

**ARKANSAS DEPARTMENT OF EDUCATION
SPECIAL EDUCATION UNIT**

**XXXXXXXX, Guardian of
XXXXXXXXXXXXXX, Student**

PETITIONER

VS.

NO. H-24-31

Osceola School District

RESPONDENT

HEARING OFFICER’S FINAL DECISION AND ORDER

ISSUES PRESENTED:

Whether the above referenced 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 about August 2, 2023 to January 25, 2024, 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 properly implemented Student’s IEP due to the absence of a certified special education teacher;
- (2) whether the District provided Student FAPE in the least-restrictive environment (“LRE”) from about August 2, 2023 to January 25, 2024;
- (3) whether the District provided Student FAPE by providing appropriate supports and services to address Student’s psychological needs and behaviors or whether a psychological evaluation was needed.

PROCEDURAL HISTORY:

On January 25, 2024, the Arkansas Department of Education (hereinafter the “Department”) received a written request from XXXXX (“Guardian”) to initiate due process

hearing procedures on behalf of Student (“H-24-31”). Guardian requested a due process hearing because she believed that the District failed to properly implement Student’s IEP due to the absence of a certified special education teacher, failed to comply with IDEA and Department regulations by failing to develop an IEP that would provide Student FAPE in the LRE based on her placement in homebound instruction, and failing to provide Student appropriate supports and services to address Student’s psychological needs and behaviors or whether a psychological evaluation should be ordered. At the time H-24-31 was filed, Student (female) was seventeen years old, in eleventh grade, and lived with Guardian at a residence within the District. She attended the District high school from July 25, 2023 to November 1, 2023 at which time she was placed on homebound instruction. Student’s time at the District from July 25, 2023 to January 25, 2024 is entirely within the time for consideration.

In response to Guardian’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-24-31 for March 12-14, 2024 if Guardians and District failed to reach resolution. The parties met for a resolution conference on February 8, 2024 but failed to resolve the matter. Prior to the prehearing conference, the parties jointly moved for continuance. This Hearing Officer granted the continuance on January 18, 2023, and after conferring with the parties regarding available dates, rescheduled the hearing for April 16-18, 2024.

Petitioner requested this hearing officer issue subpoenas, and this hearing officer issued the requested subpoenas on April 2, 2024. On April 5, 2024, the Arkansas Department of Education filed a Motion to Quash Petitioner’s subpoena for Dr. Jeff Adams, Arkansas Department of Education Director of the Office of Special Education, and the Petitioner filed

a response on April 5, 2024. As Dr. Adams had no personal knowledge of Student and this hearing officer has no jurisdiction over the matter for which Dr. Adams was subpoenaed, which was regarding the provision of FAPE to all special education students in the State of Arkansas, this hearing officer thereby issued an Order Granting Motion to Quash and Revoking Subpoena on April 10, 2024.

A prehearing conference was held April 15, 2024 via zoom. 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. Petitioner had the burden of proving the allegations in this case.

The closed hearing began as scheduled and was held on April 16, 2024 and was completed the same day. Present for the hearing were Larry Steele, attorney for Petitioner; Rebecca Worsham, Attorney for the District; Guardian; Student; Veronica Gavin, Director of Special Education for the District (“LEA”); and Rick Porter, observing for the Arkansas Department of Education. The hearing officer recognized Veronica Gavin upon seeing her, and then recalled mediating a prior case with Veronica Gavin that did not involve the Student in this case. The hearing officer disclosed her prior mediation with Veronica Gavin in the District to the parties, and neither party objected to the hearing officer serving in the matter. The following witnesses testified in this matter: Guardian, Student, LEA, Tasha Atchley (“Behavior Specialist” for the District), and Tewanna Johnson (“Paraprofessional”). At the

conclusion of the hearing, both parties were 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. Student is a seventeen-year-old female in the eleventh grade and 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, that Guardian is the guardian of Student, and that Guardian and Student currently reside within the District. *See* Joint Binder Ex. 2, p. 6.

