

**ARKANSAS DEPARTMENT OF EDUCATION
Special Education Unit**

IN RE:

XXXXXXXXXXXXXXXXXXXXX, Parents of
XXXXXXX, Student

PETITIONER

VS.

CASE NO. H-24-46

Benton School District, District

RESPONDENT

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

ISSUES PRESENTED:

Whether the Benton School District (hereinafter "District" or "Respondent") denied XXXXXXXX (hereinafter "Student") a free, appropriate, public education (hereinafter "FAPE") between August 14, 2023 and May 14, 2024 in violation of certain procedural and substantive requirements of the Individuals with Disabilities in Education Act of 2004, 20 U.S.C. §§ 1400-1485, as amended (hereinafter referred to as "IDEA"), which requires an analysis of the following sub-issues:

(1) whether the District complied with procedural requirements of IDEA or denied parents meaningful participation in Student's education;

(2) whether the District provided Student FAPE in a timely manner by providing an appropriate IEP and implementing appropriate supports and services to address Student's deficits in the areas of reading and math, and behavior; and

(3) what are the appropriate remedies if IDEA was violated.

PROCEDURAL HISTORY:

On May 14, 2024, Petitioners, the Parents and legal guardians of Student, filed the request for a due process hearing in this matter pursuant to the Individuals with Disabilities in Education Act ("IDEA"). The IDEA requires "[a] parent or agency [to] request an impartial due process hearing within two years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint . . ." 20 U.S.C § 1415(f)(3)(c). The State of Arkansas recognizes this same limitations period. *Ark. Dept. of Educ. Special Educ. And Related Services*, 10.00 Mediations and Hearings, § 10.01.4.6(A). The Eighth Circuit Court of Appeals also applies a two-year statute of limitations period under the IDEA. *See In the Matter of Minnetonka v. M.L.K., by and through his Parents, S.K.*, 2021 U.S. Dist. LEXIS 37609, 2021 WL 780723, at *6 (D. Minn. Mar. 1, 2021). "Any claim of a breach falling outside of the IDEA's two-year statute of limitations would be untimely." *Indep. Sch. Dist. No. 283 v. E.M.D.H.*, 960 F.3d 1073, 1083 (8th Cir. 2020). Parents requested the hearing in this matter because they believed that District failed to comply with the IDEA, as well as regulations set forth by the Arkansas Department of Education, by failing to provide Student with appropriate supports and services to address Student's deficits in academic and behavioral skills. Parents additionally seek the remedy of private school placement.

In response to Parents' request for hearing, the Department assigned the case to a prior hearing officer. The matter was transferred to this impartial Hearing Officer on August 22, 2024, who initially scheduled the due process hearing in this matter for August 28-30, 2024 with a prehearing conference on August 26, 2024. Prior to the prehearing

conference, Respondent filed a motion for continuance on August 26, 2024, as the hearing dates conflicted with previously scheduled hearings for both Petitioner's and Respondent's attorneys. Petitioner did not object to the continuance, and the continuance was granted for good cause shown. Thereafter, November 6-8, 2024 was set as the date on which a hearing would commence by agreement of the Parties. Parties failed to reach resolution at the resolution conference, which was held on October 25, 2024, and the prehearing conference was held on November 4, 2024. See Prehearing Conf. Tr. p. 7.

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. This Hearing Officer ruled that Parents had the burden of proof, and Parents non-IDEA federal claims were dismissed without prejudice. See Tr. Vol. I p. 6. On November 6, 2024, the hearing began as scheduled, and testimony was heard on November 6-8, 2024. See Tr. V. I, II, III. Additional hearing dates were necessary due to the length of testimony taken and scheduling availability of certain witnesses, and the Parties agreed to continue the hearing to the two consecutive dates of January 13 and 14, 2025. See Tr. Vol. III p. 193.

On January 6, 2025, prior to resuming the hearing, Parents notified the District of their intent to unilaterally enroll Student in a private school and seek reimbursement for the cost of that enrollment pursuant to 20 U.S.C. §1412(a)(10)(C)(ii). Pursuant to Arkansas Spec. Ed. Rules § 10.01.11.3, the District gave written consent for Parents to amend the Complaint to seek reimbursement for the cost of private school tuition pursuant to 20 U.S.C. §1412(a)(10)(C)(ii). Also, on January 6, 2025, Parents filed their First

Amended Complaint (“Complaint”). As Student began school at the District on or about August 23, 2023, this matter was filed on May 14, 2024 and amended on January 6, 2025, the period of time between August 23, 2023 and January 6, 2025 is at issue in this matter.

School was closed on January 13, 2025 due to snow, and by agreement of the Parties, the hearing resumed on January 14, 2025. See Tr. Vol. IV. By agreement of the Parties via email and because the hearing was not completed on January 14, 2025 and due to issues with availability of witnesses and attorneys, the hearing was continued to February 10 and 11, 2025, and the hearing concluded on February 11, 2025. See Tr. Vol. V and VI.

Parents were represented by Theresa Caldwell and District was represented by Jennifer Flinn. Present for the hearing were XXXXXXX (“Mother”), XXXXXXX (“Father”) (together “Parents”), Audie Alumbaugh (“Parent Advocate”), Jamie Jenkin (“Parent Advocate”), Angela McWhorter (“LEA”), and Mylissa Blankenship (observer for training purposes). The following witnesses testified in this matter: LEA, Mary Jo Shelnut (Community Based Instruction Teacher, “CBI Teacher”), Madison Stout (“Special Education Teacher”), Kyleigh Bennett (“Kindergarten Teacher”), Jill LeSieur (“First Grade Teacher”), Gwyneth Boyer (“Kindergarten Speech Therapist”), Kelsey Hays (“Ped’s Plus Speech Therapist”), Emily Miller (Current Board Certified Behavior Analyst, “BCBA”), Jessica Lenehan (“RBT”), Courtney Williams (“Compass Director”), Kindra Shrader (“First Grade Speech Therapist”), and Mother on behalf of the Parents. Both parties were offered the opportunity to provide post-hearing briefs in lieu of closing statements, and both parties submitted a timely brief for consideration.

FINDINGS OF FACT:

In the role of factfinders, special education hearing officers are charged with the responsibility of making credibility determinations of the witnesses who testify. *Independent Sch. Dist. No. 283 v. S.D. ex rel. J.D.*, 88 F.3d 556, 561 (8th Cir. 1996); *Parrish v. Bentonville Sch. Dist.*, No. 5:15-CV-05083, at *8 (W.D. Ark. March 22, 2017). This Hearing Officer found most witnesses who testified to be credible in that they all testified to the facts to the best of their recollection. There were some inconsistencies that did play a role in this hearing officer's decisions. Some evidence, including testimony, was more persuasive and reliable concerning the issues to be decided. In this matter, Witnesses' resistance to responding directly to questions, inconsistent answers, or inability to respond to questions due to failure to recall was taken into consideration in determining the weight attributed to their testimony in this matter.

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.

A. Background

1. At the time of the Complaint, Student was a first-grade student at the Mountain View Elementary School in the District, who resided in Alexander with her Parents, sibling two years younger, and sibling born in November 2023. See Tr. Vol. IV p. 147-148; Tr. Vol. V p. 97; Vol. VI p. 23. Student attends the District through School Choice and because Mother works for the District. See Tr. Vol. VI p. 23. Student has attended school in the District since

the beginning of her kindergarten year in the fall of 2023. See Tr. Vol. V p. 97; P. Ex. p. 104.

2. In February of 2022, Student was diagnosed with Autism at age four by agreement of Student's pediatrician, Student's private speech pathologist, and Dennis Developmental. See Tr. V. VI p. 133-135. She began ABA therapy with Arrows in her home at age five, around March of 2022, and with ABA therapy, Student began progressing and saying words in a communicative way for the first time. See Tr. Vol. IV p. 136-139. Student's BCBA and RBT have continued working with her since that time. See Tr. Vol. IV p. 139-140. Their expectation of Student's ability was higher than Parents expected, and the Parents were trained in how to help Student progress and speak. See Tr. Vol. IV p. 142-144.

3. Student attended Grow Developmental Centre in Benton, Arkansas ("Grow") beginning around February of 2021 until she began kindergarten at the District in August of 2023. See P. Ex. p. 1, 146. Student received Speech, OT, PT, developmental, and ABA therapies at Grow. See P. Ex. p. 126-148, 173-188, 215-232; Tr. Vol. IV p. 137. Parent's waived Student's first opportunity for Student to attend public school kindergarten because they were seeing her progress at Grow. See Tr. Vol. V p. 80-82; P. Ex. p. 104. Through ABA therapy at Grow, Student improved in time on task to 15 minutes from 30 seconds. See Tr. Vol. V p. 81, 87. Parents noticed Student's behavior compliance progressed. See Tr. Vol. V p. 82. When Student started preschool at Grow, Student would point and pull parents to things she wanted; she would get frustrated when she could not get what she wanted. See Tr. Vol. V p. 83. By the end of her time at Grow, Student would tell Parents "Cup," "Water," "Oreos," "Outside," "Bath," and other one-word or two-word sentences to describe what she desired. See Tr. Vol. IV p. 140-141; Tr. Vol. V p. 82-84. Parents and the RBT were able to get Student to use her words because they had been through an ABA training, but using her words was

a new and emerging skill for Student at that time. See Tr. Vol. V p. 83-84. Student's behavior issues at Grow were that Student was not able to stay on task for very long, so they worked on her joint attention and following one and two step directions. See Tr. Vol. V p. 87-88. Those were the biggest behavior issues Student exhibited at Grow. See Tr. Vol. V p. 87. At the beginning of pre-K, Student was trying for 20 seconds to a minute of staying on task; by the end of pre-K through ABA therapy, she was able to stay on task for 15 minutes, was able to follow verbal commands without getting upset, and was potty trained. See Tr. Vol. V p. 87-88, 145-147. When Student left Grow, she could recite the alphabet, identify colors, use gestures to communicate, and request objects using single word phrases. See P. Ex. p. 2, 114. Student's ABA therapist worked with her in the preschool classroom setting at Grow. See Tr. Vol. IV p. 139-140. Student received 120 minutes or more of speech therapy weekly while at Grow. See Tr. Vol. V p. 129.

4. On February 13, 2023, Mother met with LEA and others for transition meeting and existing data review at Howard Perrin, another Elementary in the District prior to the April 2023 IEP meeting, and Mother raised Student's need for ABA therapy and communication assistance. See P. Ex. p. 100-108; Tr. Vol. V p. 85-87. Mother was told that ABA therapy was not something given in school but an outside service and that the District would support Student with a paraprofessional. See Tr. Vol. V p. 86. Mother was told the paraprofessional for Student would be trained in similar tactics that an RBT used, and Mother was glad Student would have an adult with her. See Tr. Vol. V p. 86.

5. On March 20, 2023, in preparation for Student to enter kindergarten in the District, Student received a psychological evaluation conducted by the Dawson Educational Co-op staff on behalf of the District. See P. Ex. p. 113, 126-127. The examiner, who later became

Student's Special Education Teacher in this matter, reported that Student has a diagnosis of Autism and that Student leaned over to pinch or squeeze the examiner's arm when frustrated. See P. Ex. p. 126-127, 129. Student's preschool teacher completed the ABAS-3 and rated Student as a 1 or 2 in all areas, indicating severe deficits. See P. Ex. p. 127. On the Wechsler Nonverbal Scale of Ability (WNV), Student completed only two of four subtests and scored below normal in Object Assembly and Recognition, indicating that her cognitive skills likely fall in the "extremely low range;" however, the examiner noted several times that Student failed to attend to tasks or complete tasks. See P. Ex. p. 128. She would not even point to colors or symbols when heavily prompted, but she did verbalize the words "square," "circle," and "triangle" at one point. See P. Ex. p. 128. On the YCAT-2, Student was unable to complete the tasks and received no scores. See P. Ex. p. 128. Student's evaluations from Grow did not reflect improvement in her standard scores for language and communication. See P. Ex. p. 134, 147, 175, 181, 184. Student's cognitive function at age four was determined to be the age equivalent of 23 months. See P. Ex. p. 147. When Student was evaluated at age five, she scored in the range of a profound cognitive delay, with an age equivalent of 19 months. See P. Ex. 144. In the spring of 2023, Student was evaluated at age six, and she was determined to have a profound cognitive delay, with the age equivalent of 22 months. See P. Ex. p. 134. However, District admitted standard scores may not accurately reflect Student's ability to learn. See Tr. Vol. VI p. 130. The Test of Nonverbal Intelligence was not administered to Student. See Tr. Vol. VI p. 124-125. Student's pre-K IEP dated May 17, 2022, does reflect that Student progressed toward all her objectives in 2021 and in 2022, and Student was starting to toilet train at the time of the May 2022 annual review. See P. Ex. p. 90. The Pre-K IEP team "strongly recommended that [Student] continue developmental and

therapy services to continue to aid her in developing new skills in communication, adaptive, cognitive, fine and gross motor, and social skills. See P. Ex. p. 89-99. As Student's evaluations did not reflect her increase in skills, as Student demonstrated her ability to learn in other facts herein, and as District staff admitted Student was difficult to assess, this hearing officer finds that these evaluations and others, do not accurately reflect Student's ability to learn.

