. Student's Sammie Gail IEP notes that Student receives instruction in "a public or private day school designated for children with disabilities," and Student's least-restrictive environment considerations included statements that Student should receive "small group instruction as necessary for the child to acquire skills specified in the IEP," and that "additional individualized instruction is needed to facilitate learning." *See* Parent Ex. p. 63. However, a page earlier in the Sammie Gail IEP reflects that Student was in a regular education classroom 98.8 % of the time. *See* Parent Ex. p. 62. Mother testified Student was in the regular education environment in preschool at Sammie Gail, but Mother also testified that Sammie Gail was "set up to deal with a child with developmental disabilities," and later testified about a second child with Autism entering Student's class at Sammie Gail. *See* Tr. Vol. IV p. 18-19, 33. Relying on the documentation that Sammie Gail is

a school designated for children with disabilities and Mother's testimony that Sammie Gail is set up to deal with a child with developmental disabilities, this Hearing Officer finds that Student's classroom at Sammie Gail was comprised of other students with disabilities, similar to a self-contained setting.

5. Sammie Gail staff recommended to Parents to start the process for an IEP and that Student receive ABA therapy. *See* Tr. Vol IV p. 20-21. By May of 2023, Student was receiving ABA therapy at Sammie Gail, and Mother saw drastic improvement in his behavior. *See* Tr. Vol. IV p. 20. Parents were no longer being frequently called to pick up Student early due to his behavior. *See* Tr. Vol. IV p. 35. Unfortunately, when another Autistic student was added to Student's classroom, Student began to mimic the other Autistic student's maladaptive behaviors, and Student's behaviors cause him to being sent home from Sammie Gail, despite their greater resources and training to support Student. *See* Tr. Vol. IV p. 19-22.

6. As Student would be school aged in the fall of 2023, Student was initially enrolled in Jacksonville Schools where he and Parents reside. *See* Tr. Vol. IV p. 22. Parents met for an initial programming conference to create Student's IEP on March 17, 2023 (the "Jacksonville IEP"), as Student had an IEP and was receiving special education services in pre-school. *See* Parent Ex. p. 69. At the initial programming conference, the Jacksonville IEP team reviewed Student's pre-school evaluations for speech therapy ("Speech"), occupational therapy ("OT"), and physical therapy ("PT"). *See* Parent Ex. p. 69. The Jacksonville IEP team included both Parents, at least two teachers/staff from Sammie Gail, a behavior interventionist, a person to interpret evaluation results, a Jacksonville special education teacher, a Jacksonville general education teacher, and the Jacksonville LEA. *See* Parent Ex. p. 65-69. Staff from Sammie Gail provided behavior input on the Student. *See* Tr. Vol. I p. 217. As documented in the Present

Level of Academic Achievement and Functional Performance (“PLAAFP”) of the Jacksonville IEP, Student’s preschool behavior issues were: supervision is needed for Student’s safety, Student tends to lick objects or others, Student has had meltdowns and disruptive behavior in preschool, and Student can be aggressive at times. *See* Parent Ex. p. 30-32. Mother did not recall Parents disputing the accuracy of Student’s behavior issues documented in the Present Level of Academic Achievement and Functional Performance or objecting to self-contained placement in the Jacksonville IEP. *See* Tr. Vol. IV p. 20-21. The Jacksonville Notice of Action states that Student was placed in the “transition classroom,” which was stated to be the self-contained classroom in the Jacksonville IEP, due to his safety issue of eloping, and the team agreed that Student would receive 60 minutes per week of OT, 30 minutes per week of PT, and 180 minutes per month for Speech. *See* Parent Ex. p. 69. The Jacksonville IEP states Student was placed in the self-contained classroom for 425 minutes weekly of Math, 525 minutes weekly of English/Language Arts, and 300 minutes weekly of Social/Emotional education. *See* Parent Ex. p. 43. The Jacksonville IEP team, including Parents, agreed that Student would be in the special education setting for 62.95% of the school day and all of Student’s academic instruction would be provided in the self-contained classroom. *See* Parent Ex. p. 43-46. Parents signed indicating agreement to the Jacksonville IEP. *See* Parent Ex. p. 46. The Jacksonville IEP was created for the 2023-2024 school year. *See* Tr. Vol. I p. 218.

7. In April of 2024, Parents applied to transfer Student into the District via School Choice for his kindergarten year, and they were notified in June of 2023 that Student had been accepted. *See* Parent Ex. p. 23; Tr. Vol. IV, p. 22.

8. In May of 2023, Student was evaluated at the University of Arkansas for Medical Science, Dennis Developmental Center (“DDC”) on referral to confirm his Autism diagnosis. *See* Parent Ex. p. 77. The DDC evaluation found Student had average intelligence with an IQ of 100 (50<sup>th</sup> percentile) and diagnosed Student with Autism and Mixed Receptive Expressive Language Delay. *See* Parent Ex. p. 80-85. The DDC evaluation recommended Student continue receiving Applied Behavioral Analysis (“ABA”) therapy to “the greatest extent possible,” “that therapists and caregivers target functional communication, imitation, social engagement, functional play skills and self-regulation across settings,” and that developmental services be administered “as intensive as possible” including parent and teacher training and support to maximize carryover of therapeutic interventions across all settings. *Id.* at p. 49, 83. The DDC Speech Therapist that evaluated Student, Ms. Smitherman, recommended 90 minutes weekly of speech, but she acknowledged her recommendations were for the medical based model, which are different from the academic model. *See* Tr. Vol. I, p. 200-202; Tr. Vol. II p. 41. The DDC’s physical therapy evaluation recommended 90 minutes per week of physical therapy. *See* Parent Ex. p. 168.

9. In July of 2023, Parents submitted Student’s Jacksonville IEP, all of Student’s evaluations and therapy records, including the DDC evaluation diagnosing Student with Autism and assessing his IQ in the normal range. *See* Tr. Vol. IV p. 23-25, 41; Parent Ex. p. 77-85. Mother called the District on July 20, 2023 to confirm the District received the records and spoke with Rose Morton, who told her the District did not have any documentation on the Student, so Mother immediately emailed the District all of Student’s records again. *See* Tr. Vol. IV p. 41-46; Parent Ex. p. 112, 138, 162.

10. Parents received notice of an IEP conference on August 3, 2023, and on August 10, 2023, the District held an IEP meeting for Student. *See* Parent Ex. p. 16, 23. Before the August 10, 2023 IEP meeting, Student's teachers at Sammie Gail and others involved in Student's treatment told Parents not to allow Student to be placed in a self-contained classroom. *See* Tr. Vol. IV p. 25-26. Student's August 10, 2023 IEP team included Emily Hipp (Student's "General Education Teacher"), Alicia Boyles ("District LEA Representative" and individual who could interpret evaluations), Angie Gaston (Student's "Special Education Teacher"), Mary Beth Stivers ("Speech Therapist"), Lisa Farley ("Speech Therapist"), Julia Treadway ("Principal"), Jessica Saum ("Special Education Supervisor"), Kasi Weathers (Student's "ABA Therapist"), and both of Student's Parents. *See* Parent Ex. p. 15.

11. In creating Student's August 10, 2023 IEP (the "District IEP"), District staff testified they accepted the Jacksonville IEP. *See* Parent Ex. p. 2-3; Tr. Vol. I p. 46, 215-217, 223-225, 228-229, 239-242; Tr. Vol. II p. 6-20, 42. Student's District IEP contained goals that were substantially the same as Student's Jacksonville IEP goals, and Student's Jacksonville IEP goals were restated in the PLAAFP. *See* Parent Ex. p. 2-3 and compare Parent Ex. p. 7 and p. 40 for math; p. 7-9 and p. 36-38 for reading and writing; p. 9-10 and p. 35 for behavior; p. 11 and p. 39 for Speech/Language; Tr. Vol. II p. 51-66. Comparing Student's special education time from his Jacksonville IEP to his District IEP, Student's minutes for math were the same, language arts minutes were similar, but the District IEP allotted special education minutes for Science and Social Studies instead of Social/Emotional instruction. *See* Parent Ex. p. 12, 23 and 43. Student received the same number of minutes of therapy for Speech, OT, and PT in the District IEP, as he had in the Jacksonville IEP. *Id* and Tr. Vol. II. p. 42. Student's District placement was self-contained, as Jacksonville's had been. *See* Parent Ex. p.



13, 45. Based on this evidence, this Hearing Officer finds the District adopted the Jacksonville IEP. *See* Tr. Vol. I p. 228-229.