2. Student has attended school at the District since kindergarten. *See* Tr. p. 30.

3. Student receives special education services under the category of Intellectual Disability, and the adverse effect it has on her educational performance. *See* Joint Binder Ex. 2, p. 7.

4. Guardian has participated in Student's IEP team meetings, provided input, and has not disagreed with any of the IEP plans for Student prior to November of 2023. *See* Tr. p. 31.

5. Student began receiving counseling in 2016 from Families Inc., but counseling stopped when Student was removed from Guardian's home for a time. *See* Tr. p. 32.

6. Student began to exhibit behavior problems of not listening and talking back during her ninth-grade year, and Student's behaviors have increased since then. *See* Tr. p. 30; Joint Binder p. 176-198.

7. In the 2021-2022 school year, Student's iReady results reflected that she was on the third-grade level for reading and the third grade level for math. *See* Joint Binder p. 82.

8. Student received direct special education services from qualified and certified Special Education Teacher Brenda Arnold in July and the beginning of August of 2023 ("Special Education Teacher"). *See* Joint Binder Ex. 11, p. 61-70; Tr. p. 115. Student's IEP provided for

1,600 total special education minutes weekly as follows: 300 minutes weekly in literacy, 300 minutes weekly in math, 150 minutes weekly in social studies, 150 minutes weekly in science, 300 minutes weekly in transition, 300 minutes weekly in vocational/life skills, and 100 minutes weekly of adaptive behavior.

9. From July 25 to August 2, 2023, Special Education Teacher kept a behavior log for Student to assist with the creation of a Behavior Plan for Student; the documentation of the following events was undisputed. *See* Joint Binder Ex. 11, p. 64-65. On July 25, 2023, Special Education Teacher documented that Student was taken out of class for a walk. *See* Joint Binder Ex. 11, p. 64. On July 26, 2023, Special Education Teacher documented that Student alleged another student called her slow, Student became mad and yelled curse words about the other student and would not stop, Student was quietly asked to calm down in an office next door, but came back out of the office yelling curse words in the hallway. *See* Joint Binder Ex. 11, p. 64. Later on July 26, 2023, Student became mad while mopping for her daily living skill, and Special Education Teacher called Guardian. *See* Joint Binder Ex. 11, p. 64. On July 27, 2023, Special Education Teacher documented that Student appeared to be “griping and fussing” in the office when Special Education Teacher first saw her in the morning, Student was mad about not being in JROTC, Special Education Teacher told Student that her schedule was changed so she then had JROTC, Special Education Teacher documented Student continued to “complain.” *See* Joint Binder Ex. 11, p. 64. Later on July 27, Student was “griping,” so Paraprofessional softly asked Student to go to the restroom to calm down. *See* Joint Binder Ex. 11, p. 64. Student went to the restroom to calm down but came out “griping about how she did not like [the Special Education Teacher];” when Student did not quiet herself, Student was asked to go back to the restroom to calm down. *See* Joint Binder Ex. 11, p. 64. Again on

July 27, Student “cursed all the way to the cafeteria” and called the Paraprofessional a “bald headed bxxxh on the way to the cafeteria.” *See* Joint Binder Ex. 11, p. 64.

10. On July 31, 2023, based on documentation of the Behavior Specialist and the Special Education Teacher, Student was asked to change seats, did not want to do it, appeared agitated, stated Paraprofessional told her to sit in the floor, stated that she wanted to slap the Paraprofessional, and yelled “I can hurt you” to the Paraprofessional. *See* Tr. p. 83; Joint Binder Ex. 11, p. 61-67. Student was escorted to the office to calm down and to call Guardian. *See* Joint Binder Ex. 11, p. 62.