6. On April 17, 2023, Student's IEP team at Howard Perrin Elementary, including Parents, met and reviewed the District's psychological evaluation dated 3/6/23 and 2/22/23, the District's OT evaluation dated 3/6/23, the District's PT evaluation dated 3/8/23, the evaluation by Dawson Educational Co-op, dated 5/6/22, and the IEP team created an IEP for Student's kindergarten year ("April 2023 IEP). See P. Ex. 109-125, 126, 130, 180, 215, 269. The team determined that Student qualified for special education based on her diagnoses of Autism, and placed Student, who was mostly nonverbal, in the general education classroom with support from a one-to-one paraprofessional pursuant to Parents' request and provided supplemental aids in the classroom, which would include, support and consultative services from her Kindergarten Speech Therapist and Special Education Teacher in the general education classroom as needed. See P. Ex. p. 1, 109-123. Student would also receive 120 minutes per month of OT and 120 minutes per month of Speech. See P. Ex. p. 109-123. Her strengths included "recites the alphabet," "identifies colors," "uses gestures to communicate," "requests objects using single word phrases." See P. Ex. p. 2, 114. Her needs included that her emotional and sensory regulation should be monitored and breaks provided accordingly" because she "may become frustrated when task demands are above her skill level." See P. Ex. p. 2. No positive behavior interventions and supports were in place to address behavior. See P. Ex. p. 117. Her goals were: to count to 10 in math, to

recognize alphabet letters for language arts, and to trace her name in writing. See P. Ex. p. 118. No minutes of special education or personal care services were provided, 120 minutes per month were provided for Speech, and 120 minutes per month were provided for OT. See P. Ex. p. 118-121.

7. On August 14, 2023, Student's IEP team at Mountain View Elementary, including the Parents, met to amend Student's IEP to add personal care minutes to Student's services, as reflected in the Notice of Action ("August 2023 IEP"). See P. Ex. 1-11. Other than the additional of personal care minutes and transportation, Student's goals and services remained the same as the April 2023 IEP. See P. Ex. p. 1-11 and 109-125. Student's language goal remained to recognize letters of the alphabet, although she was able to do so when she entered kindergarten. See Tr. Vol. I p. 27; P. Ex. p. 18. Student remained placed in the general education setting with a 1:1 paraprofessional for kindergarten for the 2023-2024 school year. See P. Ex. p. 1-2. Student's August 2023 IEP provided no special education minutes, but she would receive 120 minutes per month of Speech Therapy ("Speech"), 120 minutes per month of occupational therapy ("OT"), transportation, and 120 minutes per day of personal care services ("Care Services"). P. Ex. 8-9.

8. Student began kindergarten at the District on or about August 23, 2023. See P. Ex. p. 363-368; Tr. Vol. II p. 49. Kindergarten Teacher testified that she would instruct Student verbally while providing grade-level instruction to all of the class; then, Student's paraprofessional worked one-on-one with Student, supported her, and helped her with modified schoolwork. See Tr. Vol. II p. 35-37. Kindergarten Teacher did not ever pick up Student's AAC or attempt to communicate with Student through her AAC. See Tr. Vol. II p. 36-37. Kindergarten Teacher testified Student understood what she was saying based on

some of Student's responses. See Tr. Vol. II p. 48. Kindergarten Teacher also testified that Student was not able to participate in her classroom due to paraprofessional's lack of knowledge and Student's limited ability to focus on instruction. See Tr. Vol. II p. 126-127.

9. Student was assisted daily by her paraprofessional, or if Student's regular paraprofessional was absent, a substitute paraprofessional was assigned to Student. See Tr. Vol. III p. 73; Tr. Vol. VI p. 75. Student did not have a day without a paraprofessional. *Id.* Student's paraprofessional worked one-on-one with Student so that Student could participate in the classroom, transition safely from one activity to the next, and access her schoolwork and activities with modifications, as directed by the teacher or a special education teacher. See P. Ex. p. 114; Tr. Vol. I p. 141. 24. Since no special education minutes were included in Student's IEP at that time, the CBI Teacher assumed that, during this time, the paraprofessional was the person teaching and implementing Student's goals with the resource or a special education teacher consulting, although no indirect services are included in the IEP. See Tr. Vol. I p. 24-26, 30-31; P. Ex. p. 23. The resource teacher who was Student's folder holder at the time is no longer at the District, and she was responsible for implementing Student's IEP goals. See Tr. Vol. I p. 26, 32-33. Student's paraprofessional for 2023-2024 refused to be trained as an RBT, despite the District's urging her to complete the training, and the District did not renew her contract. See Tr. Vol. VI p. 229.

10. Special Education Teacher came into Student's classroom daily to modify classwork and model ways to support Student in her activities and school work for the paraprofessional, as a consult. See Tr. V. II p. 45-47, 117-118; Tr. V. III p. 172. She also worked with Student directly from time to time. See Tr. Vol. II p. 45-47.

11. Parent recalls receiving a picture of another child that Student had scratched

down the neck on August 30, 2023; Parent was horrified because Student had never shown aggression toward anybody in that way. See Tr. Vol. V p. 89; P. Ex. 372. Parent asked what action was needed, and Special Education Teacher stated there was really nothing to do. See Tr. Vol. V p. 89. Mother set up a meeting with Student's principal to discuss what should be done and was told that the District would let her know if the behavior persisted. See Tr. Vol. V p. 89. Student was coming home and crying for hours in the evening. See Tr. Vol. V p. 90. District staff made vague statements to Mother that Student was crying, not wanting to participate, and showing frustration, but Parents did not receive details of the behavior incidents occurring between August and December of 2023, except for the incident that occurred on August 30, 2023. See Tr. Vol. V p. 89, 91, 94-95. Parent did not receive communication regarding Student's behavior incident occurring on August 31, 2023 or November 2, 2023. See P. Ex. p. 369-373; Tr. Vol. V p. 90-91, 94-95. Parent did receive daily communication sheets with smileys from Special Education Teacher. See P. Ex. p. 388-406; Tr. Vol. V p. 97-98.

12. Special Education Teacher recorded behavior incidents that included Student's physical aggression toward other children or staff on 8/22/23, 8/25/23, 8/26/23, 8/29/23, 8/30/23, 8/31/23, 9/7/23, 9/11/23, 10/10/23, 10/24/23, 10/31/23, 11/2/23, 11/3/23, 11/7/23, 11/10/23, 11/13/23, 11/14/23, 11/16/23, 11/27/23, 11/28/23, 11/29/23, 11/30/23, 12/1/23, and 12/5/23. See P. Ex. 350-352; 363-368; Tr. Vol. III p. 75. Other than the 11/2/23 incident, Kindergarten Teacher did not recall the incidents happening in her classroom and through they may have occurred during recess. See Tr. Vol. II p. 39-43; P. Ex. 373. Special Education teacher photographed injuries caused by Student's actions, and many of the injuries were to Special Education Teacher and occurred through May of the 2023-

2024 school year. See P. Ex. p. 369, 371, 374; Tr. Vol. III p. 75-79. In the spring of 2024, documented incidents of Student's aggression toward others occurred on 1/4/24, 1/5/24, 1/8/24, 1/9/24, 1/10/24, 1/23/24, 1/24/24, 1/25/24, 1/29/24, 1/30/24, 1/31/24, 2/2/24, 2/6/24, 2/14/24, 2/16/24, 2/19/24, 2/19/24, 2/21/24, 2/23/24, 3/4/24, 3/5/24, 3/8/24, 3/11/24, 3/26/24, 3/27/24, 3/29/24, 4/4/24, 4/10/24, 4/11/24, 4/12/24, 4/15/24, 4/16/24, 4/17/24, 4/18/24, 4/19/24, 4/25/24, 4/29/24, 4/30/24, 5/2/24, 5/3/24, 5/6/24, 5/7/24, 5/8/24, 5/9/24, 5/13/24, 5/14/24, and 5/16/24. See P. Ex. 350-352, 363-368, 375-387; Tr. Vol. III p. 75. The incidents on May 8 and May 16, 2024 resulted in Student's restraint. See P. Ex. p. 387, 538-551.

13. When Student would become agitated, Special Education Teacher would try to calm Student using arm squeezes and hugging, and Special Education Teacher felt she and Student had a good relationship. See Tr. Vol. III p. 79-82. On 9/11/23, 9/12/23, and 9/19/23, Special Education Teacher documented that Student had some positive participations in OT selected learning activities, for example: for three minutes each including tubes/marbles, blocks, puzzles, and playdoh with sensory breaks in-between each; she required redirects every 10-30 seconds. See P. Ex. p. 364. When Student would begin to exhibit signs that she was frustrated, Special Education Teacher would first "attempt to push through" with work, use a "first/then," and then try to keep going with a penny board reward. See Tr. Vol. III p. 82-83. When Student became aggressive toward herself or others, Special Education Teacher would have to "intervene and move on." See Tr. Vol. III p. 83.

14. On September 1, 2023, Student's Special Education Teacher completed a behavior intervention referral to submit to the District's behavior specialist, Nicole McCallum ("District's Behavior Specialist"). See P. Ex. p. 353-360; Tr. Vol. II p. 38; Tr. Vol. III

p. 74. The behavior referral was submitted because Kindergarten Teacher and Special Education Teacher hoped that the input of District's Behavior Specialist, who is also a BCBA, would help get Student's behavior under control. See Tr. Vol. II p. 38-39. Student was exhibiting disruptive and aggressive behaviors in the general education kindergarten classroom, but no help was provided immediately. See Tr. Vol. II p. 43-35.

15. On September 7, 2023, Parents gave the District consent for the District Behavior Intervention Consultant to provide services for Student. See P. Ex. p. 362; Tr. Vol. V p. 92-93. Parents were told that District's Behavior Specialist would observe Student and create a Behavior Intervention Plan ("BIP") to help improve Student's behavior. See Tr. Vol. II p. 38-39; Tr. Vol. V p. 92-93.

16. On September 13, 2023, the IEP team met to update Student's IEP academic goals and create behavioral goals that were to be noted on a behavioral plan and added to Student's file (the "September 2023 IEP"). See P. Ex. p. 12. Based on information from the BCBA, Mother, and school data, the IEP team, including Parents, amended her math goal to being able to count to 25 and her language arts goal to working on letter sounds, as she can already identify her capital letters at 92% accuracy. See P. Ex. p. 18. Her writing goal remaining tracing her name. *Id.* The September 2023 IEP did add Speech goals to improve her communication. See P. Ex. p. 22-23. Student's BCBA observed Student in the classroom and attended the meeting to help determine the best plan of action for Student's success in the classroom; Student's BCBA agreed to share Student's therapy plan with the IEP team with Mother's approval. See P. Ex. p. 12. The District worked with Student's BCBA to develop a plan for Student's RBT to come to school for two days per week (Mondays and Tuesdays) for four hours per day. See D. Ex. p. 95; P. Ex. p. 552-564. The IEP team submitted a circuit

referral to Easter Seals to trial an electronic AAC device for Student. See P. Ex. p. 18.