12. The DDC evaluation and recommendations were discussed at the District IEP meeting. *See* Tr. Vol. I p. 236-237, 242, 245, 247, 250, 253. Although Mother testified she did not recall Student's evaluations being discussed at the IEP meeting, Mother also testified that District officials explained that "education minutes are different" with regard to the speech and PT minutes, which would have occurred in the context of a discussion of the DDC evaluation. *See* Tr. Vol. IV p. 46. The discussion of the difference in minutes in an educational and medical setting was confirmed by the DDC Speech Therapist's testimony. *See* Tr. Vol. I, p. 200. The District did not follow the DDC's recommendation of 90 minutes of speech weekly but provided 45 minutes weekly, and the District IEP provided 30 minutes weekly of physical therapy, as in the Jacksonville IEP. *See* Parent Ex. p. 12, 127, 168; Tr. Vol. IV p. 50. The Speech goals in the District IEP appear to have been adopted from the Speech Therapist's recommendations. *See* Tr. Vol. I p. 207-208. Although the DDS evaluation recommended open channels of communication between parents, teachers, and all therapists, this was not discussed at the District IEP meeting. *See* Tr. Vol. II p. 39; Parent Ex. p. 83.

13. Student's District IEP provided Student 25% of time in general education, while the Jacksonville IEP provided him 37% of time in general education, which this Hearing Officer finds to be substantially similar. *See* Parent Ex. p. 13, 45. Mother testified that the District looked at the Jacksonville IEP and recommended the same thing, including Student's placement in a self-contained classroom because of his maladaptive behaviors. *See* Tr. Vol. I p. 253-258; Tr. Vol. IV p. 32-34. The District repeated the reasoning for Student's placement in the special education setting less than 40% as "small group instruction is necessary for

the child to acquire skills specified in the IEP”, the “child’s behavior significantly impedes his or her learning and that of others” and added that “student’s needs could not be achieved in the general education environment, even with supplemental aides and supports as provided,” “additional individualized instruction was needed to facilitate learning,” and “a more structured environment was needed than could be provided in the general education setting.” *See* Parent Ex. p. 13 and 45. Parents wanted Student in the general education setting with a paraprofessional but agreed with Student’s initial placement in self-contained with a plan to review the placement at the October 10, 2023 IEP meeting after gathering information; Parent agreed to the self-contained placement because District had agreed to allow ABA Therapy during Student’s lunch, recess and activity times. *See* Tr. V. I p. 262-263; Tr. Vol. IV p. 36. The Special Education Teacher recalled Parents requesting placement in the general education classroom, but Student was placed in her self-contained class based on behavioral concerns. *See* Tr. Vol. I p. 29, 45, 47. Parents signed the District IEP indicating their agreement and were okay with the self-contained placement at that time. *See* Parent Ex. p. 15; Tr. Vol. I p. 157; Tr. Vol. IV p. 36. The ABA Therapist felt the District’s IEP was a win for Parents because Student could receive ABA Therapy during times when it would be needed. *See* Tr. Vol. III p. 91. Student’s Special Education Teacher and Principal believe the self-contained placement was the most appropriate placement for Student with a goal of transitioning him to the general education setting. *See* Tr. Vol. I p. 159; Tr. Vol. II p. 243.

14. The Notice of Action documents that ABA Therapy was agreed to at the August 10, 2023 IEP meeting, but whether ABA Therapy was a part of Student’s IEP was disputed. *See* Parent Ex. p. 23. The Special Programs Coordinator asserted in documentation and testimony that Student’s ABA therapy was not listed as a special education service being

provided to Student because ABA therapy was not a “service that the school District was providing.” See Parent Ex. p. 26; Tr. Vol. III p. 206-207, 250-251. Although the District IEP included behavior goals and behavior intervention strategies, it did not expressly provide any special education minutes to address Student’s maladaptive behaviors. See Parent Ex. p. 4, 9-10, 12. Parents argue ABA therapy was part of the IEP as it was the research based “special education” intended to address Student’s Autism related maladaptive behaviors at school, and in separate sections argue that the District failed to provide services to address Student’s behaviors in removing 300 minutes of social/emotional minutes per week and that Student’s IEP was inappropriate because it did not include Student’s ABA therapy. See Parent Ex. p. 13, 25-27, 43; Parent’s Post-Hearing Brief at p. 13-14, 10-11 and 29. Certainly, ABA Therapy for Student was discussed in detail and agreed to by the District and Parents in the meeting because the Notice of Action reflects that Student’s ABA Therapist would provide therapy from 11:30-11:50 a.m. and 1:30-3:30 p.m. See Parent Ex. p. 23. Citing the Notice of Action, District admits in its Post-Hearing Brief that Student’s IEP included ABA therapy to be provided by his private therapist from 11:00 a.m. to 11:50 a.m. during Student’s lunch/recess and from 1:30 p.m. to 3:30 p.m. during Student’s activity time. See Parent Ex. p. 23; District Post-Hearing Brief p. 7. Thus, this Hearing Officer finds ABA Therapy was not transcribed into the District IEP document, but ABA Therapy was agreed to as part of Student’s IEP as a special education related services received at the District.

15. Finding credibility and weight in the testimony of the Special Education Facilitator, the Special Education Teacher, Mother, and the ABA Therapist, as cited below, this Hearing Officer further finds that the agreement reached in the August 10, 2023 IEP meeting was that ABA Therapy would be provided to Student between 11:00-11:50 a.m. and

1:30-3:30 p.m. with the ABA Therapist present with the Student and his peers during their lunch, recess, and activity periods (“Agreed ABA Therapy”). After the District IEP meeting, the understanding of the ABA Therapist was that she was permitted to be present with Student and his peers during lunch, recess, and activity periods, and this stood out to her because she had been told in the past that she was not permitted in lunch, recess, or activity at the District. *See* Tr. Vol. III p. 47-48, 120; Parent Ex. p. 23. In fact, the ABA Therapist did provide the Agreed ABA Therapy to Student during the stated times roughly three days a week from August 17 to September 1, 2023, which suggested that the Principal and Special Education Teacher shared the understanding of Agreed ABA Therapy. *See* Tr. Vol. I p. 63, 66; Tr. Vol. III p. 48-52; Tr. Vol. IV p. 36; Parent Ex. 193. Parents had the same understanding of Agreed ABA Therapy and only accepted Student’s placement in the self-contained classroom because of the Agreed ABA Therapy. *See* Tr. Vol. IV p. 36. Highlighting the Agreed ABA Therapy in Student’s lunch, recess, and activity period, Mother and the Special Education Teacher recalled that the District was adamant that the ABA Therapist could not be in the classroom while classroom instruction was going on. *See* Tr. Vol. IV p. 37; Tr. Vol. I p. 57-58. The Special Education Teacher added that the IEP Team had discussed what the ABA Therapist’s times would look like and what the ABA Therapist would be doing, and notably, the Special Education Teacher did not testify that the ABA Therapist was told in the District IEP meeting that the ABA Therapist was told she could not be present with Student and his peers during lunch, recess, and activity periods. *See* Tr. Vol. I p. 57-58. Later in her testimony, the Special Education Teacher testified that she never heard that the ABA Therapist was not allowed out on the playground with Student, but the ABA Therapist could not come into the classroom, as documented on the Notice of Action. *See* Tr. Vol. I p. 107.

Contrary to the District's interests which lends great credibility, the Special Education Facilitator testified that the Agreed ABA Therapy times were "the time that was agreed upon by the committee for [the ABA Therapist] to come into the school to work with the Student, and the Special Education Facilitator said she understood the ABA Therapist would be with Student during lunch and on the playground during recess and activity periods. *See* Tr. Vol. 270-271. There was no testimony suggesting the District communicated at the August 10, 2023 IEP meeting that the ABA Therapist would not be permitted to provide the Agreed ABA Therapy in the context of lunch, recess, and activities with Student and his peers.