11. On August 2, 2023, Guardian, Student, Behavior Specialist, Student’s principal, Student’s school counselor, Special Education Teacher, Paraprofessional and LEA created a Behavior Plan for Student, to target Student’s behaviors of a) refusal to follow instructions, cursing and yelling, b) making false accusations against staff, and c) leaving class without permission. *See* Joint Binder Ex. 11, p. 68-69. Mental health counseling was discussed at the meeting. *See* Joint Binder Ex. 10, p. 58. Guardian reported Student was on a waiting list for counseling, and the school counselor completed a referral for mental health services to expedite getting the Student into school based mental health. *Id.* Positive reinforcers were discussed. *Id.* The team considered moving the Student to half days but “rejected in order to give the Behavior Plan time to be implemented.” *Id.*

12. Student’s Behavior Plan included the following interventions: instructions are to be given by an adult, the teacher should firmly, in a calm voice, restate the instructions one step at a time, and be sure to monitor until the task is completed. *See* Joint Binder Ex. 12, p. 68-69. If Student gets agitated and becomes loud or uses inappropriate language, she should be allowed to go to her calm-down spot for 15 minutes. *Id.* When in the calming area, Student

will use taught breathing techniques. *Id.* The teacher will message the assistant principal and ask if she is available when the Student asks. *Id.* and Tr. p. 97-98. The Behavior Plan provided for the use of daily check-in/check-out sheets with a behavior scale for each targeted behavior. *See* Tr. p. 98; Joint Binder Ex. 12, p. 71. Student could earn points and receive a weekly reward by reducing targeted behaviors; however, this intervention was discontinued after eight weeks because Student struggled to take the document to be signed. *See* Tr. p. 98-100; Joint Binder Ex. 13, p. 71-78.

13. Sometime between August 1 and August 10, 2023, Special Education Teacher was injured in the classroom and has been on medical leave since then. *See* Tr. p. 24-25, 115-116.

14. Based on testimony of LEA and Paraprofessional, since Special Education Teacher went on medical leave, LEA goes into the classroom daily and ensures the substitute teacher and paraprofessionals have what they need for the students. *See* Tr. p. 115-116, 172-173. LEA has a Master's degree in Special Education and a Specialist Degree in Special Education Curriculum and Special Education. *See* Tr. p. 115. Student does not have a problem with District LEA. *See* Tr. p. 69.

15. Based on testimony of LEA and Paraprofessional, the Behavior Specialist is the primary teacher who goes into Student's classroom to teach lessons since Special Education Teacher has been injured. *See* Tr. p. 116. Behavior Specialist is a certified special education teacher. *See* Tr. p. 81, 92.

16. Based on testimony of Paraprofessional, LEA and Behavior Specialist are in the special education classroom daily for about an hour each. *See* Tr. p. 172-173.

17. District Paraprofessionals complete training and receive a certificate, they complete district-wide professional development, and they receive training through Easter Seals. *See*

Tr. p. 137-38. Paraprofessionals can assist with providing academic instruction to students but must be supervised by a certified teacher. *Id.* Paraprofessional, other paraprofessionals, and the substitute in the classroom work one-on-one with Student and other special education students. *See* Tr. p. 169-170.

18. Although Student was struggling with behavior prior to the absence of Special Education Teacher, based on testimony of the Guardian and Paraprofessional, Student's behaviors escalated further after Special Education Teacher had to go on medical leave; Guardian believes the escalation occurred because Student did not respect the substitute or paraprofessionals. *See* Tr. p. 46-52, 60-70, 156, 177-198. Behavior Specialist asserted a change in personnel will not likely correct Student's behavior because Student has been argumentative with every adult in her classroom; however, timing of the escalation and the testimony of Guardian and Paraprofessional were persuasive. *See* p. Tr. 112.

19. Student believes students in her class lied about her; Student denied any physical bullying by other students when asked if other students bullied her. *See* Tr. p. 69-70. District's Behavior Specialist asserted that Student had made allegations against other individuals that the Behavior Specialist found to be untrue. *See* Tr. p. 88. Paraprofessional stated she had not seen other students bully Student, but she has seen Student bully other students. *See* Tr. p. 156-160. Guardian testified that Student has a hard time comprehending and thinks people are being mean to her, but she really does not understand what people are saying or asking of her. *See* Tr. p. 45. Based on this testimony, the weight of the evidence favors that Student has not been bullied but indeed does misunderstand and perceive that she has been bullied.