17. On September 13, 2023, Special Education Teacher's documentation reflects a good day with "ABA here." See P. Ex. p. 401. Student was able to successfully tact 24 of 26 uppercase letters when the RBT probed; she incorrectly answered "M" for "N" and "Q" for "U." See P. Ex. p. 557. She was able to remain quietly in place for group instruction for 5 minutes before starting to whine, and the RBT prompted her to mand for a break. See P. Ex. p. 557. The RBT blocked client from accessing restricted playground areas, as Student did not respond to instructions from the teachers present. See P. Ex. p. 557. Student answered with her name when asked in order to credit the lunch to the client's account. See P. Ex. p. 557. BCBA prepared a BIP draft for school. See P. Ex. 565-568.

18. On September 14, 2023, District's Behavior Specialist received the completed behavior referral from Special Education Teacher. See P. Ex. p. 350. From September 14 to October 12, 2023, the District conducted observations for a functional behavior assessment ("FBA"), and the observations resumed on December 4, 2023 and continued through March 28, 2024. See P. Ex. p. 27-34; P. Ex. p. 350-352, 388-407, 408-518. Student's behaviors were recorded on daily log sheets from April 11, 2024 through May 16, 2024. See P. Ex. p. 519-546. District's Behavior Specialist noted she completed the FBA on October 12, 2023. See P. Ex. p. 350. The FBA noted that Student's private BCBA and Registered Behavior Technician ("RBT") provided "direct services two days a week," although these services were not included on Student's IEP. See P. Ex. 27 and 23. District's Behavior Specialist conducted interventions with Student and modeled for the paraprofessional and Special Education Teacher on October 25 and 26, 2023. See P. Ex. 350. Special Education Teacher testified that District's Behavior Specialist completed Student's FBA and BIP. See P. Ex. p. 375-387, 408-

515; Tr. Vol. III p. 74-75, 98-99.

19. Between October 2 and 17, 2023, Student's BCBA and RBT were in the classroom with Student for four hours on two days a week, and no injurious behavior incidents were noted between October 2 and 17, 2023, except one on October 10th prior to the arrival of the RBT. See P. Ex. p. 364-365, 552-564; Tr. Vol. III p. 83-88, 94. The purpose of their presence was to "allow the RBT to provide assistance and training during [Student's] morning group instruction, lunch, recess, and library time." See P. Ex. p. 552. During this time, Student was able to maintain an appropriate scripting volume and remain on the rug with peers during story time, gathered her own food in the lunch line, and practiced squeezing a sensory toy instead of engaging in aggressive behavior. See P. Ex. p. 553. The RBT also implemented a token board for non-preferred tasks at the table, edible reinforcement for appropriately participating in group activities, and generalized manding. See P. Ex. p. 552. BCBA stated via email that, when she was present, she could "transfer stimulus control" to paraprofessional, so Student would respond positively to paraprofessional. See Tr. Vol. III p. 101-102.

20. On October 2, 2023, ABA therapy occurred at the school, and the RBT was able to conduct non-preferred tasks with Student at the table when working for edible reinforcement, client greeted a teacher with a "hi," Student gathered her food from the lunch buffet, and RBT blocked Student from reaching for a peer's food. See P. Ex. p. 558. On October 3, 2023, ABA therapy occurred at school, and Student manded for "yogurt," "chips," and a "brownie" when asked what she wanted and was able to remain quietly scripting on the rug for story time for 7 minutes and 54 seconds. See P. Ex. p. 559.

21. On October 9, 2023, ABA therapy was conducted in the classroom, and Student's paraprofessional shadowed. See P. Ex. P. 560. Prior to the arrival of the RBT, Student had

been whining and had grabbed the paraprofessional once. Id. RBT had Student take a sensory break and then return to the table for the non-preferred task. Id. During group instruction, Student was required to sit in a chair and attend to a book with her peers, and Student stayed in her chair for the duration of the book, which was 9 minutes and 5 seconds. Id. Student manded for swinging, and chips, brownie and yogurt when asked what she wanted. Id.

22. On October 10, 2023, ABA therapy occurred in Student's classroom, with Kindergarten Teacher and 12 peers. See P. Ex. p. 560-561. Student had grabbed paraprofessional twice prior to the ABA session. See P. Ex. p. 561. When Kindergarten Teacher was giving instruction, Student sat in a chair instead of on the rug to prevent touching, Student completed non-preferred tasks at the table using a token board, Student independently manded for items from her lunchbox at lunch, and Student remained quietly scripting on the rug for story time of 10 minutes and 44 seconds. Id. Student displayed some unusual behaviors of crying and grabbing her face with no observable antecedent, but the RBT was able to prompt Student for a sensory break and got her to calm down. Id.

23. On October 16, 2023, Student received ABA therapy in the classroom with the paraprofessional shadowing the RBT; Kindergarten Teacher and 11 peers were present. See P. Ex. p. 562. RBT used Student's circle time binder to keep Student engaged in circle time, and Student repeated the date. Id. Student remained quiet in her chair for story time. Id. Student completed non-preferred tasks at the table with edible reinforcement. Id. When Student whined after several high effort responses, RBT prompted Student to take a break, and Student hit herself in the head, squeezed her thighs, and bit the back of her own hand during the sensory break with no observable antecedent. Id. RBT prompted Student to

squeeze sensory toys instead of self-injuring. Id. During recess, Student hit herself on the head forcefully three times with no observable antecedent. Id. Student used a spoon to eat mashed potatoes at lunch and independently manded for items from her lunchbox. Id.

24. On October 17, 2023, Student received ABA therapy in the classroom setting with Kindergarten Teacher and 12 peers present, and two paraprofessionals shadowed the RBT. P. 563-564. Student completed non-preferred tasks at the table with edible reinforcement with RBT modeling the use of short sentences when giving instructions. See P. Ex. p. 563. Student regulated her volume when a teacher told the entire room to be quieter. Id. The paraprofessional worked with Student on non-preferred tasks at the table after lunch, and the RBT observed to provide feedback. Id. Student began to whine and furrow her brow, and then Student grabbed the paraprofessional and began crying. Id. RBT prompted Student to say “break” and removed demands. However, the paraprofessional continued to place demands on Student such as “pick up that paper,” or “look at me and take a breath,” and Student responded by gritting her teeth and hitting herself in the head. Id. RBT removed the client from the table for a sensory break to de-escalate and had her squeeze a sensory ball instead of hitting herself. Id. The episode lasted 3 minutes 30 seconds before Student calmed, and RBT transitioned Student to the library where Student attended to the story with low volume scripting. Id.

25. Kindergarten Teacher testified that the ABA sessions were distracting and disruptive to the learning environment in the general education setting. See Tr. Vol. II p. 127-129; Vol. III p. 85. Kindergarten Teacher testified that the RBT conducted child-led ABA therapy during instruction time, and Student wandered around the room while the therapist praised Student for following instructions like, touching her nose. See Tr. V. II p. 72, 127-

129. During ABA therapy, Student was not engaged in instruction, and other children were watching Student instead of instruction. See Tr. Vol. II p. 127-129. Student is taught reading with CKLA in the general education classroom. See Tr. Vol. I p. 13.

26. Special Education Teacher also testified having Student's ABA therapy sessions conducted while Kindergarten Teacher was teaching was very distracting, in a different way from Speech or OT pushing in because they were two extra people and having conversations between themselves. See Tr. Vol. III p. 85-93. Special Education Teacher testified that ABA therapy was conducted while Kindergarten Teacher was trying to teach. See Tr. Vol. III p. 88-90. Special Education Teacher understood that ABA therapists were to collaborate with District staff and show staff effective techniques for teaching and working with Student so that goals and techniques could be aligned between home and school; however, that did not occur. See Tr. Vol. III p. 88-90. The District offered that the ABA Therapist could come to the school during non-essential instruction time to work with Student outside the classroom, but an agreement was not reached. See D. Ex. p. 102-107. Special Education Teacher admitted Student's vocalizations and hitting or pinching are also distracting. See Tr. Vol. III p. 86-89. The Special Education Teacher asked how to calm Student when she became aggressive, but Special Education Teacher did not recall what the BCBA advised. See Tr. Vol. III p. 94-95.

27. On October 30, 2023, Student's IEP team, including her parents, met with Easter Seals on October 30, 2023 to discuss the AAC device for Student to trial. See D. Ex. p. 103-106; Tr. Vol. V p. 82-83. The group decided that Student would trial an iPad with the communication app., TouchChat. See P. Ex. p. 55; D. Ex. p. 122; Tr. Vol. II p. 255; Tr. Vol. V p. 124. Easter Seals delivered the trial iPad with the appropriate app to the District on or about

November 9, 2023. See D. Ex. p. 113; Tr. Vol. II p. 255. Mother recalling Student's own AAC being given to her in January of 2024, which was consistent with the approximation from Kindergarten Speech Therapist. See Tr. Vol. V p. 83; Tr. Vol. II p. 255-256. The parties disputed regarding whether Student's AAC was broken for periods of time. A check-in/check out log reflected that Student's AAC was broken from April 16, 2024 to May 14, 2024, and this hearing officer finds it to be reliable. See P. Ex. p. 72-73; Tr. Vol. I p. 21-22. CBI Teacher testified that she reverted to visuals when the AAC was broken. See Tr. Vol. I p. 21.

28. On November 2, 2023, Mother emailed the District that she was withdrawing the consent for District's Behavior Specialist to work directly with Student that had been given on September 7, 2023. See D. Ex. p. 110. District's Behavior Specialist discontinued observations of Student accordingly and did not finalize or implement a Behavior Improvement Plan ("BIP") for Student, although data had been accumulated for Student during the three months. See P. Ex. p. 350.

29. Mother's email dated November 15, 2023 reflects that she reinstated consent for McCallum to work directly with Student within two weeks of withdrawing consent.

30. Based on emails dated November 14-15, 2023, Special Education Teacher created a BIP draft around that time that she discussed with Mother over email after consulting with Student's BCBA, but the BIP was not discussed in an IEP meeting. See P. Ex. p. 30-34; D. Ex. p. 92-94, 118; Tr. Vol. III p. 98-103. Special Education Teacher testified she used the BCBA's Behavior Plan to guide hers, and she got the triggers and antecedent for behaviors from the data collected at school. See P. Ex. p. 30; Tr. Vol. III p. 103-104. Special Education Teacher testified she implemented the BIP she created in consultation with Parent and Student's BCBA with fidelity. See P. Ex. p. 30-34; Tr. Vol. III p. 36, 99-101. It targeted the behaviors of:

(1) Verbal Scripting Volume: singing or scripting loudly during inappropriate/quiet times; (2) Physical Aggression/Frustration/Tantrum: engaging in bodily contact that causes harm or injury to another person. This may include hitting, kicking, shoving, pinching, biting, or any form of contact inflicting physical harm on others; (3) Self-Injurious Behavior: engaging in bodily contact that causes harm or injury to self. This may include hitting, pinching, or any form of contact inflicting physical harm on self; (4) Eloping Within the Classroom or Designated Area: When Student attempts to leave or leaves the designated area without authorization, including: the boundaries of the Kindergarten playground, out of her chair at inappropriate times in the classroom, not remaining; (5) Disrobing: Removes clothing items (shoes and socks specifically) in settings or situations during the school day; and (6) Inappropriate Touching: Any form of using one or both hands to touch or rub genital area. P. Ex. p. 30.