16. Parents in-person attendance at and participation in Student's District IEP meeting was documented in the Notice of Action. *See* Parent Ex. p. 23. At the District IEP meeting, Parents expressed concerns about the self-contained placement and requested that Student be placed in the general education environment with the support of a one-on-one paraprofessional/RBT working under the supervision of Student's ABA Therapist, as this had been effective in preschool at Sammie Gail, and the District's acknowledgement of Parents' concerns and requests was documented in the Notice of Action stating Parents were concerned about the self-contained classroom placement and wanted Student to "learn to transition into the general education classroom as he becomes more comfortable in the school setting." *See* Parent Ex. p. 23; Tr. Vol. IV p. 28-30. The Notice of Action also records that the team considered Parents' request to place Student in the general education classroom with a one-on-one para, but the team discussed and rejected the option at this time due to the "new school setting with multiple transitions, new teachers, and a new environment." *See* Parent Ex. p. 23. Although Parents expressed a desire to move Student toward general education, Parents did not object to the self-contained placement at the

District IEP meeting; Mother testified Parents accepted Student's placement in the self-contained classroom because of the Agreed ABA Therapy during lunch, recess and activities. *See Tr. Vol. IV p. 36.*

17. The August 10, 2023 Notice of Action also documents that Student's IEP team held a reevaluation conference to "request components needs for different eligibility criteria from SLI to Autism . . . achievement, social history, vision/hearing, medical physical," as well as OT, PT and Speech evaluations to determine Student's current level of functioning. *See Parent Ex. p. 23.* The District requested these evaluations primarily to establish Student qualified for Special Education under the category of Autism instead of language impairment. *See Tr. Vol. 218-220.* The District and Parents also scheduled an IEP for 60 days later on October 10, 2023, so that the IEP team could review the testing and assessment data and determine next steps for Student. *See Tr. Vol. IV p. 51.*

18. Student began school on August 15 or 16, 2023 with most of his instruction in the self-contained classroom. *See Tr. Vol. I p. 68, 151.* Student's Special Education Teacher had a background in ABA therapy from working at a clinic for a summer that provided ABA therapy. *See Tr. Vol. I p. 31, 33, 68.* She took the courses needed to become a Registered Behavior Technician ("RBT"). *Id.* The two paraprofessionals assisting the Special Education Teacher with Student were certified paraprofessionals but were not RBTs and had no training in ABA Therapy, except for tips from the Special Education Teacher. *See Tr. Vol. II p. 89-91, 156, 183.* Paraprofessional Harris and Principal testified, on a daily basis, a paraprofessional is the sole adult supervising the self-contained class at times. *See Tr. Vol. II p. 208, 229.* The Special Education Teacher was away for training on several dates at issue leaving Student's class with a substitute teacher. *See Tr. Vol. II p. 209.*

19. Beginning on August 17, 2023, Student's ABA Therapist began providing the Agreed ABA Therapy to Student at the District; the ABA Therapist had been serving Student since 2022 and was paid for by Parents' private insurance. *See* Tr. Vol. III p. 9, 49. The ABA Therapist was a Board-Certified Behavior Analyst ("BCBA"). *See* Tr. Vol. III p. 10. She explained that BCBA's typically supervise a RBT that works directly with a child sitting next to a child in the classroom and keeping the child on task using ABA techniques. *See* Tr. Vol. III p. 19-20. The RBT gathers Antecedent, Behavior, and Consequences data ("ABC Data") that can be used to revise an IEP if the child is not making expected progress in reducing maladaptive behaviors at school *Id.* at p. 21 and Tr. Vol. III p. 69-70. However, Student's ABA Therapist serves Student directly because Parents' Tricare insurance would not pay for an RBT. *See* Tr. Vol. III p. 95. The ABA Therapist identified Student's primary needs as social skills and functional communication stating "without being able to state your wants and needs, behaviors will always occur." *See* Tr. Vol. III at p. 28. The ABA Therapist taught Student functional communication to express his needs, and she provided an example of how she used ABA techniques to teach Student to properly use a slide and the stairs at the District. *See* Tr. Vol. III, p. 31, 38, 51-52. The ABA Therapist explained that the Student needed ABA Therapy in his natural classroom environment to learn how not to become overstimulated. *See* Tr. Vol. III p. 57. The ABA Therapist admits she came into the classroom once for indoor recess. *See* Tr. Vol. II p. 100; Tr. Vol. III p. 82-83. She also sat with Student and his peers at lunch and attended recess and activities with Student and his peers for three weeks. *See* Tr. Vol. II p. 101; Tr. Vol. III p. 48-54. Although she performed FBAs for other students, she had not done an FBA for Student because she had not seen Student's "behaviors" at Sammie Gail. *See* Tr. Vol. III p. 25-26, 86.

20. Student's Special Education Teacher and paraprofessionals did see "behaviors" at the District and documented Student's behavior incidents in a behavior log; the following entries occurred prior to September 1, 2023. *See* Parent Ex. p. 194-213. To determine whether the Agreed ABA Therapy was effective, the ABA Therapy log can be compared with the behavior log. *See* Parent p. 193; 194-213; Tr. Vol. I p. 68-129. Notably, the Student calmed well for the Special Education Teacher, but the Special Education Teacher was not present during many of Student's behavior incidents. *See* Tr. Vol. I p. 73, 75, 77, 89, 94, 118, 120. On August 16, 2023, the first day of school, Student had behavior incidents in which he kicked a peer and started screaming then self-calmed quickly with assistance, ran laps in the classroom when he was supposed to be seated, and cried because he wanted to ride the bus instead of a car. *See* Parent Ex. p. 194; Tr. Vol. I p. 68. On August 17, 2023, at 1:15 p.m., Student ran, cried, screamed, kicked and self-soothed in response to being told he could not go to the Lego center. *See* Parent Ex. p. 194; Tr. Vol. I p. 68. At 1:30 p.m. on August 17, 2023, Student ran around the room, screamed, and threw objects across the room when the ABA Therapist arrived, Special Education Teacher calmed Student, and Student left with the ABA Therapist for activity. *See* Parent Ex. p. 194. As noted, the ABA Therapist saw Student during the ABA Therapy times and was present for the 1:30 p.m. August 17; this was the ABA Therapist's first visit with Student at school. *See* Parent Ex. p. 194. On August 18, 2023, the behavior log documents that Student verbally communicated he did not want the [ABA Therapist] at school, but no behaviors were noted. *See* Parent Ex. p. 194; Tr. Vol. I p. 69. Student's behaviors in August were taken care of in the classroom, so the Special Education Teacher was not too concerned about them at that time. *See* Tr. Vol. I p. 69. The ABA Therapist provided Student therapy during the Agreed ABA Therapy times on August 18, 22,



24, 31, 2023 and there were no behavior notations from August 18 to September 6, 2023. *See* Tr. Vol. I p. 70; Tr. Vol. II p. 118-119; Parent Ex. p. 193-204.

21. As agreed in the August 10, 2023 Notice of Action, the District completed a psychol-educational evaluation of Student on August 31, 2023 and September 6, 2023 (Dist. P. 118-134); OT evaluation on September 1, 2023 (District p. 135-139), PT evaluation on September 7, 2023 (District Ex. p. 141-144), and Speech evaluation on September 12, 2023 (District Ex. p. 145-150). The number of minutes recommended in these evaluations were consistent with the minutes Student was receiving under the District IEP, except that the new physical therapy evaluation found no deficits affecting Student's ability to access education and recommended discharge. *Id.* and Parent Ex. p. 12.

22. On September 1, 2023, the Special Programs Coordinator, Ms. Mendoza and Ms. Saum met with Student's ABA Therapist. *See* Parent Ex. p. 25. As documented, the Special Programs Coordinator first "apologized for any confusion that we may have caused in regard to the guidelines that we were asking her to follow" and explained that the ABA Therapist had been permitted to serve students in all settings as a contract employee the previous year, but as a self-employed therapist, that she could not service students in the general education setting. *See* Parent Ex. p. 25. The ABA Therapist stated she was unaware of the difference and asked when she would be permitted to serve Student. *Id.* The Special Programs Coordinator explained the ABA Therapist could not be present with Student and his peers during lunch, recess, and activities but could pull Student out of his educational setting to work with him during those periods. *See* Parent Ex. p. 25; Tr. Vol. III p. 57-58. The ABA Therapist asked the District to compromise and allow her to go to recess with the Student because one-on-one therapy would not be beneficial for Student's social skills. *See* Tr. Vol. III

p. 56-58. However, the Special Programs Coordinator stated that the ABA Therapist providing services in the general education setting was against District policy; however, a copy of the District policy was not produced. *See* Tr. Vol. III p. 58. The Special Education Facilitator did not know there were later restrictions made to the Agreed ABA Therapy until after the September 1, 2023 meeting. *See* Tr. Vol. I p. 271.

23. Documentation and testimony supported that the ABA Therapist told the Special Education Teacher after the September 1, 2023 meeting that she “acted dumb and like I did not know” in the meeting. *See* Parent Ex. p. 25. However, due to the confluence of testimony regarding the Agreed ABA Therapy as detailed above, the ABA Therapist stating she “acted dumb” in the September 1, 2023 does not cause this Hearing Officer to find that the ABA Therapist knew or should have known she should not have provided the Agreed ABA Therapy with Student during his time with peers in lunch, recess, and activities. *See* Tr. Vol. I p. 104. When asked what she knew about the September 1, 2023 change in Agreed ABA Therapy, the Special Education Teacher said, “I just know that she was not allowed to come into the classroom, and she wasn’t supposed to be sitting at the lunch table with him with all the other peers, which that is school protocol, to my understanding.” *See* Tr. Vol. I p. 102.