20. Student reports that Paraprofessional called Student the “R-word” and told Student she looked like her biological mom. *See* Tr. p. 59, 64, 69. Behavior Specialist was not aware that Student alleged to have been called the “R-word” prior to the hearing. *See* Tr. p. 83, 89. Based on Student’s difficulty comprehending and that Student had not raised this allegation earlier, it is unlikely Paraprofessional made these statements.

21. District referred Student for counseling services in or before September of 2023, and Student was receiving counseling at the time of the hearing. *See* Tr. p. 33; Joint Binder p. 40.

22. Student was off medications between 2016 and September 2023; however, Student was prescribed Focalin and Clonidine in or before September of 2023. *See* Tr. p. 40; Joint Binder p. 40.

23. Based on testimony of Behavior Specialist, several approaches were attempted to assist Student to assist in handling frustration and anxiety in the fall of 2023; however, none were successful. *See* Tr. p. 101. Student continued to refuse to go to the calming area and would begin yelling, cursing and threatening students and staff. *Id.* Behavior referrals document these behaviors. *See* Joint Binder p. 187-198.

24. Because Student’s Behavior Plan was not curbing Student’s behaviors of yelling, cursing, making threats, hitting, kicking, and throwing things, Student’s IEP team met on August 2, September 20, September 27, October 27, and November 1 of 2023. *See* Joint Binder p. 4, 187-198. At the September 27, 2023 IEP meeting, Student’s counselors from Life Strategies recommended Student be admitted into acute care. *See* Tr. 103; Joint Binder p. 4.

25. Prior to the November 1, 2023 IEP meeting, Guardian requested homebound placement in the fall of 2023 for Student due to her behaviors. *See* Tr. p. 40.

26. When the IEP team met on November 1, 2023 and placed Student in a homebound setting, Guardian objected because she wanted to try to place Student somewhere other than homebound before Student was assigned to receive her education in a homebound placement. *See* Tr. p. 40-41.

27. Based on the November 1, 2023 Notice of Action, the District believed it had exhausted all options other than homebound; it states:

[Student] has been on a behavior plan since 8/2/23. She has since had multiple behavior incidents, and changes in the behavior plan have not been successful. She has been verbally abusive to both adults and her classmates to the point that it appears that she is in a manic state and no measures to calm her are functional. She becomes physically agitated, throwing things and hitting walls, and refuses to follow any instructions or use any calming techniques that we have discussed. The school has exhausted all options to reign in her behavior and it has escalated into a bullying situation with one peer in her classroom. The team has decided to place her into the district homebound program. Her behavior has become more intense and erratic. The team has met on 8/02/2023, 9/20/2023, 9/27/2023, and on 10/27/2023 to try to help [Student] in any way that the school possibly can. On 9/27/2023, [Student's] therapist, mental health counselor, and the clinic manager of Life Strategies of Arkansas attended the conference. It was recommended acute care at that time because of her behavior she was displaying in the conference.

See Joint Binder Ex. 1, p. 4.

28. Student was placed on homebound services on November 1, 2023 because her aggressive behaviors interfered with her ability to learn and the ability of her classmates to learn; Student's aggressive behaviors included throwing things, punching, kicking her desk, and making threats. *See* Tr. p. 118, 122, 143; Joint Binder p. 6-24.

29. The District recommended a full mental health evaluation for Student and offered to pay for Student's full psychiatric evaluation, but Guardian's consent was needed. *See* Tr. p. 121, 139. LEA thought a new diagnosis might be needed for Student, and then, the IEP team could perform a cognitive assessment and create a new IEP. *See* Tr. p. 121.