31. On November 28, 2023, the IEP team reconvened at the request of Parents (“November 2023 IEP”). See P. Ex. p. 35, 38. Special Education Teacher attended the IEP meeting; CBI Teacher was not included. See P. Ex. p. 49; Tr. Vol. I p. 38. The Community-Based Instruction (“CBI”) classroom offers a functional curriculum, less sensory stimulation, a smaller class size, and more on-on-one instructional time. See Tr. Vol. I p. 11; Tr. Vol. VI p. 74. Parents opposed Student spending time in the CBI classroom, the IEP team considered the request but ultimately determined that Student would benefit from time in the CBI classroom at the November 28, 2023 meeting. See P. Ex. p. 35. Parents requested a home-school communication sheet to be sent home daily because Student cannot communicate with Parents regarding her day at school. See P. Ex. p. 35. The IEP team amended the IEP to provide Student with 120 minutes per week of direct instruction in the CBI classroom (30

minutes per day) in order to access the STAR curriculum, a functional and academic curriculum based on ABA principles and designed for students with Autism; the hope was time in the CBI classroom would address Student's behaviors. P. Ex. 35-37, 42, 44, 48; Tr. Vol. I p. 36; Tr. Vol. VI p. 71-72. The IEP team directed Special Education Teacher with the support of the District's behavior specialist, to develop a BIP. See P. Ex. p. 35. Student's BCBA was to provide documentation to help create the BIP. Id. As described above, Special Education Teacher used the therapy plan shared by Student's BCBA to draft a BIP. See P. Ex. p. 30; Tr. Vol. III p. 103. The least restrictive environment page of this IEP states: "the child's behavior significantly impacts his or her learning, or that of others. Small group instruction is necessary. Needs can't be achieved in the General Ed. setting. Individualized instruction is needed to facilitate learning. A more structured environment is needed." See P. Ex. P. 50; Tr. Vol. I p. 39. The IEP team also determined "that a high-tech [Augmentative or Alternative Communication ("AAC")] device with TouchChat is appropriate for [Student] to increase communication skills." P. Ex. p. 42-43; Tr. Vol. I p. 35-36.

32. CBI Teacher has her Masters in Special Education and has been teaching special education for fifteen years and CBI since 2019. See Tr. Vol. I p. 10. CBI Teacher became Student's folder-holder at the end of the 2023-2024 school year, which meant she was then responsible for implementing Student's IEP goals and objectives. See Tr. Vol. I p. 10, 32-33. CBI Teacher first testified that Student started coming to the CBI classroom "about the end of October last year" because Student was not able to sit through instruction in the general education classroom, but after reviewing the November 28, 2023 IEP, CBI Teacher recalled that was when Student started coming to the CBI classroom. See P. Ex. p. 38; Tr. Vol. I p. 15-16. The CBI classroom utilizes the STAR curriculum, an ABA based curriculum for Students

with Autism and utilizes the PCI reading program to teach reading, instead of the program utilized in general education because PCI is whole language based, which she sees as better for teaching a nonverbal Student to read. See Tr. Vol. I p. 11-15. The STAR curriculum teaches pre-academic skills and functional skills but not reading and math. See Tr. Vol. I p. 34-35. CBI Teacher testified Student could count from one to twenty when she entered kindergarten but could not exhibit her skills on command. See Tr. Vol. I p. 18-19. Student could receptively identify shapes and colors. See Tr. Vol. I p. 18. CBI Teacher started discrete trials with Student in October of 2023. See Tr. Vol. I p. 19. CBI Teacher would vocally communicate with Student and also use flash cards, visuals, and the AAC device. Tr. Vol. I p. 19. CBI Teacher believed Student got the AAC device, an iPad with TouchChat, around the end of October of 2023. See Tr. Vol. I p. 19-20. Student would communicate using the AAC sometimes, and the Speech therapist helped the CBI Teacher learn the device. See Tr. Vol. I p. 20-21. CBI Teacher attested that Student was able to master some academic skills, but she did have some disruptive, aggressive, and eloping behaviors and would be taken for a break when she exhibited frustration. See Tr. Vol. I p. 47, 52, 68-77, 80. The CBI Teacher testified that Student would also go to the resource teacher's room for assessment of her progress toward goals; the resource teacher was consulting with the paraprofessional. See Tr. Vol. I p. 37-38. The CBI Teacher was given the BIP when Student first started coming to her. See P. Ex. p. 72; Tr. Vol. I p. 72-73.

33. After Christmas, District's Behavior Specialist provided Kindergarten Teacher intervention services to address Student's behavior. See Tr. Vol. II p. 39. Kindergarten Teacher did not recall receiving or implementing Student's Behavior Intervention Plan. See Tr. Vol. II p. 39-40.

34. On March 15, 2024, the IEP team met (the “March 2024 IEP”), including Mother, for Student’s annual review to review and revise Student’s IEP “to address any lack of expected progress toward the annual goals and in the general education curriculum . . . , the results of any reevaluation . . . , the information about the child provided to, or by, the parents . . . , [and] the child’s anticipated needs.” P. Ex. p. 52. Parents provided the following input:

[Student’s] parents were both present and participated in the Annual Review meeting with the special education team in person. [Student’s] mother noted that she feels like [Student’s] behavior has made improvements at home since they started [a] different medication. She also voiced that she would like the district behavioral specialist to rejoin the team to help increase positive behavior in the school setting. The speech/language therapist gave [Student’s] parents some more information on using her AAC device at home. Parents noted that she has been using more words/phrases/sentences verbally at home too, which the school has also seen. Overall, [Student’s] parents would like for her to remain in the general education classroom as much as possible with some continued support from the CBI classroom.

P. Ex. p. 54. The IEP team reported:

Outside of the school setting, [Student] receives ABA therapy at her home. Over the course of her kindergarten school year, Student had a 1:1 paraprofessional in the general education classroom. However, after continuous behavioral data was collected, it was determined that [Student] should spend some of the time in the CBI classroom in order to receive some instruction in a more controlled environment where a behavior plan could be better implemented at the time. This time in the CBI classroom has been very helpful for [Student] and she has made some improvements with task demand in that setting. The general education classroom still continues to be a stressful area for her and negative behaviors continue to occur with task demands. The behaviors include: scratching herself and staff/peers, pinching herself and staff/peers, hitting herself in the head repeatedly, biting herself and staff, spitting, growling noises, shoving the table and objects, throwing objects and/or slamming them down.

P. Ex. p. 55. The IEP team increased Student’s time in the CBI classroom because Student would “become overwhelmed (crying/yelling/aggressive behaviors) toward self and others” in the general education classroom, the team agreed that the CBI classroom was beneficial for Student, and Student’s IEP was modified to add more instructional time in the CBI

classroom (from 8:45 a.m. until 10:30 a.m.). See P. Ex. p. 52, 57. After March 15, 2024, Student would receive 30 minutes per day of direct instruction in reading, 30 minutes per day of direct instruction in math, and 30 minutes per day of direct instruction in behavior daily in the CBI classroom. See P. Ex. p. 57, 65; Tr. Vol. I p. 39-41. Student was to remain in the general education setting for the remainder of the day except when she was removed for therapies. See P. Ex. p. 54. Also, at the March 15, 2024 IEP meeting, the IEP team reviewed Student's progress toward her goals and noted that Student did not master her academic goals including counting independently from 1-25, counting with 1:1 correspondence, verbalize the most common sound for each letter, trace her name, or independently navigate her AAC. P. Ex. p. 58. However, Student was able to identify numbers 1-25 at 60% accuracy and she correctly identified the letters when given the sounds for "a," "z," "t," and "d," but she was unable to even finger-trace her name. See P. Ex. p. 58. The IEP team revised Student's goals. In math, Student's goal became "given a set of manipulatives (blocks, counting bears, etc.), Student will exhibit a motor pattern of placing the requested amount of manipulatives into a cup or bowl independently for an accuracy of 80% across 4 out of 5 trials, as measured by observation and performance by 3/15/2025." See P. Ex. p. 61. In behavior, Student's goal became "with movement breaks and the use of self-regulation strategies, Student will demonstrate the ability to attend to a task for an average of 75% of intervals in a 20-minute class period as measured by data sheets and observations by 3/15/2025." See P. Ex. p. 62. For OT, Student's goal became to "improve sensory motor regulation, fine motor skills, visual motor, bilateral coordination and motor planning skills to increase independence and accuracy with following self-care and classroom routings, participating in writing or coping skills, and using classroom supplies and materials effectively as measured by mastery of $\frac{3}{4}$

short term objectives by 3/14/2025,” with one of her objectives being to improve self-regulation by choosing a sensory input/activity or break. See P. Ex. p. 62. Her speech goals became: (1) “given multisensory cues, [Student] will request by using any form of language (spoken language, sign language, and/or augmentative symbols/device) while playing or engaging in other motivating activity given achievement of the following objectives by the next annual review of progress by 3/15/2025” and (2) “given access to high-tech AAC device, [Student] will independently navigate/access device as measured by completion of the following objectives by 3/15/2025.” See P. Ex. p. 63-64. The objectives became (1) “given minimal cues, [Student] will carry her AAC system with her for 3 transitions per school day across 4 out of 5 days in a week as measured by classroom observation, teacher interviews, and data collection across 3 consecutive data sessions by 3/15/2025”; (2) “given a verbal yes/no appropriate questions, Student will answer yes/no by selecting “yes” or “no” using AAC device in 4 out of 5 opportunities measured by classroom observation, teacher interviews, and data collection across 3 consecutive data sessions by 3/15/2025”; and (3) “given a group of objects, Student will count the objects (1-10) using augmentative symbols or device with minimal cues in 4 out of 5 opportunities as measured by classroom observation, teacher interviews, and data collection across 3 consecutive data sessions by 3/14/2025.” P. Ex. 63-65. There was no writing goal. P. Ex. 61-65. The team determined that extended school year (“ESY”) services were not appropriate. P. Ex. 61. Documentation reflects the Parents signed a second consent to allow the District’s Behavior Specialist to assist the Special Education Teacher with Student’s Autism-related maladaptive behaviors, and the IEP team scheduled another meeting to discuss Student’s first grade year. P. Ex. p. 52, 54, 57. Mother noted that Student’s behavior seemed better since new medication was

started. See P. Ex. p. 54. Parents did not sign the March 2024 IEP. See P. Ex. p. 60.

35. On March 25, 2024, a speech evaluation was attempted for Student, but the examiner determined that testing would not be appropriate for Student at that time because she appeared to have difficulty attending to structured tasks and would only respond to prompts from her mother. See Tr. Vol. III p. 9. The examiner recommended 180 minutes of speech therapy weekly for the improvement of Student's language and functional skills. See P. Ex. p. 170.

36. On April 3, 2024, Parents signed a new consent form for District's Behavior Specialist to work directly with Student. See P. Ex. p. 69, 350; D. Ex. p. 13. District's Behavior Specialist resumed collecting data on Student's behavior on April 4, 2024, and she observed and intervened with Student through May 17, 2024. See P. Ex. p. 350-352; D. Ex. p. 2.

37. On April 26, 2024, the IEP team, including Parents, met at Parents' request to review and revise Student's IEP in preparation for first grade (the "April 2024 IEP"). See P. Ex. p. 74-88. Parents submitted the following concerns to the team: (1) taking Student to the restroom every hour; (2) RBT training for the paraprofessional; (3) modified assignments provided directly in the classroom by general education or resource teacher; (4) determining how Student's skills and grades are assessed; (5) resource teacher pushing into general education and working with Student on curriculum directly; (6) adding joint attention as an OT goal; (7) reporting Student's trials and scores to track progress in Speech; (8) implementing Speech in direct sessions with Student; (9) identifying functional communication in Speech; (10) replacing/repairing AAC and initiating AAC goals; (11) finalize behavior plan. P. Ex. p. 74. In addition, Parents requested Student's BCBA and/or RBT be allowed to come into the school setting to provide Student ABA therapy throughout

the school day, but the District members of the IEP team stated the “school district provides the STAR program which is based on ABA principles and uses ABA strategies as [Student’s] curriculum in the CBI classroom.” P. Ex. p. 70. The District did not state that Student was making progress on her IEP goals. P. Ex. p. 70. Instead, the IEP team stated the Student “struggles significantly in the area of joint attention and this negatively affects participation in the school setting . . . the IEP team and parents determined that [Student] would benefit from an IEP goal to track progress in joint attention.” See P. Ex. p. 70, 75. “OT will add an IEP goal with the focus on enhancing the child’s ability to engage in joint attention, which is important for developing social interaction, language, and learning skills. Joint attention may be measured by the following observations: Responding to a caregiver’s voice, Shifting focus between people and objects, Identifying and describing their emotional states and/or that of others, Expressing enjoyment and interests, Recognizing what others are suggesting through gaze and gestures, Using the emotions of others to steer behavior in social interactions (i.e. showing empathy or praising others).” P. Ex. p. 75. “If [Student] is unable to cope in the general education setting with supports and services being provided (aggression toward self/peers/adults, creaming/crying), she will then be provided the services and supports needed in the school’s CBI classroom at that time. See P. Ex. p. 75. In addition, the IEP team agreed to “repair the AAC device in order to keep goals in place.” P. Ex. p. 70, 75. The IEP team did not change Student’s special education minutes. See P. Ex. 85. The IEP team also reported that Student met her Speech goal for spontaneous single-word requesting, so that goal was discontinued. See P. Ex. p. 70. On her kindergarten report cards, Student received mostly “1s,” which meant “minimal progress.” See P. Ex. p. 303; Tr. Vol. 43. Student was able to name her upper- and lower-case letters, could name numbers 1-20, and could name two

dimensional shapes, but she did not know her letter sounds at the end of school in the spring of 2024. See P. Ex. p. 303-307; Tr. Vol. 43-44. Mother did not sign the April 2024 IEP. See P. Ex. p. 74-80; Tr. Vol. V p. 165-166.