24. On September 1, 2023 after her meeting with the District, Student’s ABA Therapist informed Mother that she could only work with Student thereafter in a one-on-one therapy room, but the District had not informed the Parents of the change. *See* Tr. Vol. IV p. 55. Because Student is very active and the ABA Therapist had been prohibited from attending recess with Student, the ABA Therapist and Parents decided ABA Therapy would be provided thereafter from about 11:00 to 11:30 a.m. in the mornings to permit Student to attend recess. *See* Parent Ex. p. 193; Tr. Vol. I p. 103, 106, 111; Tr. Vol. IV p. 63-64. After

being instructed to pull the Student out for one-on-one therapy, the ABA Therapist switched to working on table time goals from social skills goals because she social skills goals instruction would not be beneficial when Student is not with his peers. *See* Tr. Vol. III p. 73.

25. By text on September 2, 2023, the ABA Therapist expressed to the Special Education Teacher and Parents that because of the misunderstandings regarding “what was expected with the ABA, we need to have a meeting and address the concerns.” *See* District Ex. p. 90; Tr. Vol I p. 166. The Special Education Teacher did not send out a Notice of Conference after the September 2 text because she was letting Special Programs handle it. *See* Tr. Vol. I p. 166-168. The Special Education Teacher had been told to cease communication with Parents after a Parents threatened a lawsuit on September 2, 2023. *See* District Ex. p. 87; Tr. Vol. I p. 170-172.

26. On September 5, 2023, District’s Special Programs Coordinator met with Mother to discuss the location that Student’s ABA Therapy would be provided thereafter. *See* Parent Ex. p. 26-27; Tr. Vol. IV p. 60. Mom was “not happy that the [ABA Therapist] could not provide therapy to the [S]tudent in the classroom in the four hours that they had requested.” *See* Parent Ex. p. 26-27. Mother asked what policy dictates when an ABA Therapist can come into the school setting and was told a privacy policy. *See* Parent Ex. p. 27; Tr. Vol. 37-38. Mother asked for a copy of the policy and was told it was a practice not a policy. *See* Tr. Vol. IV p. 37-39; Tr. Vol. III p. 211-213. Mother requested Student be pulled from the self-contained class and put in the regular classroom, Special Programs Coordinator offered an IEP meeting immediately, and Mother responded she would let her know if Parents wanted to meet sooner than the meeting scheduled for October 10, 2023. *See* Parent Ex. p. 27. The District’s Special Programs Coordinator offered Parents an IEP meeting the day after the

September 5, 2023 meeting, but the Parents decided to wait for the October 10, 2023 meeting when Student's evaluations would be completed. *See* Tr. Vol. III p. 225. The Special Programs Coordinator documented that Mother told her that Mother left the District IEP meeting with the understanding that ABA Therapy would be happening in the classroom, which is contrary to Mother's testimony that Mother recalled a discussion that no ABA Therapy would be provided in the classroom while instruction was going on. *See* Parent Ex. p. 27; Tr. Vol. IV p. 36-37. This discrepancy likely resulted from misspeaking or misunderstanding due to high emotions during the conversation, and this Hearing Officer finds that Mother left the August 10, 2023 District IEP meeting with the understanding that Student would receive the Agreed ABA Therapy with Student in his peer environment during lunch, recess and activity. *See* Tr. Vol. IV p. 36.

27. When the ABA Therapist sought information from Student's teachers about his behavior at school, on or about September 1, 2023, the ABA Therapist was told Student's teachers could not communicate with her about Student's behaviors. *See* Tr. Vol. III p. 55, 59; Parent Ex. p. 25.

28. At the time of the meeting on September 5, 2023, Mother believed Student was doing pretty well based on information from the ABA Therapist. *See* Tr. Vol. IV p. 60. However, Parents had not been informed of Student's screaming, crying, running, throwing, and kicking at school, which had been documented in behavior notes. *See* Tr. Vol. IV p. 61; Parent Ex. p. 194. Mother testified she had communication from Student's teacher but was not told about any of his problematic behaviors. *See* Tr. Vol. IV p. 62; 194-210. The District Special Programs Coordinator agreed that Parents should have received communication about Student's behavior incidents. *See* Tr. Vol. III p. 261. Mother stated improving Student's

behavior was key to his eventual general education placement, so she needed to know what she could be doing at home to help. *See* Tr. Vol. IV p. 62. District's failure to communicate Student's behavior incidents and restraints caused Parents to lose trust in the District, so Parents did not return Student to school following the suspension. *See* Tr. Vol. IV p. 81, 90-92; Parent Ex. 194-210. Parents reasserted their belief that Student needs to be in the regular educational environment with non-disabled peers who can model appropriate social behaviors and that student needs special education in the form of ABA Therapy in the setting with his peers to teach him how to conform to behavior norms. *See* Tr. Vol. IV p. 103-104.

29. After the September 1, 2023 change in ABA Therapy, Student's behaviors escalated. *See* Tr. Vol. I p. 66; Tr. Vol. II p. 137. Again, the behavior notes can be compared to the ABA Therapy log, and the Special Education Teacher present during many of the incidents. *See* Tr. Vol. I p. 68-129 (review of incidents), 73, 75, 77, 89, 94, 118, and 120 (incidents occurring when Special Education Teacher was not with Student); Parent Ex. p. 193-204. ABA Therapist provided therapy on Wednesday, September 5 from 10:45-11:30 a.m. but stopped at 11:30 because she had been told she could not attend recess with Student and did not want him to miss recess. *See* Parent Ex. p. 193; Tr. Vol. III p. 63-64.

30. There was no ABA Therapy on September 6, 2023; that day at 11:00 a.m. Student punched a classmate in the face, and at 11:20 a.m. that day, Student got upset over having to use a pencil, knocked materials off the table, and climbed on the table. *See* Parent Ex. p. 193, 195.

31. On September 7, 2023, Student received ABA Therapy only from 11:00 to 11:30 a.m., and at 3:25 p.m., Student hit a general education student on the head and then started slapping teachers on the leg with his backpack straps. *See* Parent Ex. p. 193, 195.

32. On September 8, 2023 at 8:30 a.m., Student kicked a classmate and then started hitting her with a toy a few minutes later; Student received ABA Therapy from 1:30 to 3:15 p.m., and. *See Parent Ex. p. 193, 195.*

33. On September 11, 2023, Student did not receive ABA Therapy, and from 8:15 a.m. to 10:20 a.m., Student was yelling at classmates, and then at 2:00 p.m. Student spit at another student and screamed at teachers. *See Parent Ex. p. 193, 195-196.*

34. On September 12, 2023 at 8:40 a.m., Student was poking other Students; when he was told to sit in a chair, he screamed, yelled no, and then was removed at Special Education Teacher's request with two paraprofessionals for calming. *See Parent Ex. p. 193, 196-98.* At 9:57 a.m. on September 12, 2023, in response to being warned to play a game nicely or it would be put away and then it being put away, Student began clawing, yelling at and pulling the clothes of Paraprofessional Hollis, which resulted in Student having a two-person transfer to the Lab. *See Parent Ex. p. 193, 196, 199-200; Tr. Vol. II p. 125-127.* On September 12, 2023, Student received ABA Therapy from 10:50 to 11:30 a.m. and from 1:30 to 3:15 p.m. *See Parent Ex. p. 193.*

35. On September 13, 2023, Student received no ABA Therapy; at 10:54 a.m., Student grabbed and climbed on another student because the student touched his toy; when Student was warned not to hit or hurt another student, Student screamed "no" and hid under the table. *See Parent Ex. p. 201.* Later, on September 13, 2023 at 12:15 p.m., Student refused to work, tossed stools and other items at the wall, and refused to get out of others personal space. *See Parent Ex. p. 193, 201.* Again, on September 13, 2023 at 2:20 p.m., when Special Education Teacher was out of the room, Student left his seat to stomp on a Student's leg and returned to his seat, hit a student next to him with his headphones, and when he was escorted

out of the room to walk, Student ran from the Principal. *See* Parent Ex. p. 201-202; Tr. Vol. II p. 130.

36. On September 14, 2023, Student received ABA Therapy from 10:45 to 11:30, and at 11:40 a.m., while on the playground, Student walked up and kicked another student who was sitting inside a cube and explained he wanted the other student out of the cube so he could have it. *See* Parent Ex. p. 193, 202-203.

37. On September 15, 2023, at 9:35 a.m.; there was a substitute teacher; Student hit, pushed and yelled at another student; Student received ABA Therapy from 1:30 to 3:15 p.m. *See* Parent Ex. p. 193, 204.

38. On September 18, 2023, Student received no ABA Therapy, and Student punched another student at 8:25 a.m., pulled a student's hair at 8:30 a.m., hit another student in the back at 8:37, and threw an item toward a classmate while listening to a story. *See* Parent Ex. p. 193, 204.