30. Since November 1, 2023, the District has requested that Student be evaluated and then return to direct instruction in the special education classroom at school. *See* Tr. p. 132. Guardian and the District agreed in November of 2023 to have Student's psychiatric evaluation completed and then the District would return Student to the special education classroom setting. *See* Tr. p. 133.

31. Guardian filed the due process complaint on January 25, 2024. *See* Tr. p. 132-133.

32. At the resolution conference, the parties again agreed that Student would have a psychiatric evaluation and then the District would complete a new psycho-educational evaluation and develop a new IEP for Student to return to the school setting. *See* Tr. p. 146.

33. On March 26, 2024, LEA first learned Life Strategies had evaluated Student on September 21, 2023; however, Guardian did not sign a release for the evaluation to be sent to the District. *See* Tr. p. 141 and Joint Binder p. 127-132. The copy emailed to LEA is unreadable in part. *Id.*

34. LEA candidly acknowledged that the District is required to have a certified special education teacher in the special education classroom; however, despite its efforts, the District had not been successful in filling the position due to the shortage of special education teachers. *See* Tr. p. 116-117. Based on LEA's testimony, the District posted and advertised the open position on several platforms, which LEA listed. *See* Tr. p. 116. The District has hired three teachers from the Phillipines to teach special education at the District and expects they will be present and certified soon. *See* Tr. p. 117.

35. Student's most recent iReady results stated in the Amended IEP dated November 1, 2023 were that she is performing on a kindergarten level in the areas of reading and math. *See* Joint Binder p. 7.

36. Since Student was assigned to homebound placement, Guardian has communicated with District's Behavior Specialist, and District's Behavior Specialist drops off work for Student on Mondays. *See* Tr. 47. Student loves the Behavior Specialist and is completing the work and returning it to her. *Id.* and p. 106-109. The Behavior Specialist offered to meet with Student at the office of Behavior Specialist for one-on-one instruction, but Guardian declined the offer. *See* Tr. p. 48, 143-144.

37. Guardian's goal for the hearing was that Student return to school in person with a certified special education teacher. *See* Tr. p. 54.

In the role of factfinders, special education hearing officers are charged with the responsibility of making credibility determinations of the witnesses who testify. *Independent Sch. Dist. No. 283 v. S.D. ex rel. J.D.*, 88 F.3d 556, 561 (8th Cir. 1996); *Parrish v. Bentonville Sch. Dist.*, No. 5:15-CV-05083, at *8 (W.D. Ark. March 22, 2017). This hearing officer found each of the witnesses who testified to be credible in that they all testified to the facts to the best of their recollection; minor discrepancies in the testimony were not deemed to be intentionally deceptive. 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 to the student to receive educational benefit. *Id.* The burden of proof falls on the party seeking relief. *See Snetizer v. Iowa Dep't of Educ.*, 796 F.3d 942, 948 (8th 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 or guardians; 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 [Guardian]’s opportunity to participate in the decision-making process, or (3) cause a deprivation of educational benefits. *See K.E. ex rel. K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795, 804-805 (8th Cir. 2011); 20 U.S.C. § 1415(f)(3)(E)(ii)(I)-(III).

A. Request for Evaluation

Perhaps the Complaint alleged a procedural violation in stating that the Student “needs . . . a psychological evaluation.” *See* Complaint. However, the weight of the evidence supports that what the Student needed in the fall of 2023 was a psychiatric evaluation, and the District offered to pay for it. The psychiatric evaluation needed is beyond the scope of a psychological evaluation in the education setting. This hearing officer finds no procedural violation of IDEA on the part of the District as to any request for evaluation.