38. Mother testified she was frustrated at the April 2024 IEP meeting because Kindergarten Teacher never worked one-on-one with Student, Student had regressed from being potty trained to being back in pull-ups, there was no BIP, Student's progress was not being tracked, the paraprofessional never received RBT training, and the paraprofessional had missed a large number of days, which affected Student negatively. See Tr. Vol. V p. 160-167; P. Ex. p. 70. Mother continued to ask for ABA therapy in the school setting, but the IEP team was not agreeable to that option in the manner that Mother requested. See Tr. Vol. V. 161. Student's AAC was broken, and the District agreed to repair it to keep goals in place. See Tr. Vol. V p. 161-163; P. Ex. p. 70. Mother testified Kindergarten Teacher stated that Student howls and cries all the time making it hard to teach. See Tr. Vol. V p. 155. In the fall of 2023 and continuing into the spring of 2024, Student would come home crying. See Tr. Vol. V p. 158. Mother felt that ABA therapy in school was needed to give Student a "fair shot" at general education. See Tr. Vol. V p. 167. At home, Student could count to 25. See Tr. Vol. V p. 173. Mother testified that Student's behavior has reflected that Student comprehends the content of conversations since she was three or four, such as Student becoming sad when Mother was discussing one of her brother's accomplishments but becoming happy again when Mother then discussed one of Student's accomplishments. See Tr. Vol. IV p. 154-155.

39. On May 8, 2024, Student was physically restrained after hitting a peer and slapping a teacher. See P. Ex. p. 538-539. Again May 16, 2024, Student was physically restrained after slapping, pinching and spitting at peers and adults, as well as injuring

herself. See P. Ex. p. 547-549.

40. During her kindergarten year, Student's IEPs provided her 120 minutes per month of direct and consultative speech therapy minutes. See P. Ex. p. 9, 23, 48, and 58. Student's evaluation in 2022 recommended Student receive 120 minutes of Speech per week. See P. Ex. p. 179; Tr. Vol. II p. 272. Student's Kindergarten Speech Therapist became certified in the summer of 2024 after working with Student through kindergarten as a Clinical Fellowship Year under the supervision of LEA, who is a speech therapist. See Tr. Vol. II p. 159-161. Kindergarten Speech Therapist served between 35 and 40 students during the 2023-2024 school year. See Tr. Vol. II p. 162, 202. She appeared anxious or defensive during her testimony, and there were some inconsistencies, such as her testimony that Student received 120 minutes of speech per week when it was 120 minutes per month. See Tr. Vol. II p. 164-165, 166-167, 170-172, 177-179, 181-183, 193-194, 200-202, 214, 216, 273-275. Kindergarten Speech Therapist was aware that Mother had complained about her. See Tr. Vol. II p. 235-236. Kindergarten Speech Therapist testified that Student has deficits in receptive and expressive speech with limited verbal output. See Tr. Vol. II p. 163. Kindergarten Speech Therapist stated Student's receptive, expressive, and pragmatic language were all profoundly delayed. See Tr. Vol. II p. 191; P. Ex. p. 175. However, she observed Student speak in one-to-two-word phrases for highly motivating items like food or tickles. See Tr. Vol. II p. 163-164. Kindergarten Speech Therapist had not worked with TouchChat before the Easter Seals consult for Student in the fall of 2023 but was given videos to watch to learn it. See Tr. Vol. II p. 164-165. Consistent with Mother's testimony, Kindergarten Speech Therapist testified that Student got her own AAC about eight weeks prior to March 15, 2024, and before that, Student had a loaner AAC from Easter Seals. See

Tr. Vol. II p. 165-166, 239-240. Kindergarten Speech Therapist testified that there were times when Student imitated or independently navigated the device. See Tr. Vol. II p. 167. Kindergarten Speech Therapist did not develop Student's March 2024 IEP goals for speech/language. See Tr. Vol. II p. 170, 206, 210. She worked with Student on the concept of using the AAC as her voice by speaking in one-to-two-word phrases to make familiar requests, such as Marshmallow, peanut butter, Pinkalicious. See P. Ex. p. 297-305; Tr. P. II p. 225. She testified Student was not independently requesting items on her AAC by May of 2024. See P. Ex. p. 294-305; Tr. Vol. II p. 227-230. Kindergarten Speech Therapist misinterpreted and misstated Student's achievement on the goal regarding phonetics; Student cannot relate to phonetics. See P. 297-305; Tr. Vol. II p. 230-231. She testified that she does not log all her time because she does not bill Medicaid, but she actually spent more time on Student than allotted by the IEP or than her logs reflect (420 minutes instead of 1,080 minutes for the 2023-2024 school year). See D. Ex. p. 45-72; P. Ex. p. 189-202; Tr. V. II p. 213-221, 246-247, 295. Parent Ex. p. 189 was not created by Kindergarten Speech Therapist Boyer, and she testified it does not accurately reflect therapy sessions with Student and that her weekly schedule better reflects therapy time with Student than the logs. See P. Ex. 189-202; D. Ex. 45-72; Tr. Vol. II p. 243-247. Student's RBT notes reflecting that on September 13, 2023, the RBT witnessed Kindergarten Speech Therapist working with Student in the lunchroom. See P. Ex. p. 557-558; P. Ex. p. 194. Also, on April 4, 2024, Kindergarten Speech Therapist emailed Parents about working with Student in the classroom on that date, but there is no log entry. See D. Ex. p. 128. Kindergarten Speech Therapist testified she provided Student two twenty-minute direct therapy sessions per week, in addition to consultative services with Student's teachers. See Tr. V. II p. 216. At first,

Kindergarten Speech Therapist would push into Student's kindergarten classroom, but then, she saw Student in the lunchroom or on the playground. See Tr. Vol. II p. 262. She pulled Student from CBI time for speech therapy because that was nonessential time for kindergarten. See Tr. Vol. II p. 241-242. Kindergarten Speech Therapist collaborated with CBI Teacher on which skills Student was achieving. See Tr. Vol. II p. 252. Kindergarten Speech Therapist Boyer initiated Student's AAC referral. See Tr. Vol. 252-253. At the March 2024 IEP meeting, she gave Parents more information on using the AAC, and Mother stated that Student has been using more words/phrases/sentences verbally at home too, and the District had noticed that too. See P. Ex. p. 54, 60. Student's AAC was broken from April 15, 2024 to May 14, 2024. See P. Ex. p. 304; Tr. Vol. II p. 226. Because Student's behavior interfered with therapy through the end of the 2023-2024 school year, District recommended that Student continue to receive 120 minutes of Speech per month, although Student did not achieve her Speech goals in the 2023-2024 school year. See P. Ex. 47-48, 58, 76; Tr. Vol. II p. 278-287. Kindergarten Speech Therapist testified she struggled to find motivators for Student. See Tr. Vol. Vol. II p. 163. Kindergarten Speech Therapist did not recommend Student receive Speech over the summer; she knew Student would receive Speech at Pediatrics Plus over the summer. See Tr. Vol. II p. 282.

41. For six weeks during the summer of 2024, Student received Speech with Ped's Plus Speech Therapist at Pediatrics Plus, and her first goal was to have Student trust her. See Tr. Vol. III p. 8, 18. At the beginning of summer, Student was reluctant to come to speech therapy and would sometimes hit, yell or run from Ped's Plus Speech Therapist. See Tr. Vol. III p. 11. She testified that Student's sessions were spent working on the use of the AAC, an iPad with TouchChat. See Tr. Vol. III p. 11-12. Student's AAC did not have a lot of functional

items on it for Student, such as there was no bathroom button easily accessible to Student, so Ped's Plus Speech Therapist made some changes to allow Student quick access to icons for food, bathroom, water, and her preferred tasks because evidence shows preferred tasks are what kids will ask for first, verbally or on an AAC. See Tr. Vol. III p. 12. She modeled using the AAC for Student over and over by having Student ask for things she loves, like the show Pinkalicious. See Tr. Vol. III p. 13. In early June, Student might use her AAC twice in one session with prompting, but by the end of July, Student was using her AAC to request things more than ten times in a session. See Tr. Vol. III p. 13. Student learned to use the AAC to request a restroom break, which was important to stop accidents that had occurred because she was unable to communicate that she needed the restroom. See Tr. Vol. III p. 13-14, 24-25. Student used the AAC to request water a few times. See Tr. Vol. III p. 25. Student's use of the AAC helped decrease Student's negative behaviors, and there were very few days when Student would run around the room, which at that point seemed to be more sensory seeking than from frustration. See Tr. Vol. III p. 14. Student's sessions were thirty to sixty minutes each and three times per week; Student received a totally of 180 minutes of Speech weekly. See Tr. Vol. III p. 14-15. Student received thirteen sessions over the course of the summer. See Tr. Vol. III p. 15. Ped's Plus Speech Therapist worked on Student using the AAC to request a favored activity or item, joint attention, and following one-step directions. See Tr. V. III p. 13, 17-22. She testified the goal might be "harder to do in a school setting" because requesting cartoons was not an academic activity. See Tr. V. III p. 17. Student fully met the goal of requesting items using her AAC. See Tr. V. III p. 13, 17-22. She was able to follow one-step directions 50% of the time, which was progress for her, but her goal was to follow them 80% of the time. See Tr. Vol. III p. 23. Student exhibited joint attention with 50% accuracy.

See Tr. Vol. III p. 23-25. Other goals were attempted but stopped if Student was not participating. See Tr. V. III p. 21-26. Ped's Plus Speech Therapist testified that she heard Student made one-word utterances but not two-word utterances. See Tr. V. III p. 26. Student would respond to her name. See Tr. Vol. III p. 21. She testified that, receptively, Student appears to understand most of what is said to her, particularly if it is something of interest to her. See Tr. Vol. III p. 16. Pediatrics Plus recommended Student receive 180 minutes of Speech weekly. See P. Ex. p. 170; Tr. Vol. II p. 271.