39. On September 19, 2023, Student received ABA Therapy from 11:00 a.m. to 11:30 a.m. and from 1:30 a.m. to 3:15 a.m., and Student screamed at teacher at 7:55 a.m., had a screaming crying incident at 8:05 a.m., a kicking incident at 9:05 a.m., pried peer's hands off the monkey bars, threw rocks, and ran from paraprofessional at 9:30 a.m. resulting in Student being restrained, and threw rock at peer on the playground at 11:38 a.m. *See* Parent Ex. p. 193, 205-208, 217-218. Neither the Special Education Teacher nor Paraprofessional Hollis were present for the playground incident. *See* Tr. Vol. I p. 118; Tr. Vol. II p. 104.

40. Student received no ABA Therapy on September 20, 2023, and Student grabbed, scratched and slapped paraprofessional at 9:20 a.m., grabbed paraprofessional's leg at 9:30 a.m., and yelled, shoved a box paraprofessional was holding, and eloped down the hallway at

12:45 p.m., and screamed and pushed past paraprofessional and peers while lining up to leave. *See* Parent Ex. p. 193, 209-210.

41. On September 21, 2023, Student threw papers, kicked backpacks, and slapped paraprofessional at 8:50 a.m., he got into a slapping fight with a peer on the playground at 9:40 a.m., around 1 p.m. Student was screaming and not obeying and was escorted to the behavior lab where he continued to hit and pull hair resulting in a two-person seated hold until calmed by the Special Education Teacher, and then around 3:15 p.m. while waiting for the car rider line Student eloped down the hall. *See* District Ex. p. 50-51; Parent Ex. p. 193, 211-216; Tr. Vol. I p. 122-123; Tr. Vol. II p. 142-145. Student received ABA Therapy from 10:15 a.m. to 11:00 a.m. on September 21, 2023. *See* Parent Ex. p. 193. Based on his disruptive behaviors on September 21, 2023, Student was suspended for one day, which was served on Friday, September 22, 2023, and Student was permitted to return on Monday, September 25, 2023. *See* Parent Ex. p. 206-216. Principal testified Student was suspended because he needed a break from school. *See* Tr. Vol. II p. 280-280.

42. Parents were not informed of Student's behavior incidents or restraints until September 21, 2023, which was the date of Student's second behavioral incident in which resulted in Student's second physical restraint and then suspension and two days after the first incident that resulted in Student's restraint. *See* Parent Ex. p. 215-217; District Ex. p. 50; Tr. Vol. I p. 79, 126-129, 177; Tr. Vol. II p. 131-and Tr. Vol. IV p. 62. Special Education Teacher testified she called Parents when Student's behaviors got to the point when Student stopped responding to her as he normally did. *See* Tr. Vol. I p. 127. Mother was called on Thursday, September 21, 2023 about the two incidents resulting in restraint, and Parents were provided with documentation from the incident involving restraint on Thursday, September



21, 2023, by email from the Principal on September 2023. *See* Parent Ex. p. 217; District Ex. p. 82. Student received a one-day suspension from classes for the date of September 22, 2023, based on his elopement from the classroom and disruption of the learning environment, and was allowed to return to school on September 25, 2023. *See* District. Ex. p. 53. Mother made a police report regarding the two incidents when restraints were utilized with Student, but no prosecution resulted. *See* Parent Ex. p. 217-218, Tr. Vol. IV p. 78-81.

43. Likewise, the ABA Therapist was not informed on Student's behavior incidents prior to September 21, 2023; she was shocked to learn Student was hitting and kicking people at school, as described in behavior notes. *See* Parent Ex. p. 194-218; Tr. Vol. III p. 65. The Special Education Teacher told Paraprofessional Harris not to talk to the ABA Therapist about Student's behaviors because paraprofessionals cannot talk with Parents or therapists about Student behaviors. *See* Tr. Vol. II p. 221. The ABA Therapist testified the behavior notes indicated a lack of ABA training because ABC data (antecedents and consequences) of Students behavior were not documented. *See* Tr. Vol. III p. 69-70; Parent Ex. p. 194-218.

44. Although Paraprofessional Hollis and Paraprofessional Harris testified the ABA Therapist was not helping with Student's behavior but "just observing and taking notes," the ABA Therapist explained that her role was to take notes, documenting behaviors, and only intervene when needed. *See* Tr. Vol. II p. 100-101, 215-217; Tr. Vol. III p. 19, 32-33. Comparing Student's documented behavior incidents to the service log of the ABA Therapist reveals that there were behavior notes for Student only on one occasion when the ABA Therapist was with him and that was her first time to provide therapy to him at school. *See* Parent Ex. p. 193-218; Tr. Vol. I p. 69-129. Based on this comparison and that Student's behavior incidents increased when the ABA Therapist was no longer permitted to provide

the Agreed ABA Therapy with Student and his peers during lunch, recess, and activity, this Hearing Officer finds that the ABA Therapist was providing effective ABA Therapy to Student.

45. Parents did not return Student to school on Monday September 25, 2023 because of concerns about Student's safety, and Student has not return to the District since September 22, 2023 because of concerns that the District did not manage Student's behavior appropriately causing his behavior to result in physical restraint. *See* District Ex. p. 66; Tr. Vol. IV p. 100. Parents admit they unilaterally decided not to return Student to the District after Student was picked up from School on September 21, 2023. *See* Tr. Vol. IV p. 89.

46. Principal attempted to contact Parents to set up a conference to discuss Student's needs on September 25, 26, and 27, but Parents did not respond because they were consulting police and attorneys. *See* Dist. P. 108 and Tr. Vol. III p. 308; Tr. Vol. IV p. 76, 99.

47. Parents filed their due process complaint in this matter on October 9, 2023. It was undisputed that, as of the date the Complaint was filed, Student was a five-year-old male entering kindergarten in the District, or that Student is a child with a disability in need of special education, related services, supplementary aids and services, supports, accommodations, and/or modifications as defined by IDEA. *See* Parent Ex. p. 23.

48. An IEP Conference for Student had been scheduled for October 10, 2023, and the Notice of Conference was issued on September 19, 2023, including plans "review/revise the IEP" and "evaluation programming conference/review evaluation results." *See* Parents Ex. p. 28. However, Parents declined participation in the October 10, 2023 IEP meeting because they had filed a due process complaint and planned to discuss matters at the resolution conference. *See* Tr. Vol. I p. 146-147; Tr. Vol. IV p. 99; Parent's Post-hearing Brief at p. 8.

49. Student received related services as reflected in the logs for speech, OT, and PT therapies. *See* Parent Ex. p. 135, 156, and 182. However, during the five weeks that Student attended school at the District in 2023, Student received 90 minutes of the 225 minutes of Speech (Parent Ex. p. 135; Tr. Vol. III p. 259-260), 270 of the 300 minutes he was to receive of OT (Parent Ex. 156-158), and 60 of the 150 minutes he was to receive of PT (Parent Ex. p. 182-183). In addition, Student did not receive the Agreed ABA Therapy at school after September 1, 2023 because the District's change in the ABA Therapy environment and failure to communicate behaviors rendered it no longer beneficial, which removed Student's primary behavior support. *See* Parent Ex. p. 193-214; Tr. Vol. III p. 56-58. This Hearing Officer finds the removal of Agreed Behavior Support along with the frequent absence of Special Education Teacher resulted in a regression in Student's behavior goals.

50. Special Education Teacher felt that Student made progress on his IEP goals during the five weeks that he attended the District, although she testified that Student had mastered many if not all of his District IEP goals before he began school at the District. *See* Tr. Vol. I p. 130-144; Parent Ex. p. 26-30, 223-241. She was working with Student on writing the letters for the corresponding sounds and felt that he progressed in his behavior goals by learning norms, such as walking in line. *See* Tr. Vol. I p. 142-143. Due to the absence of contrary evidence and Student's short time at the District, this Hearing Officer defers to Special Education regarding Student's progress academically.

51. During Student's attendance at the District, the Special Education Teacher found Student was strong in phonics and took him into a general education classroom two occasions around September 5, 2023; however, Student was unable to tolerate the noise in the general education classroom and began having a tantrum and stimming. *See* Tr. Vol. I p.

148-154. She felt Student might have been able to learn to tolerate the general education setting in time with a Functional Behavior Assessment and a Behavior Plan, which Student had been referred for due to the restraint incidents. *Id.*

52. The ABA Therapist testified Student is “brilliant” and made good progress in ABA Therapy. *See* Tr. Vol. III p. 75-77. She believes Student should be in the general education setting with a one-on-one paraprofessional until he adjusted. *See* Tr. Vol. III p. 75-77. She further explained Student needed to be in a general education setting because he would mimic appropriate classroom behavior of general education students. *See* Tr. Vol. III p. 77.