B. Meaningful Participation

If Petitioner intended to allege the District denied Guardian meaningful participation in Student’s education when stating the “[Student] was placed into the district homebound program,” the evidence does not support such an allegation. The U.S. Supreme Court held that a school district cannot refuse to consider parent/guardian concerns when drafting an IEP and cannot predetermine the educational program for a disabled student prior to

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

In this case, this Hearing Officer finds that a preponderance of the evidence establishes that the District did not impede Guardian’s opportunity to participate in the decision making process regarding the provision of FAPE to Student. Guardian testified that she participated in each of Student’s IEP meetings and had been requesting Student be placed on homebound services prior to the November 1, 2023 IEP meeting. Between July 25, 2023 and the November 1, 2023, the District kept data needed for Student’s FBA, created Student’s behavior plan, involved Behavior Specialist who attempted a variety of strategies to curb Student’s behaviors, referred Student for counseling and had counseling begin, and the Student was prescribed medication in an attempt to manage her behaviors. Mental health professionals at the November 1, 2024 meeting recommended acute care for Student based on her behavior at the conference. As Student’s behaviors were interfering with the education of Student and her peers, after discussing the absence of other options with

Guardian, the District determined it had exhausted all options and placed Student on homebound services. Guardian and Student attended the meeting and Guardian objected to homebound services at the November 1, 2024 IEP meeting; the Notice of Action documents that keeping Student in school was considered but rejected due to her inappropriate behavior and threats toward adults and peers.

Conclusion

Having considered Guardian's allegations of procedural due process violations above, it is the conclusion of this Hearing Officer that Student was *not* denied FAPE as a result of procedural violations of the IDEA, as Guardian was not denied meaningful participation and the District did not fail to perform an educational evaluation of Student.

II. Allegations of Substantive Violations of the IDEA

Next, this Hearing officer must consider whether the District substantively provided FAPE to Student during the 2023-2024 school year.

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

Petitioner's Complaint made no allegation that Student's IEP was inappropriate. Further, Guardian testified that she participated in each IEP meeting and did not have a problem with any of Student's IEPs. Thus, whether the District offered "an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances" is not at issue in this matter. *See Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S.Ct. 988, 999 (2017).

B. Implementation of the IEP

In *Neosho R-v School District v. Clark*, 315 F.3d 1022 (8th Cir. 2003), the Eighth Circuit held that a District's failure to substantially implement because the professionals at issue

lacked training constituted a denial of FAPE. Here, the focal allegation of the Complaint, which was confirmed by the testimony of Guardian, is that the District failed to properly implement Student's IEP because the District did not have a full time qualified special education teacher in Student's special education classroom to provide Student's special education instruction set forth in Student's IEP. This allegation is not disputed for the school days on or about August 2, 2023 through November 1, 2023. LEA admitted that the District is required to have a certified special education teacher in Student's special education classroom, that Special Education Teacher was injured at the beginning of August, and that the District has been unable to fill the position through the date of the hearing on April 16, 2024. LEA was candid and convincing in detailing the District's efforts to hire another special education teacher, and special education certified LEA and Behavior Specialist were each providing instruction for approximately one hour daily for a total of two hours daily.

Student's IEP sets for that Student was to received a total of 1,600 minutes weekly with 300 minutes weekly in literacy, 300 minutes weekly in math, 150 minutes weekly in social studies, 150 minutes weekly in science, 300 minutes weekly in transition, 300 minutes weekly in vocational/life skills, and 100 minutes weekly of adaptive behavior. The estimated 1 hour, or 60 minutes, daily that the special education certified LEA and Behavior Specialist each spent in the classroom providing direct instruction (for a total of 120 minutes daily or 600 minutes weekly) comported with Student's IEP and support Student's educational needs in part. However, there was a deficit of 1000 minutes weekly of special education instruction for Student weekly for the weeks between about August 2 through November 1, 2023, which is approximately 12 weeks, for a total of 12,000 minutes. However, the absence of a certified special education teacher to provide direct instruction in Student's special education

classroom for the remaining 1000 minutes weekly from or about August 2, 2023 to November 1, 2023 is a significant failure of implementation.