42. First Grade Speech Therapist provided Speech to Student in the fall of the 2024 school year and implemented the April 2024 IEP, particularly working on two-word phrases like "more bubbles." See Tr. Vol. VII p. 14, 28, 30-33. She was a part-time contractor for the District; she saw Student one on one from 8:30 a.m. to 9:00 a.m. See Tr. Vol. VII p. 12-13, 22, 39. At first, she saw Student in the CBI classroom, so Student could become familiar with her, followed along with Student, and allowed Student to choose what to play with. See Tr. Vol. VII p. 26-27. First Grade Speech Therapist was not familiar with TouchChat, but CBI Teacher would figure out how to add items to the device and taught First Grade Speech Teacher. See Tr. Vol. VII p. 22. Student already knew how to use the AAC when she began working with Student, and Student did not use it frequently, although she carried it at all times. See Tr. Vol. VII p. 27-28. First Grade Speech Therapist spoke to Student verbally would assist Student in responding using the AAC. See Tr. Vol. VII p. 28. She testified she struggled to find motivators for Student, and Student lost attention on motivators quickly. See Tr. Vol. VII p. 20-21. She testified that 120 minutes per month of direct speech therapy was an appropriate amount for Student due to her lack of attention and unwillingness to participate. See Tr. Vol. VII p. 15, 17-18. First Grade Speech Therapist added the phonics

keyboard to Student's AAC at the request of the CBI Teacher. See Tr. Vol. VII p. 15. Student would verbalize "want bubbles" or "more bubbles," for "want" or "more," and with navigation assistance from First Grade Speech Therapist, and Student could use the AAC to request "more bubbles" or "want bubbles." See Tr. Vol. VII p. 20-22, 30, 36. First Grade Speech Therapist had six 20-minute sessions with Student in two months; Student missed two scheduled sessions because she was absent or went on a field trip. See Tr. Vol. VII p. 35. She testified that Student could tolerate thirty minutes of Speech at a time. See Tr. Vol. VII p. 36. She did not believe Student was uninterested in Speech; Student came with her willingly. See Tr. Vol. VII p. 36-39, 45. Speech therapy should be continuous and across all settings for carryover. See Tr. Vol. VII p. 38. She did not observe that Student was capable of matching phonetic sounds to letters. See Tr. Vol. VII p. 42, 44-45.

43. In October of 2024, the parties held a resolution conference, and Parents were asking for Student's BCBA or RBT to come to school with her. See Tr. Vol. VII p. 26.

44. For the 2024-2025 school year, Student's First Grade Teacher has an elementary certification, a Master's degree in literacy education, and eleven years of classroom experience. See Tr. Vol. IV p. 9-10. She found out Student would be in her class a week before school started in August of 2024. See Tr. Vol. IV p. 11. First Grade Teacher gives a mini teach or model for the paraprofessional for what the paraprofessional needs to do with Student, and then Student's paraprofessional gives her intervention. See Tr. Vol. IV p. 15, 21; Tr. Vol. V p. 13-15, 28. First Grade Teacher stated this was the way Student was supposed to receive instruction per Student's IEP. See Tr. Vol. V p. 13-15. First Grade Teacher said Student does need to be in her class but needs a lot more direct instruction. See Tr. Vol. V p. 42. First Grade Teacher tells Student good morning and talks about the things Student will be learning

each day. See Tr. Vol. IV p. 21. First Grade Teacher did not know how to use Student's AAC; she relies on paraprofessional to do that. See Tr. Vol. IV p. 21-22. First Grade Teacher talks to Student, and Student responds on her device. See Tr. Vol. IV p. 21-23. First Grade Teacher testified that Student types out her answer on the AAC. See Tr. Vol. IV p. 23. Student is not in one of the RTI groups, and First Grade Teacher did not know if Student was on Lexia for reading. See Tr. Vol. IV p. 16. She said the First Grade Paraprofessional would know what Student is working on, but First Grade Teacher did not know. See Tr. Vol. IV p. 16-17. First Grade Teacher testified that Student responds to writing prompts like "would you rather have lunch with the president or the principal" by typing her answers on the AAC. See Tr. Vol. IV p. 23. First Grade Teacher testified Student types and spells the words if there are no pictures for the answers. See Tr. Vol. IV p. 24. First Grade Teacher testified that she thought Student knew her letter sounds, but she was not sure of her memory. See Tr. Vol. IV p. 27-28, 38, 104. She did not think Student could read words, could not count to 100, could not identify numbers. See Tr. Vol. IV p. 28. She did not know Student's reading level, if Student was tested for dyslexia, or Student's schedule. See Tr. Vol. IV p. 103; Tr. Vol. V p. 12. She testified Student was in her room from 8:10 a.m. to 10:30 or 10:45 a.m. and works with her paraprofessional during that time. See Tr. Vol. V p. 12-18, 24-27. Student eats lunch with the rest of her class, goes to recess with the class, activities with the class, and leaves at 2:00 p.m. because her bus leaves then, although school dismisses at 2:45 p.m. See Tr. Vol. V p. 31-32; 41-42, 100. First Grade Teacher testified that Student does get some of First Grade Teacher's time, but she gets ten minutes, not 20 minutes. See Tr. Vol. IV p. 16, 32; Tr. Vol. V p. 28-30. First Grade Teacher works with Student on CVC words, and Student does basically the same lesson as the other students but has her paraprofessional working with her. See Tr. Vol. IV p.

17, 96-99. Later, First Grade Teacher testified she worked with Student on letter identification and letter sounds with flash cards, sand, writing a letter, saying a letter, and saying the sound. See Tr. Vol. IV p. 32-33. First Grade Teacher knew Student was nonverbal but has heard Student count from one to ten for her, say her alphabet, and identify letters of the alphabet. See Tr. Vol. IV p. 20-21. She said she was supposed to administer the same assessments to Student, as other children in her class, including reading words out loud, and she did not recall making modifications. See Tr. Vol. IV p. 80. She thought Student tried to spell the words on her AAC. See Tr. Vol. IV p. 80. First Grade Teacher uses West Virginia Phonics as the reading curriculum for small groups and first testified it was approved on the ADE website until she reviewed the website, but she uses CKLA to teach large group reading. See Tr. Vol. IV p. 33-35, 61. First Grade Teacher testified she consulted with CBI Teacher in modifying assignments for Student. See Tr. Vol. V p. 59-60. First Grade Teacher did not know if Student had any problems in library, art, PE or STEM. See Tr. Vol. V p. 31-32. If First Grade Teacher had problems with Student, she would discuss them with the paraprofessional and CBI teacher. See Tr. Vol. V p. 31-32. Student has hit other children in the carpet area, she stims or makes noises, but the other children are used to the noises. See Tr. Vol. V p. 32-33, 39-40, 45. Student is supposed to be in First Grade Teacher's classroom as much as Student can tolerate, but Student is not in the classroom all day because Student takes sensory breaks. See Tr. Vol. IV p. 18-20, 50-51. First Grade Teacher asserts the IEP is being followed, but looking at the August 2023 IEP, she did not recognize that it was not the current IEP. See P. Ex. p. 8; Tr. Vol. 47-48. She did not know what Student's IEP said about whether Student was supposed to spend time away from her classroom. See Tr. Vol. IV p. 18-19, 47-48. First Grade Teacher did not know if Student spent time in the CBI classroom but thinks Student is

in the CBI room or sensory room when she is not in the first-grade class. See Tr. Vol. IV p. 19, 41, 49-51. OT sometimes pushed into her room to serve Student, but speech services were not pushed in. See Tr. Vol. IV p. 49. On the first day of her testimony, First Grade Teacher did not know if CBI Teacher was a CBI teacher or special education teacher, but on the second day of her testimony, First Grade Teacher asserted CBI Teacher teaches CBI. See Tr. Vol. IV p. 42; Tr. Vol. V p. 18. On the second day of her testimony, First Grade Teacher knew Student went to CBI, Speech, and OT. See Tr. Vol. V p. 21-22, 68. She testified Student sees Ms. Shelnut ("CBI Teacher"), Ms. Craig (a special education teacher), and OT. See Tr. Vol. V p. 30. First Grade Teacher testified that she gave Student a report card this year and kept up with Student's skills on a spreadsheet. See Tr. Vol. IV p. 42, 53. She testified Student made progress, but she did not bring any supporting data. See Tr. Vol. IV p. 88-91. Student's report card showed all "1s" for minimal progress See P. Ex. p. 306-307; Tr. Vol. IV p. 88-89. Student's first grade interim report card stated Student identified letters inconsistently; Student is making minimal progress in phonemic awareness, reading one syllable words, and spelling one syllable words; Student could count to ten and identify numbers one to 10, although the IEP stated Student could count to 20. See Tr. Vol. IV p. 111-113; P. Ex. p. 18, 189-689-A. Student counted to 10 verbally for First Grade Teacher but could not count to 20. See Tr. Vol. V p. 61. First Grade Teacher acknowledged Student is difficult to assess because of the way Student responds and if she is willing to do an assignment. See Tr. Vol. IV p. 108; Tr. Vol. V p. 39. Student could not read words but would locate letters on her device to sound them out. See Tr. p. 118-127. Student is able to stay in class longer compared to the beginning of the year. See Tr. Vol. V p. 43-44.

45. Student's ABA therapist, "BCBA," has a Masters in ABA and criminal justice, and

she has been practicing for five years. See Tr. Vol. I p. 91. She has worked with Student for two years. See Tr. Vol. I p. 91. ABA therapy needs to have multiple settings, so generalization happens. See Tr. Vol. I p. 117-118. The earlier in life that ABA intervention is provided the better, and BCB recommends 35 to 40 hours weekly for Student between the ages of two and eight. See Tr. Vol. I p. 121. ABA Therapy could be ineffective after age eight to 10. See Tr. Vol. I p. 121-123. ABA therapy is medically necessary for Student, as evidenced by the insurance company's approval of the service. See Tr. Vol. I p. 123. BCBA testified that Student made good progress during her first six-month treatment term, regressed during her second and third treatment term, and was making increased progress during her fourth treatment term. See Tr. Vol. I p. 92. BCBA recommended Student receive 25 hours per week of ABA therapy in home and school settings, but Student was only able to receive 9 hours weekly of ABA therapy after the District discontinued Student's ABA therapy at school. See P. Ex. p. 554. BCBA's documentation reflected that Student's skill acquisition decreased and behaviors regressed after the removal of ABA therapy from the school day; however, BCBA admitted the RBT was only in school with Student two days per week, for four hours per day, for two weeks in October of 2023 and that six months of regression could not have resulted from the cessation of that therapy. See P. Ex. p. 553; Tr. Vol. I p. 101, 111-114, 124-129. BCBA and RBT were not banned from the District buildings, but the District only offered short time frames that they were unable to provide, which made it seem they were forced out. See Tr. Vol. I p. 137-139. BCBA came for two of the four sessions, and only RBT came for the other two sessions. See Tr. Vol. I p. 129. BCBA was told that other children would get distracted and upset because Student would receive candy as reinforcers, and they did not receive candy, but BCBA never saw other children get upset when she was there, only the

paraprofessional became upset about the candy. See Tr. Vol. I p. 128, 143-144. BCBA responded that she would fade edibles, but Student was not ready for that yet. See Tr. Vol. I p. 145. The paraprofessional felt inferior to the RBT, was not comfortable learning from the RBT, and paraprofessional resigned. See P. Ex. 563-564; Tr. Vol. I p. 144-147. BCBA testified there were many things affecting Student's behavior, including Student's complex medical issues that occurred throughout her kindergarten year and continuing to date, as well as the addition of a new baby to the family soon after Student began kindergarten. See Tr. Vol. I p. 104, 125, 136. BCBA testified that if the District has an RBT working under a BCBA with Student that it would be the same service that BCBA Miller would provide. See Tr. Vol. I p. 150-151. BCBA stated doing ABA therapy in school is not actually teaching educational activities; ABA is to keep behaviors at low rates. See Tr. Vol. I p. 96-98. Student's ABA therapy progress report for the second 9 weeks of 2023-2024 reflects that "given flashcards and asked 'what number' [Student] was able to verbalize the numbers: 1, 2, 3, 4, 5, 6, 8, 9, 10, 13, 14, 15, 16, 17, 20" but missed 7, 12, 18, and 19. See P. Ex. p. 633, 636. On December 5, 2023, Student verbalized counting 5, 6, 7, 8, 9, 10 about 10 minutes after being asked to count. Id. Student was working on "more," "want," and "finished," using her AAC. See P. Ex. p. 638. Student has progressed in using the AAC as her voice but still uses vocal language as her primary form of communication. See P. Ex. p. 638; Tr. Vol. I p. 93. BCBA has worked with Student on potty training from the beginning, and Student mastered the skill two or three times but regressed likely due to some medical variables. See Tr. Vol. I p. 93. Student has made gains in social interactions with her siblings without challenging behaviors. See Tr. Vol. I p. 93-94. Student can attend to a task for fifteen minutes with reinforcement. See Tr. Vol. I p. 103. Student could label 24 of 26 alphabet letters correctly. See P. p. 557-564; Tr.