53. It is undisputed that Student had no Behavior Intervention Plan, although his District IEP included behavior intervention strategies. *See* Parent Ex. p. 4. District did not refer Student for a Functional Behavior Assessment (“FBA”) in the August 10, 2023 IEP meeting. *See* Tr. Vol. I p. 32-33. The District agrees that Student needs behavior supports. *See* Tr. Vol. I p. 269. The District referred Student for an FBA and after the restraint and intended to create a behavior plan if Student remained at school. *See* Tr. Vol. II p. 76, 136.

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 (8<sup>th</sup> 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. Misunderstandings and miscommunications were evident. However, inconsistencies did play a role in the 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.

### **CONCLUSIONS OF LAW AND DISCUSSION:**

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 procedure set forth in IDEA. *Id.* Then, the hearing officer must determine whether a student's IEP was reasonably calculated to enable the student to receive educational benefit. *Id.* The burden of proof falls on the party seeking relief. *See Sneitzer v. Iowa Dep't of Educ.*, 796 F.3d 942, 948 (8<sup>th</sup> Cir. 2015).

An IEP is a comprehensive program prepared by a child's "IEP Team," which includes teachers, school officials, the local education agency (LEA) representative, and the child's parents; an IEP must be drafted in compliance with a detailed set of procedures. 20 U.S.C. §1414(d)(1)(B). An IEP must contain, among other things, "a statement of the child's present

levels of academic achievement,” “a statement of measurable annual goals,” and “a statement of the special education and related services to be provided to the child.” *Id.* § 1402(9). “Special education” is “specially designed instruction . . . to meet the unique needs of a child with a disability”; “related services” are the support services “required to assist a child . . . to benefit from” that instruction. *Id.* §§ 1401(26), (29). A school district must provide a child with disabilities such special education and related services “in conformity with the [child’s] individualized education program,” or “IEP.” 20 U.S.C. §1409(9)(D). When formulating an IEP, a school district “must comply both procedurally and substantively with the IDEA.” *Rowley*, at 206-07.

### **I. IDEA Procedural Compliance**

Pursuant to *Rowley*, a hearing officer must first determine whether the District complied with the procedures set forth in IDEA. For a child to be denied a FAPE, the procedural inadequacies must (1) impede the student’s right to an appropriate education, (2) seriously hamper the parent’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 (8<sup>th</sup> Cir. 2011); 20 U.S.C. § 1415(f)(3)(E)(ii)(I)-(III).

Here, Parent alleges that the District committed procedural violations of the IDEA by (A) failing to provide comparable services to Student until the District adopts or implements a new IEP; (B) denying the Parent meaningful participation in Student’s education by predetermining Student’s IEP; and (C) failing to consider Student’s most recent evaluations.

## **THE AUGUST 10, 2023 IEP MEETING**

### **A. Comparable Services**

Pursuant to State and Federal law, for a student who moves from another public agency in the same State and enrolls in a new school within the same school year, the local education agency shall provide FAPE by providing the child “services comparable to those described in the child’s IEP from the previous public agency” until it “[a]dopts the child’s IEP from the previous public agency”; or “[d]evelops, adopts and implements and new IEP, if appropriate, that meets the applicable requirements in §§300.324.” 34 C.F.R. § 300.323(f) and 20 U.S.C. §1414(d)(2)(C)(i)(II). As Student transferred to the District via School Choice laws from another District in the state, the District had the obligation to provide comparable services to the Jacksonville IEP until it adopted the Jacksonville IEP or develops a new IEP.

As detailed above, the evidence is clear that the District adopted the Jacksonville IEP at the District IEP meeting on August 10, 2023 prior to Student’s first day of school, as permitted by law. Testimony of the Special Education Teacher, the Special Education Facilitator, and Mother established that the District accepted and adopted the Jacksonville IEP as an in-state IEP that was done for the current school year. Placement for Student in the District was in the self-contained classroom, as it had been in Jacksonville. The Jacksonville IEP goals were restated in the Present Level of Academic Achievement and Functional Performance in Student’s District IEP. The District IEP goals were pulled from the Jacksonville IEP. Therapy minutes for Speech, PT, and OT in the District IEP were the same as the Jacksonville IEP. Special education minutes for math and language arts were similar between the IEPs, although the District IEP allotted time for Science and Social

Studies instead of Social/Emotional instruction, but the District IEP provided behavior goals and behavior intervention strategies adopted from the Jacksonville IEP.

Notably, the District IEP differed from the Jacksonville IEP in that the District IEP document did not denote special education minutes or services to address Student's maladaptive behaviors. However, as this Hearing Office found above, based on the Notice of Action, the Agreed ABA Therapy was included and agreed to in Student's educational plan agreed to as a related service that would support Student and allow him to access his education. *See* 20 U.S.C. §1401(29) and 20 U.S.C. §1414(d)(1)(A)(i)(IV). Because ABA therapy was part of Student's "special education," it should have been recorded on Student's IEP and provided at "public expense" if necessary. *See* 20 U.S.C. §1401(9).

Both parties would like to proverbially "have their cake and eat it too," but logically, each party is making a winning argument and a losing argument regarding whether Agreed ABA Therapy was part of Student's IEP. The District's Special Education Coordinator held fast to her assertion that ABA Therapy was not a part of the IEP because the District was not providing it, and if that had been the case, by extension, the District IEP would not have been improperly altered in the September 1, 2023 meeting. However, Parent's point is well taken that the District cannot claim ABA is not special education simply because Parents were paying for it. In addition, District's IEP would have lacked sufficient behavior support for Student if the Agreed ABA Therapy had not been a part of the District's IEP. Thus, the District wisely conceded in its Post-hearing Brief that the ABA Therapy was part of Student's IEP.

Parents argue the IEP is insufficient because it does not contain behavior minutes; however, Parents cannot effectively assert that the District failed to include services to support Student's behavior goals on Student's IEP document and then conversely argue that



the District unilaterally changed Student's IEP when the District altered the Agreed ABA Therapy on September 1, 2023, which will be addressed below. This Hearing Officer found above that Agreed ABA Therapy was a part of the IEP and that the District unilaterally changed it rendering it ineffective.

Other than its omission from the District IEP document itself, a preponderance of the evidence led to the conclusion that the Agreed ABA Therapy was a related service and part of Student's special education. Certainly, Student received the Agreed ABA Therapy for about three weeks and seemed to benefit from it by remaining in the educational environment when it was implemented. As this Hearing Officer found above, the evidence supports that Student's Agreed ABA Therapy was an integral part of Student's special education plan (or IEP), and the District's IEP sufficiently included behavior supports of the Agreed ABA Therapy, as was documented in the Notice of Action on August 10, 2023. Thus, there was no procedural violation in failing to provide comparable services or adopt the prior in-state IEP in the creation of the District IEP on August 10, 2023.

#### **B. Meaningful Parental Participation**

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 (8<sup>th</sup> 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 (8<sup>th</sup> 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.

Parent alleges Student's District IEP was predetermined and denies parental participation primarily because Student's placement in the District IEP was in the self-contained classroom, as it had been in the Jacksonville IEP. Mother testified that Parents requested that Student be placed in the general education environment with the support of a one-on-one paraprofessional/RBT working under the supervision of Student's ABA Therapist, as this had been effective in preschool, and the District's acknowledgment of her request was documented in the Notice of Action. The Notice of Action further reflects the discussion of Parents' concerns about the self-contained classroom placement and that Student "learn to transition into the general education classroom as he becomes more comfortable in the school setting." The Notice of Action also records that the team considered placing Student in the general education classroom with a one-on-one para, but the team discussed and rejected the option at this time due to the "new school setting with multiple transitions, new teachers, and a new environment." Although Parents expressed a desire to move Student toward general education, Parents did not object to the self-contained placement at the District IEP meeting because the District agreed to allow Student's ABA Therapist to provide therapy while Student was with peers during lunch, recess, and activity periods; the ABA Therapist considered Student's IEP a "win." Everyone seemed to agree with the District IEP at the end of the meeting on August 10, 2023.

For the above stated reasons, this Hearing Officer concludes the District did not commit a procedural violation of IDEA because Parents had meaningful participation in the August 10, 2023 IEP meeting, and the District IEP was not predetermined. Although the District adopted the Jacksonville IEP, the IEP and Notice of Action reflect the input and suggestions of Parents and the ABA Therapist.

### **C. Consideration of Most Recent Evaluations**

An IEP must consider the results of the . . . most recent evaluation of the child.” 20 U.S.C. §1414(d)(3)(A)(iii). In their complaint, Parents allege the District committed a procedural violation of IDEA by failing to consider the DDC evaluation in creating the District IEP, which is understandable considering that the Jacksonville IEP was created before the DDC evaluation containing new information, while the District IEP was adopted from the earlier Jacksonville IEP.