Further, as in *Neosho*, the substitute teachers and paraprofessionals serving in Student's class the majority of the time were not professionally trained in special education or implementation of a Behavior Plan in order to successfully reduce the inappropriate behavior in a manner fitting Student's disability. Thus, it is logical that the Behavior Plan created on August 2, 2023 failed to provide the behavior support needed by Student.

Because Student was not receiving instruction from a certified special education teacher for a majority of the school day and there was no certified special education teacher to implement the Behavior Plan present in the special education classroom the majority of each day between about August 2, 2023 and November 1, 2023, the District failed to implement the IEP. The District's failure to implement Student's IEP resulted in a deprivation of educational benefit to Student between August 2 and November 1, 2023, as exhibited by the regression in Student's iReady scores between 2021-2022 and 2023-2024.

CONCLUSION

This Hearing Officer finds a preponderance of the evidence establishes that the District significantly failed to implement Student's IEP, which resulted in the deprivation of educational benefit to Student. As discussed above, this was a substantive denial of the provision of FAPE to Student between August 2 and November 1, 2023.

B. Least Restrictive Environment

Guardian also alleged that the District failed to educate Student in the LRE in placing Student in homebound instruction after the November 1, 2024 IEP meeting. 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 CJN ex rel. SKN v. Minneapolis Public School*, 323 F.3d 630, 641 (8th Cir. 2003). However, the IDEA “significantly qualified the mainstreaming requirement by stating that it should be implemented to the ‘maximum extent appropriate.’” *Pachl v. Seagren*, 453 F.3d 1064, 1067 (8th Cir. 2006); *see also* 20 U.S.C. §1412[a](5). A disabled student should not be separated from his or her peers unless the services that make segregated placement superior cannot be “feasibly provided in a non-segregated setting.” *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983). The requirement to mainstream is not applicable when it “cannot be achieved satisfactorily.” *See Pachl*, 453 F.3d at 1068. 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.

Here, this Hearing Officer finds the evidence does support that homebound instruction was the LRE for Student on November 1, 2023. Due to the District’s vast efforts in conducting an FBA, creating a Behavior Plan, meeting many times in an attempt to adjust the Behavior Plan, referring Student for counseling, and requesting a psychiatric evaluation for Student, the District had exhausted all available options other than homebound placement. Although Guardian would have liked to consider another placement at that meeting, she did not raise any other options for placement, and continuing in-school

education was untenable for Student at that time. Guardian, herself, had even been requesting homebound services for Student prior to the November 1, 2023 IEP meeting.

Testimony supported that Student was completing homebound assignments provided by the special education certified Behavior Specialist and turning them in. Behavior Specialist even offered one-on-one instruction for Student at her office, but Guardian rejected the offer. Further, it was undisputed that the District offered to return Student to on-campus instruction in the special education classroom after the Student received a psychiatric evaluation, and it was provided to the District. The evidence reflects that Guardian did obtain a psychiatric evaluation for Student in September of 2023 but did not sign for it to be released to the District. The District did not learn of or receive a copy of the psychiatric evaluation until March of 2024, and the copy the District received is illegible in part. Thus, Guardian's failure to provide the psychiatric evaluation to the District caused and prolonged Student's placement in homebound instruction, and as of the date of the hearing, the District was still requesting a legible copy of Student's September 2023 psychiatric evaluation.

CONCLUSION

For the above stated reasons, this Hearing Officer finds the homebound placement for Student was the LRE for Student at that time and that the District did not deny Student a FAPE in the LRE in placing her in homebound instruction.

REMEDIES

Having determined that the District denied FAPE to the Student by significantly failing to implement Student's IEP due to the absence of a full time special education teacher in Student's class between about August 2, 2023 and November 1, 2023, this Hearing Officer

must now determine whether Student is entitled to compensatory education to the extent necessary to put the Student in the position in which she would have been had she been provided FAPE. In the present case, District denied FAPE to Student between about August 2, 2023 and November 1, 2023 due to the absence of a full-time certified special education teacher in Student's classroom to implement 1000 of Student's instructional minutes weekly and to implement Student's Behavior Plan.