Vol. I p. 114-115. BCBA offered to sit with Kindergarten Teacher and help her assess Student's abilities, but she did not accept the help. See Tr. Vol. I p. 115. If Student has 45 instances of behavior, it suggests that the BIP has not been run to fidelity. See P. Ex. 363-368; Tr. Vol. I p. 105-107.

46. RBT worked with Student at Grow through the time Student received ABA therapy in the school setting. See P. Ex. p. 557-564; Tr. Vol. I p. 154, 163. She showed the kindergarten paraprofessional strategies that worked for Student and having paraprofessional conduct them, but the paraprofessional was not receptive and quit. See P. Ex. p. 563-564; Tr. Vol. I p. 157-158. At the April 2024 IEP meeting, the District explained that if Student's BCBA/RBT came into the school then the District would have to allow other private therapists to enter. See Tr. Vol. I p. 158-159. During the time that RBT was in the school, RBT saw Student engaging in behaviors in response to demands being placed without supports being provided, such as her token board. See P. Ex. p. 566; Tr. Vol. I p. 159-160. RBT was successful in supporting Student's participation in library and lunch. See Tr. Vol. I p. 160. Student's precursor behaviors were never acknowledged by any paraprofessional or other people helping, which resulted in behavioral episodes. See Tr. Vol. I p. 162. After October 2023, The District only offered small 15-minute segments of time, which could not work for BCBA or RBT scheduling or billing, so they felt that the District did not want them in the school. See Tr. Vol. I p. 99-101.

47. Mother testified that Student has idiopathic arthritis in her jaw, her shoulders, her knees, her ankles, and her wrists, which cause her chronic pain. See Tr. Vol. V p. 174; Tr. Vol. VI p. 11-17. Student takes several medications daily, and those medications were modified frequently during Student's kindergarten year. See Tr. Vol. V p. 174-177; Tr. Vol.

VI p. 11-17. According to Mother, Student claws at her joints, which is consistent with testimony from District staff that Student would claw herself until she bled. See Tr. Vol. III p. 174, Tr. Vol. V p. 175; Tr. Vol. VI p. 11-17. Mother testified that Student has undergone many tests, medication changes, and injections, but Student is not yet in medical remission. See Tr. Vol. V p. 174-176. Student is often in pain after school, which is exhibited by Student laying down and clawing at her knees, shoulders, and jaws. See Tr. Vol. V p. 174-176; Tr. Vol. VI p. 11-17.

48. LEA acknowledged that the gap between Student and her peers has widened between kindergarten and first grade, and she attributed that to Students “profound disability” and medical issues. See Tr. Vol. VI p. 38-47, 63, 121, 131, 163-165, 184-186, 188, 228-229. Despite her assessments resulting in scores showing profound disability, LEA believes Student “understands a lot more than we can get out of her”; it is extremely hard to know what Student knows. See Tr. Vol. VI p. 165. Student’s paraprofessional for kindergarten refused to be RBT trained, so she was not renewed. See Tr. Vol. VI p. 229. Student’s paraprofessional for her first-grade year is RBT trained, and District’s Behavior Specialist is a BCBA. See Tr. Vol. II p. 38-39; Tr. Vol. VI p. 229. District would like to increase Student’s Speech and OT services, but the providers report that Student cannot tolerate it yet. See Tr. Vol. VI p. 229. LEA testified one of the functions of a speech pathologist in a school setting is to build capacity among a child’s teachers and staff so that the child’s communication goals can be addressed throughout the day in different settings. See Tr. Vol. VI p. 56. LEA stated ABA therapy could be more easily implemented in the CBI classroom, although the LEA expressed reservations that if she allowed one CBI student to have their own ABA therapist in class with them, then she would have to allow them all to do so. See Tr. Vol. VI p. 231-232.

LEA testified that Compass Academy cannot provide anything different or better than the District could. See Tr. Vol. VI p. 184. LEA stated ABA therapy needs to be implemented in a range of settings to be generalized. See Tr. Vol. VI p. 234.

49. Parents filed the Complaint on May 14, 2024, and the Parties have remained in “stay put” since May 14, 2024. See Complaint. Private school at Compass was discussed between the parties. See Tr. Vol. VI p. 183-184. On January 6, 2025, Parents filed an amended complaint in this matter with the written consent of the District and added their request for a remedy of reimbursement for private school tuition. See Amended Complaint.

50. Compass Academy is a private school that could provide Student’s therapies and the smaller classroom environment that she needed. Tr. Vol. V. p. 170-195. Compass Director stated she had knowledge of students similar to the Student in this matter, although she had not reviewed Student’s educational files or evaluations and gave no specifics as to the services Student would receive at Compass. See Tr. V. V p. 193-194, 197. At Compass Student can receive behavioral and academic instruction in a classroom with children of similar age and ability. Tr. Vol. V. p. 183, 214. Student can also receive OT, Speech, PT, and ABA therapy using Student’s BCBA and RBT in the educational setting. Tr. Vol. V p. 171-172, 183-185. Using Student’s existing ABA therapists is important because they have rapport, know Student’s signs of frustration, and know how far they can push Student. See Tr. Vol. V p. 172. Compass Academy would start by screening Student to assess her skills and then program her reading using Wilson reading when they are ready for it, math, and writing for her skill level. See Tr. Vol. V p. 186-188. Parent’s insurance will pay for full-time ABA therapy, OT, PT and Speech. See Tr. Vol. V p. 177-178. Student has not started at Compass because Parent has no way to get her here. See Tr. Vol. V p. 178. Compass Academy is a year-round school

to prevent regression. Id. at 188-189. Tuition is \$9,500.00 per year. See Tr. Vol. V p. 189. There is a \$200.00 new student fee and a \$150.00 renewal fee each year. See Tr. Vol. V p. 190. A nonverbal child is not a problem at Compass, in fact Compass has served nonverbal students well because it is a smaller setting, and Compass has other students who use an AAC to communicate. See Tr. Vol. V p. 191-195, 209-210. Compass teaches students in the way they understand and at each student's pace. See Tr. Vol. V p. 195, 204-205. Compass has one teacher and one paraprofessional in each classroom. See Tr. Vol. V p. 192. Compass currently has 147 students and approximately half are elementary students, and there is a functional group of four to ten right now. See Tr. Vol. V p. 193. For the 147 students, Compass has 15 "lead teachers." See Tr. V. V p. 196. Of those 15 teachers, only five are certified teachers, with the remaining having "various degrees," and three of the certified teachers are certified in special education. See Tr. V. V p. 196-197. The requirement for being a teacher at Compass is having a degree and experience with children, which could come from a day care setting. See Tr. V. V p. 196. Compass prefers that its teachers have a degree in the area they teach, but it is not required. See Tr. V. V p. 197. For example, one Compass literacy teacher has a degree in psychology, and another has a Master's Degree in literacy. See Tr. V. V p. 197, 202. Compass does not have a specific curriculum for students who need a functional curriculum; Students work on the specific skills they are needing. See Tr. V. V p. 198. Compass Academy utilizes paraprofessionals to help track progress or work with students in the classroom, help with feeding, toileting, self-care, and assisting at recess. See Tr. Vol. V p. 198-199. Teachers plan instruction, not paraprofessionals, but paraprofessionals help carry out instruction as needed and directed by the teacher. See Tr. Vol. V p. 199. The ATLAS exam is not appropriate for students with special needs, so Compass uses other exams to assess their

students. See Tr. V. V p. 200-201. The District is not permitted to utilize alternate exams. See D. Posthearing Brief p. 17. Compass Director confirmed that the District currently transports one student to Compass daily. See Tr. Vol. V p. 209. The District currently transports another Student to Compass daily in an SUV. See Tr. Vol. V p. 208-209.

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 *Sneitzer 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; 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 (8th Cir. 2011); 20 U.S.C. § 1415(f)(3)(E)(ii)(I)-(III). The U.S. Supreme Court held that a school district cannot refuse to consider parents’ concerns when drafting an IEP and cannot predetermine the educational program for a disabled student prior to meeting with parents. *See Schaffer v. Weast*, 546 U.S. 49, 53 (2005). Predetermination could deprive parents of a meaningful opportunity to participate in the formulation process pertaining to the IEP. *See Lathrop R-II Sch. Dist. v. Gray*, 611 F.3d 419, 424 (8th Cir. 2010). “The IDEA explicitly requires school districts to include parents in the team that drafts the IEP to consider ‘the concerns of the parents for enhancing the education of their child’ and to address ‘information about the child provided to, or by, the parents.’” *M.M. ex rel. L.M. v. Dist. 0001 Lancaster County Sch.*, 702 F.3d 479 (8th Circ. 2012) (citing 20 U.S.C. §

1414(d)(3)(A)(ii), (d)(4)(A)(ii)(III)). However, the IDEA does not require a school district to accede to parents' demands without considering suitable alternatives; a district does not procedurally violate the IDEA simply by failing to grant a parent's request.

Here, Parent alleges that the District committed procedural violations of the IDEA by denying the Parent meaningful participation in Student's education when Student was removed to the CBI classroom for behavior without approval. See Complaint p. 9-10, 33, Amended Complaint, and P. Posthearing Brief at p. 23. This Hearing Officer finds that the IEP team met periodically to review and revise the IEP to address Student's lack of progress, as required, noting that the IEP Team met for the August 2023 IEP, the September 2023 IEP, the November 2023 IEP, the March 2024 IEP, and the April 2024 IEP Meeting. See U.S.C. §1414(d)(4)(A). The evidence reflects that Parent(s) were present and participated fully at each IEP meeting. The IEPs reflected Parents' input and when Parent's input was considered but declined, such as when Parents opposed increasing CBI time in the March 2024 IEP. The District did attempted to meet Parents request for ABA therapy in Student's class setting; however, the District found it too distracting to other students.

A preponderance of the evidence supports that Student's placement in the CBI classroom did not precede the IEP meeting with the Parents in which time in the CBI classroom was included in the IEP and agreed to by Parents, the November 2023 IEP. CBI Teacher recalled that Student started coming to her for instruction at that time. If Student was taken into the CBI classroom to access sensory equipment at times prior to the November 2023 IEP meeting, that does not amount to a change in placement and did not result in any educational deprivation to Student. For the above stated reasons, this Hearing Officer concludes Parents were not denied meaningful participation in Student's education.

II. Allegations of Substantive Violations of the IDEA

Next, this Hearing officer must consider whether the District substantively provided FAPE in a timely manner to the 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.

The August 2023 IEP

Here, a preponderance of the evidence supports that the August 2023 IEP was not reasonably calculated for progress in light of Student’s circumstances. Fortunately, it remained in place for only a month.

The August 2023 IEP did not include Speech goals, although Student was mostly nonverbal and was profoundly delayed. Further, Student’s time in Speech was insufficient for a nonverbal Student at 120 minutes per month. The LEA and Kindergarten Speech Therapist attempted to justify Student’s Speech minutes of 120 minutes per month by saying that she could not tolerate more. However, the Ped’s Plus Speech Therapist testified that Student needed and could tolerate 120 minutes per week with 30 minutes sessions at a time, and this Hearing Officer placed greater weight on her testimony as she is not a party to this

matter.

The August 2023 IEP not include a BIP or behavior goals, although it was noted that “her needs included that her emotional and sensory regulation should be monitored and breaks provided accordingly” because she “may become frustrated when task demands are above her skill level.” No positive behavior interventions and supports were in place to address behavior.

Student’s academic goals were not appropriate. Her math goal was to count to 10, although Mother and ABA therapists confirmed that Student knew how to count to 10 upon entering kindergarten. Her language arts goal was to learn letter sounds, although she is mostly nonverbal. No special education time was assigned for Student to work on her academic or behavioral goals, despite her known delays.

The September 2023 IEP

Likewise, a preponderance of the evidence supports that the September 2023 IEP was not reasonably calculated for progress in light of Student’s circumstances. Student’s time in Speech remained insufficient at 120 minutes per month, and as discussed above, Student has demonstrated that she can tolerate up to 30 minutes with proper supports.