However, a preponderance of the evidence supports that the DDC evaluation and recommendations, the most recent evaluations, were discussed and considered at the District IEP meeting. Although Mother testified she did not recall anything from Student’s evaluations being discussed at the IEP meeting, Mother also testified that District officials explained that “education minutes are different” with regard to the speech and PT minutes, which is a statement that would have occurred in the context of a discussion of the DDC evaluation, as explained by the DDC Speech Therapist in her discussion of medical versus educational minutes. Although the District did not follow the DDC’s recommendations regarding the number of therapy minutes for Speech, PT and OT, the Speech goals in the District IEP appear to have been adopted from the Speech Therapist’s recommendations. Further, the Student’s IQ information from the DDC evaluation was utilized. Thus, the

District did not violate IDEA by failing to consider the most recent evaluations at the August 10, 2023 IEP meeting.

### **THE SEPTEMBER 1, 2023 MEETING**

#### **A. Comparable Services**

Based on the evidence detailed above, this Hearing Officer found a preponderance of the evidence supported that the Agreed ABA Therapy was part of Student's IEP. This Hearing Officer further found that a preponderance of the evidence favored that the Agreed ABA Therapy consisted of the ABA Therapist being present with the Student and his peers during lunch, recess, and activity times, which occurred during the timeframes of 11:00-11:50 a.m. and 1:30-3:30 p.m. In fact, the Agreed ABA Therapy occurred for the first three weeks that Student attended the District.

It is undisputed that, on September 1, 2023, the District's Special Programs Coordinator met with the ABA Therapist and told the ABA Therapist that she could no longer provide ABA Therapy in his organic setting with peers during lunch, recess, and activity periods. The reason given by the District was that the District's protocol or practice required that non-employee therapist provide services one-on-one with their students to protect the privacy of other students, but there was no evidence that confidentiality of other students could not have been protected using a confidentiality agreement or via other means.

The ABA Therapist would continue to be permitted to meet with Student during the agreed therapy times, but the ABA Therapist would have to meet with the Student for one-on-one therapy in a room provided by the District. The testimony of the ABA Therapist established that one-on-one therapy would not be beneficial to Student as behavioral support or teaching social skills. Having determined that the Agreed ABA Therapy was part

of Student's IEP, it logically follows that District's unilateral alteration in the context that ABA Therapy could be provided in a manner that removes its benefit to Student is a procedural violation of IDEA because the District removed Student's comparable behavioral support services and time to the Student.

### **B. Meaningful Parental Participation**

As detailed above, Parent alleges she was denied a meaningful opportunity to participate in Student's education, specifically asserting that the District changed the environment of Student's Agreed ABA Therapy rendering it ineffective. As this Hearing Officer found that a preponderance of the evidence favored that the Agreed ABA Therapy consisted of the ABA Therapist being present with the Student and his peers during lunch, recess, and activity times, which occurred during the timeframes of 11:00-11:50 a.m. and 1:30-3:30 p.m., this Hearing Officer further concludes that the District denied Parents meaningful participation in the change in Student's IEP that occurred on September 1, 2023, as District predetermined the change in the provision of Student's IEP and it is undisputed that there was no notice to Parents nor Parent participation in the September 1, 2023 meeting. For these reasons, it is the opinion of this Hearing Officer that a preponderance of the evidence establishes that District did predetermine a change in Student's IEP at the September 1, 2023 meeting with Student's ABA Therapist and committed a procedural violation of IDEA in doing so.

### **C. Consideration of Most Recent Evaluations**

As no new evaluations results were available between the August 10, 2023 District IEP meeting and the September 1, 2023 meeting, no analysis is necessary for consideration of most recent evaluations.

## **Conclusion**

For the August 10, 2023 District IEP meeting, this Hearing Officer concludes that the District met its procedural obligations under IDEA to provide comparable services to the Jacksonville IEP in adopting the Jacksonville IEP, to provide Parents meaningful participation in the District IEP meeting, and to consider the most recent evaluations. However, in the September 1, 2023 meeting, the District committed procedural violations of IDEA by failing to provide comparable behavior support services to Student and by denying meaningful participation to Parents in the determination of how ABA Therapy would be provided.

## **II. Allegations of Substantive Violations of the IDEA**

Next, this Hearing officer must consider whether the District's procedural violations of IDEA resulted a substantial denial of FAPE to Student.

### **A. Reasonably calculated for progress appropriate in light of the child's circumstances**

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) stating: "a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.* at 1001. An IEP calculated to provide "merely more than *de minimis* progress from year to year" does not satisfy the substantive requirements of IDEA. *Id.* at 999.

Here, a preponderance of the evidence supports that the District IEP as drafted and agreed upon on August 10, 2023 was reasonably calculated for progress in light of Student's circumstances. The District adopted the Jacksonville IEP, an in-state IEP, that was written for the current year, which is permissible under IDEA as cited above. The District did not

blindly adopt the Jacksonville IEP but considered that Jacksonville had the benefit of input from Student's Sammie Gail staff, considered the DDC evaluation and made minor changes based on that input, and considered and included proposals made by Parents and the ABA Therapist, including the Agreed ABA Therapy with peers during Student's lunch, recess, and activity periods. The evidence reflects that Student's behavior issues were Student's primary barrier to education, and the ABA Therapy had been utilized successfully at Sammie Gail, which led to the District's including it in the District IEP. In fact, the Agreed ABA Therapy was conducted from about August 15 to September 1, 2023, and Student's behaviors were manageable in the classroom during this time. Student's Special Education Teacher did not report the behavior issues to Parents because they seemed minor to her during this time. Although there is certainly an argument that the District should have begun the process of an FBA immediately, the ABA Therapist testified that she performs FBAs but had not found that Student needed one.

Since Student only attended the District for the first five weeks of school in 2023, this Hearing Officer lacks substantial information needed to determine whether Student actually progressed academically. Although the Special Education Teacher testified that Student progressed, she also confirmed that Student already possessed the skills to complete many of his District IEP goals when he entered her class. It is the opinion of the Hearing Officer, nonetheless, that the academic goals as written were reasonably calculated for Student to progress, as they were consistent with Student's grade level, and some of the goals such as phonics were challenging for Student and moving Student in the direction of reading.

As discussed above, the District committed procedural violations of IDEA in failing to provide comparable services and failing to provide Parents meaningful participation in

creating the District IEP after the September 1, 2023 meeting altered the provision of ABA Therapy. Again, when District's Special Education Coordinator met with ABA Therapist on September 1, 2023 and instructed her to thereafter only see the Student only on a one-on-one basis either in a provided therapy room or at the parent table during lunch, the Agreed ABA Therapy that had provided Student with the behavioral support rendered it ineffective or no longer "beneficial" and therefore removed the Agreed ABA Therapy from Student's IEP.

As detailed in the behavior notes and testimony of Special Education Teacher and the paraprofessionals, Student's maladaptive behaviors escalated after September 1, 2023, and Student would be removed from the classroom due to his disruptive behaviors. At times, Student eloped from the classroom. Ultimately, the rendering of ABA Therapy ineffective led to Student's suspension on September 21, 2023. As the alteration of ABA Therapy to a one-on-one context rendered it ineffective and resulted in an escalation of Student's behaviors that led to Student's loss of education and therapy time, this Hearing Officer finds by a preponderance of the evidence that the District substantively denied Student FAPE in altering his ABA Therapy to one-on-one because Student's IEP was no longer reasonably calculated for Student to progress. The District's alteration of Student's IEP by rendering ABA Therapy ineffective caused the District's IEP to fail to be reasonably calculated to allow Student to progress in light of his circumstances and that deficit caused a deprivation of educational benefits to the Student in the form of special education and therapy time.

Further, although not written in the District IEP, the District conceded it should have communicated with Parents about Student's behavior incidents. The District's failure to communicate Student's behavior incidents with Parents or the ABA Therapist further rendered his ABA Therapy ineffective. The ABA Therapist testified and the DDC evaluation



established that it is important that all family and staff working with Student have open lines of communication so that ABA Therapy could be administered consistently across all settings, as needed for Student to generalize his behavior management in all settings. Unfortunately, Parents and the ABA Therapist lacked information that Student was struggling with behaviors at school, as Student's behaviors continued to escalate, result in his removal from the educational setting, restraints, and then a suspension. Thus, the District's failure to communicate also resulted in educational deprivation for Student and was a substantive denial of FAPE.