A hearing officer has broad discretion regarding the remedy granted in cases where a student is denied FAPE by a school district. Similarly, regarding compensatory education, "[w]hether District is able to provide FAPE prospectively is irrelevant to an award of compensatory education." *Indep. Sch. Dist. No. 283 v. E.M.D.H.*, 960 F.3d 1073, 1085 (8th Cir. 2020). The purpose of compensatory education is "restorative," and damages are "strictly limited to expenses necessarily incurred to put Student in the education position [she] would have been had the District appropriately provided a FAPE." *Id.* at 1086.

CONCLUSION

Considering all the facts discussed above, including academic and behavior regression, it is the opinion of this Hearing Officer that the District should offer to compensate Student by providing Student (prior to her graduation) with small group or one-on-one instruction by a certified special education teacher for 12,000 minutes, which should be apportioned among the Student's areas of need as set forth Student's most updated IEP and shall focus on mastery of Student's goals set forth in Student's most updated IEP. This award of compensatory education is in addition to any special education minutes prescribed for Student in the IEP covering the 2024-2025 school year and should be implemented to the extent possible during Student's school breaks and to a limited extend in after school

tutoring, as this hearing officer recognizes that Student may require time to attend to mental health counseling and other needs. Further, this Hearing Officer recognizes that Guardian previously declined one-on-one instruction with Behavior Specialist at the office of Behavior Specialist and did not request compensatory education in the Complaint, which is the reason that this Hearing Officer orders that the District *offer* this compensatory education to Student instead of ordering the District to complete this compensatory education to Student. District must show best efforts to offer the compensatory education minutes at a time and place acceptable to Guardian and Student and should document its efforts do so.

FINAL CONCLUSIONS AND ORDERS:

Upon consideration of all the testimony and evidence, this Hearing Officer finds that a preponderance of the evidence establishes a finding in favor of the Guardian that District failed to provide the Student a FAPE as a result of the substantive violation of IDEA discussed above. District is hereby ordered to take the following actions regarding Student:

1. District shall have a full-time certified special education teacher for Student's high school special education classroom for the 2024-2025 school year.
2. Acknowledging the Guardian did not request and may decline the offering of compensatory education, District should *offer* to compensate Student by providing Student with small group or one-on-one instruction by a certified special education teacher for 12,000 minutes (prior to her graduation), which should be apportioned among the Student's areas of need as set forth Student's most updated IEP and shall focus on mastery of Student's goals set forth in Student's most updated IEP. This award of compensatory education is in addition to any special education minutes prescribed for in Student's IEP covering the 2024-2025 school year and should be implemented to the extent possible during Student's school

breaks and to a limited extent in after school tutoring, as this hearing officer recognizes that Student may require time to attend to mental health counseling and other needs. District must show best efforts to offer the compensatory education minutes at a time and place acceptable to Guardian and Student and should document its efforts do so.

3. Upon production of a legible copy of Student's September 2023 psychiatric evaluation to the District and if Student remains in the District for the 2024-2025 school year, District is ordered to re-evaluate Student within sixty days of receipt of Student's psychiatric evaluation and provide Guardian a facilitated IEP meeting through the Arkansas Special Education Mediation Project operated by the UALR Bowen School of Law.

4. Guardian also alleged that the District's conduct constitutes disability discrimination in the Consolidated Case pursuant to §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794(a) or Title II of the Americans' with Disabilities Act, 42 U.S.C. § 12131-12165, along with other allegations. This Hearing Officer has no jurisdiction over disability discrimination claims or other allegations beyond the scope of IDEA. See ADE Spec. Ed. Rules §10.02.22.1. Therefore, to the extent Guardians' due process complaints raise disability discrimination claims or other matters beyond the scope of this hearing officer's jurisdiction, those claims are dismissed.

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 13th day of May, 2024.

/s/ Debby L. Ferguson
Hearing Officer