### **CONCLUSION**

This Hearing Officer concludes a preponderance of the evidence establishes that the District failed to provide an IEP reasonably calculated to provide benefit to the Student in light of his circumstances after the District IEP was altered on September 1, 2023 regarding the provision of ABA Therapy. As discussed above, this was a substantive denial of the provision of FAPE to Student, as Student's behaviors began to interfere with his access to education shortly thereafter.

### **B. Least Restrictive Environment**

Parent further alleged that the District failed to educate Student in the LRE. As discussed above, the IDEA requires that students with disabilities be educated in the least restrictive environment pursuant to 20 U.S.C. §1412(a)(5). There is a "strong preference in favor of disabled children attending regular classes with children who are not disabled," resulting in a "presumption in favor of public school placement." *See C/JN ex rel. SKN v. Minneapolis Public School*, 323 F.3d 630, 641 (8<sup>th</sup> 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 (8<sup>th</sup> 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 (6<sup>th</sup> Cir. 1983). The requirement to mainstream is not applicable when it “cannot be achieved satisfactorily.” *See Pachl*, 453 F.3d at 1068. However, 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.

This Hearing Officer heard the desires of Parents and the ABA Therapist to provide Student the opportunity to model the behavior of general education students and have great expectations for Student, and Student appears to have great capacity to learn and grow to meet those expectations. However, Despite Student’s IQ and academic skills, the evidence reflects that Student’s behavioral needs cannot be met in the general education classroom. Student experienced frequent behavior issues resulting in his removal from the self-contained classroom even when he was receiving the Agreed ABA Therapy services and had the support of a Special Education Teacher with some ABA training and two paraprofessionals. The Student cannot benefit from a general education placement if he is unable to remain in the classroom. In addition, the District’s self-contained classroom, Student had a Special Education Teacher with some ABA training, two paraprofessionals for support, small class size, and small group or individualized instruction, and those services could not feasibly be provided together in the general education setting.

Moreover, Hearing Officer gives weight to the consensus of educators who found that the Student lacked the coping skills in 2023 to manage in the general education classroom and needs time and opportunity to work on those skills. Documentation from Sammie Gail as well as testimony supported that Sammie Gail was a preschool for children with developmental disabilities, which had training and resources for assisting children with Autism, and Student had been able to succeed for a time in that setting with the support of the ABA Therapist. Self-contained placement was for best for Student pursuant to the consensus of the Jacksonville staff and participating Sammie Gail staff as expressed in the Jacksonville IEP. Even though Parents advocated for general education placement at the District IEP meeting, the consensus of District staff was also that self-contained placement would be most appropriate for Student initially, as expressed in the District IEP. In addition, District staff who testified maintain that the self-contained room is the most appropriate placement for Student. Moreover, Parents and the ABA Therapist did not object to self-contained placement at the August 10, 2023 IEP meeting, since there was the goal of working toward the general education classroom and in light of the Agreed ABA Therapy.

The Hearing Officer found the testimony of Special Education Teacher persuasive regarding her experience in taking Student into the general education classroom for phonics on two occasions. She testified the Student had to be removed on both occasions because he was stimming and making noise because the environment appeared to be overstimulating to Student. Again, Student cannot benefit from the general education setting if he is unable to remain there, and evidence of Student's screaming and crying in the self-contained setting suggests Student would be a disruptive force in the general education setting.

Unfortunately, a preponderance of the evidence supports that self-contained placement was the LRE for the Student, based on his skills in the fall of 2023.

### **CONCLUSION**

For the above stated reasons, this Hearing Officer finds the District's self-contained classroom was the LRE for Student, and thus, an appropriate placement for the Student.

### **REMEDIES**

Having determined that the District denied FAPE to the Student in altering the Agreed ABA Therapy on September 1, 2023, this Hearing Officer must now determine the extent to which Student is entitled to compensatory damages necessary to put the Student in the position in which he would have been had he been provided FAPE.

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 (8<sup>th</sup> 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 (8<sup>th</sup> 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.” *Indep. Sch. Dist. No. 283 v. E.M.D.H.*, 960 F.3d 1073, 1085 (8<sup>th</sup> Cir. 2020). The purpose of compensatory education is “restorative,” and damages are “strictly limited to expenses necessarily incurred to put Student in the education position [he] would have been had the District appropriately provided a FAPE.” *Id.* at 1086.

The evidence reflects that, during the five weeks that Student attended school at the District in 2023, Student received only 90 minutes of the 225 minutes of Speech (Parent Ex. p. 135; Tr. Vol. III p. 259-260), 270 of the 300 minutes he was to receive of OT (Parent Ex. 156-158), and 60 of the 150 minutes he was to receive of PT (Parent Ex. p. 182-183). In addition, Student did not receive the Agreed ABA Therapy at school after September 1, 2023 because the District’s change in the ABA Therapy environment rendered it no longer beneficial as a behavior support for Student. See Parent Ex. p. 193-214; Tr. Vol. III p. 56-58.

This Hearing Officer finds the District responsible for the deprivation of education that occurred in five weeks in which Student attended the District in August and September of 2023. Notably, Parents declined the opportunity for an IEP meeting on September 6, 2023 that might have resulted in a course correction for District and Student and prevented the escalation that occurred. Additionally, when Parents declined to meet with the District upon the Principal’s attempts to reach them to schedule a meeting on September 25, 26, and 27, 2023, while keeping the Student home from school, Parent’s actions interfered with the District’s ability to provide FAPE to the Student. Finally, Parents and District had scheduled an IEP meeting for Student on October 10, 2023 to review new evaluations, but Parents continued to decline to attend.

## **CONCLUSION**

Because the District altered Student's IEP removing the Agreed ABA Therapy by rendering it ineffective, this Hearing Officer finds that the District should provide Student with compensatory education for education and services missed for the five weeks that Student attended the District. After that time, District was willing to hold an IEP meeting to discuss Student's needs; however, Parents declined to meet with or return Student to the District, which interfered with the District's provision of FAPE after that point.

## **FINAL CONCLUSIONS AND ORDERS:**

Upon consideration of all the testimony and evidence, this Hearing Officer finds that, although the District provided Student education in the LRE, a preponderance of the evidence establishes a finding in favor of the Parent that District failed to provide the Student a FAPE in a timely manner as a result of the procedural and substantive violations of IDEA discussed above during the five weeks that Student attended the District, which resulted in educational deprivation to Student. District is hereby ordered to take the following actions regarding Student:

1. If Parent enrolls Student in the District for the 2024-2025 school year, District is ordered to take steps necessary to begin an FBA within Student's first thirty days of attending classes, to reevaluate Student within sixty days of Student's enrollment, and to provide Parent a facilitated IEP meeting through the Arkansas Special Education Mediation Project operated by the UALR Bowen School of Law.
2. As self-contained placement is the LRE for Student at this time, Student's IEP should provide Student placement in the self-contained room with the goal of transitioning into general education.

3. As Student requires behavioral support and consistency in staffing beyond that which can be provided in self-contained placement, as a form of compensatory education, Student's IEP for the 2024-2025 school year should provide a one-on-one paraprofessional (or more than one if they need to rotate for breaks) who has (or have) RBT or BCBA training, and Student's IEP should authorize Student's paraprofessional(s) to administer ABA Therapy in all special education or general education settings. If the District requests Student's paraprofessional to enter into a reasonable confidentiality agreement for the protection of other students' confidentiality, the paraprofessional should enter a reasonable confidentiality agreement for the protection of other students' confidentiality.

4. As communication across settings is critical to the implementation of Student's ABA Therapy, Student's IEP should provide that the District provide a brief daily note to Parents describing Student's positive or negative behavior incidents that the Student has each day and should provide Parents with a contact person to whom questions can be addressed when questions arise.

5. District is additionally ordered to provide Student with compensatory education services of 135 minutes of Speech Therapy, no OT is ordered because it was substantially fulfilled, and 90 minutes of PT, along with 40 hours of compensatory education focusing on the academic goals in Student's IEP that he has not yet mastered. These compensatory education minutes are to be administered in the 2024-2025 school year.

6. Parent also alleged violations of restraint and seclusion laws, that the District's conduct constitutes disability discrimination in the 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, and the Fifth and Fourteen Amendments to the U.S. Constitution via 42 U.S.C. §1993.

This Hearing Officer has no jurisdiction over restraint and seclusion laws, disability discrimination, or other federal claims. See ADE Spec. Ed. Rules §10.02.22.1. Therefore, to the extent Parents' due process complaints raise these claims, these claims are dismissed without prejudice.

**FINALITY OF ORDER AND RIGHT TO APPEAL:**

The decision of this Hearing Officer is final and shall be implemented unless a party aggrieved by it shall file a civil action in either federal district court or a state court of competent jurisdiction pursuant to the Individual's 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 THIS 23rd day of July, 2024.**

**/s/ Debby L. Ferguson**  
**Hearing Officer**