Although the meeting was scheduled to start the process of creating a BIP and behavior goals, the September 2023 did not include a BIP or behavior goals to address the behaviors Student was exhibiting and that were being documented. The September 2023 IEP did add Speech goals to improve her communication, and the team submitted a circuit referral for Student to trial an AAC device to assist her in communication. District Behavior Specialist did get consent in the meeting to perform observations and create a BIP. Although it was not incorporated into the IEP and the times offered by the District for ABA therapy in

the agreement were discontinued after two weeks because the Kindergarten Teacher, Special Education Teacher, and paraprofessional stated ABA therapy administered in the general education setting was distracting and upsetting other students, the District tried allowing Student's BCBA and RBT to come to the campus for two days per week for four hours per day as a support. During those two weeks, Student's maladaptive behaviors decreased.

Student's language arts goal remained that she would learn letter sounds, although she is mostly nonverbal. Her math goal remained that Student would count to 25. No special education time was assigned for Student to work on her academic goals, despite her known delays.

The November 2023 IEP

The November 2023 IEP again was not reasonably calculated for progress in light of Student's circumstances. Student's time in Speech remained insufficient at 120 minutes per month and as discussed above, Student has demonstrated that she can tolerate up to 30 minutes with proper supports. Student's speech goal to improve her communication using her AAC and verbally was reasonably calculated for Student's progress, and Student received her loaner device from Easter Seals prior to this meeting.

The November 2023 IEP was also inadequate because Student still had no BIP. The District attempts to blame the absence of the BIP at this point on Parents revocation of consent for District's Behavior Specialist to work with Student on November 2, 2023, stating the District's Behavior Specialist had one drafted but did not submit it because consent was revoked or the Special Education Teacher testified that the District's Behavior Specialist did complete Student's BIP although she could not locate it. This argument fails because Mother

reinstated consent on November 15, 2023. If the District's Behavior Specialist needed an additional consent form signed in addition to Parent's email, she could have requested one as of November 15, 2023. Further, Kindergarten Teacher and Special Education Teacher reached out to District's Behavior Specialist on November 1, 2023 because Student was displaying harmful and distracting behaviors. Special Education Teacher had already compiled behavior data on Student since the beginning of school, and District's Behavior Specialist collected her own data and noted she completed the FBA on October 12, 2023. However, six weeks later, at the November 28, 2023 IEP meeting, Student was still exhibiting injurious behaviors almost daily and was still without a BIP.

The November 2023 IEP still did not include behavior goals to address the Student's maladaptive behaviors Student was exhibiting almost daily based on the documentation of Special Education Teacher, paraprofessional, and District's Behavior Specialist. Student's language arts goal remained that she would learn letter sounds, although she is mostly nonverbal. Her math goal remained that Student would count to 25. However, Student was provided 120 minutes weekly in the CBI classroom to support her special education goals.

The March 2024 IEP

The March 2024 IEP still was not reasonably calculated for progress in light of Student's circumstances. Student's time in Speech remained insufficient at 120 minutes per month and as discussed above, Student has demonstrated that she can tolerate up to 30 minutes with proper supports. Student's speech goals remained to improve her communication using her AAC and verbally were appropriate.

Student still had no BIP, which remained an inadequacy of the March 2024 IEP, as discussed above. Further, Student's behaviors were continuing to escalate, despite Student's

placement for some time in the CBI classroom. At the November 2023 IEP meeting, the team had tasked the Special Education Teacher to complete a BIP for Student with the assistance of the District's Behavior Specialist and Student's BCBA. The evidence supports that Special Education Teacher did draft a BIP for Student, but the draft was not submitted to the IEP team for review or inclusion. Only Special Education Teacher and CBI Teacher recalled receiving the draft BIP or implementing it. Kindergarten Teacher testified she would have recalled implementing it if she had received it.

In March of 2024, Student's IEP was finally revised to include a behavior goal, but the behavior goal targeted Student's attention to a task. An OT goal of improving self-regulation by choosing sensory input during breaks was added in March of 2024. The March 2024 IEP still did not include behavior goals directed at decreasing the maladaptive behaviors Student was exhibiting almost daily based on the documentation of Special Education Teacher, paraprofessional, and District's Behavior Specialist. Thus, the March 2024 IEP remained insufficient for Student's behavior goal. Student's language arts goal remained that she would learn letter sounds, although she is mostly nonverbal. Her math goal remained that Student would count to 25.

Over the objection of Parents, Student's time in the CBI classroom was increased to 30 minutes per day in reading, 30 minutes per day in math, and 30 minutes per day for behavior to support her special education goals. Parents did not sign the March 2024 IEP. Parents did sign another written consent form for District's Behavior Specialist to work with Student.

The April 2024 IEP

The April 2024 IEP still was not reasonably calculated for progress in light of

Student's circumstances. Student's time in Speech remained insufficient at 120 minutes per month and as discussed above, Student has demonstrated that she can tolerate up to 30 minutes with proper supports. Student's speech goals remained to improve her communication using her AAC and verbally and were appropriate.

Student still had no BIP beyond the draft version, which remained an inadequacy of the April 2024 IEP, as discussed above. Student's behaviors were continuing to escalate, despite Student's placement for additional time in the CBI classroom of 90 minutes daily.

The April 2024 IEP still did not include behavior goals directed at decreasing the maladaptive behaviors Student was exhibiting almost daily based on the documentation of Special Education Teacher, paraprofessional, and District's Behavior Specialist. Thus, the March 2024 IEP remained insufficient for Student's behavior goal. Student's language arts goal remained that she would learn letter sounds, although she is mostly nonverbal. Her math goal remained that Student would count to 25, although Mother testified Student could count to 25 at home.

Over the objection of Parents, Student's time in the CBI classroom was increased to 30 minutes per day in reading, 30 minutes per day in math, and 30 minutes per day for behavior to support her special education goals. Student was denied ESY. Parents did not sign the March 2024 IEP.

Educational Impact

Student's behavior was one of her primary barriers to education. Student's November 2023 IEP stated the "child's behavior significantly impacts his or her learning, or that of others. Small group instruction is necessary. Needs can't be achieved in the General Ed. setting. Individualized instruction is needed to facilitate learning. A more structured

environment is needed.” Student’s IEP lacked a behavior goal and BIP targeting Student’s maladaptive behaviors for the entirety of her time at the District, and Student’s behaviors escalated throughout her time at the District. Student was repeatedly removed from instruction due to her behaviors, and particularly, the Kindergarten Speech Therapist did not recommend increased time for Student due to her behaviors. A joint attention goal for behavior and OT goal of improving self-regulation were not sufficient to reduce Student’s behaviors. During her kindergarten year, Student regressed from being potty trained to being back in pull-ups. In the fall of 2023 and continuing into the spring of 2024, Student would come home crying. On May 8 and May 16, 2024, Student was physically restrained after injuring others and herself. There is no doubt that the failure to include a necessary behavior goal and a BIP into Student’s IEP during the time at issue resulted in Student’s educational deprivation.

Second, Student’s communication challenges are a major barrier to her education. Although the District had evidence that should have resulted in setting speech language goals at the beginning of school in August of 2023, the evidence reflects that the District acted responsively in setting appropriate speech language goals in place at the September 2023 IEP meeting. However, Student’s speech therapy minutes were insufficient at 120 minutes per month for the entire period at issue. As discussed above, the testimony of the Ped’s Plus supports that Student is able to tolerate up to 30 minutes of speech therapy at a time given the appropriate supports.

Parents argue that Student’s March IEP was inappropriate because it provided 90 minutes daily in the CBI room. However, a preponderance of the evidence reflects that Student experienced no educational deprivation in the CBI classroom. The CBI Teacher had

the experience to assess that Student's receptive communication was good and would communicate with Student vocally. CBI Teacher was able to assess that Student could count from 1-20 and could identify shapes and colors receptively. Student was able to master some academic skills in the CBI classroom, but Student's disruptive, aggressive and eloping behaviors continued, despite the CBI Teacher's attempt to implement the draft BIP that she received when Student came to her in November of 2023.

Some of Student's academic goals on her IEPs were also inappropriate or not sufficiently challenging for Student. At the March 15, 2024 IEP meeting, the IEP team reviewed Student's progress toward her goals and noted that Student did not master her academic goals including counting independently from 1-25, although she could do so at home. She did not master counting with 1:1 correspondence. According to Kindergarten Speech Teacher, Student could not verbalize any common sounds for letters; she misinterpreted and mis-scored that goal. Student could not independently navigate her AAC as of March 2023. Student was able to identify numbers 1-25 at 60% accuracy. Student remained unable to even finger-trace her name.

Student's goals were revised in the March 2024 IEP, and it is the opinion of the Hearing Officer, that the academic goals below were reasonably calculated for Student to progress, as they were consistent with Student's skill levels and some of the goals such as math and communication were challenging Student to progress. In math, Student's goal became "given a set of manipulatives (blocks, counting bears, etc.), Student will exhibit a motor pattern of placing the requested number of manipulatives into a cup or bowl independently for an accuracy of 80% across 4 out of 5 trials, as measured by observation and performance by 3/15/2025." In behavior, Student's goal became "with movement

breaks and the use of self-regulation strategies, Student will demonstrate the ability to attend to a task for an average of 75% of intervals in a 20-minute class period as measured by data sheets and observations by 3/15/2025.” See P. Ex. p. 62. For OT, Student’s goal became to “improve sensory motor regulation, fine motor skills, visual motor, bilateral coordination and motor planning skills to increase independence and accuracy with following self-care and classroom routings, participating in writing or coping skills, and using classroom supplies and materials effectively as measured by mastery of $\frac{3}{4}$ short term objectives by 3/14/2025,” with one of her objectives being to improve self-regulation by choosing a sensory input/activity or break. Her speech goals became: (1) “given multisensory cues, [Student] will request by using any form of language (spoken language, sign language, and/or augmentative symbols/device) while playing or engaging in other motivating activity given achievement of the following objectives by the next annual review of progress by 3/15/2025” and (2) “given access to high-tech AAC device, [Student] will independently navigate/access device as measured by completion of the following objectives by 3/15/2025.” The objectives became (1) “given minimal cues, [Student] will carry her AAC system with her for 3 transitions per school day across 4 out of 5 days in a week as measured by classroom observation, teacher interviews, and data collection across 3 consecutive data sessions by 3/15/2025”; (2) “given a verbal yes/no appropriate questions, Student will answer yes/no by selecting “yes” or “no” using AAC device in 4 out of 5 opportunities measured by classroom observation, teacher interviews, and data collection across 3 consecutive data sessions by 3/15/2025”; and (3) “given a group of objects, Student will count the objects (1-10) using augmentative symbols or device with minimal cues in 4 out of 5 opportunities as measured by classroom observation, teacher interviews, and data

collection across 3 consecutive data sessions by 3/14/2025.” There was no writing goal.

The team determined that extended school year (“ESY”) services were not appropriate, which the Parent argues is a denial of FAPE. However, this Hearing Officer does not find a preponderance of evidence supporting that denial of ESY to Student was a denial of FAPE. There was testimony that Student experienced some regression at times, but evidence was not sufficient that Student’s regression is related to breaks from school.

Parents additionally argue that the District’s failure to provide an RBT as Student’s paraprofessional in her kindergarten year resulted in a denial of FAPE. Testimony established that Student’s kindergarten paraprofessional was not receptive to ABA therapy. Special Education Teacher’s documentation as well as the documentation of BCBA and RBT reflect that ABA therapy decreased Student’s maladaptive behaviors and allowed Student to access her education during the two weeks in October of 2023 when the District allowed Student’s BCBA and RBT to provide therapy in the school setting for four hours per day two days per week. Further, the testimony established that the relationship between BCBA/RBT and Student is very important to the effectiveness of ABA therapy and that ABA therapy should be provided across various setting to be generalized. ABA Therapy can be a related service if it is necessary to allow Student to access his education, and based on the BCBA’s recommendations and Student’s behavior with and without ABA during her kindergarten year, this Hearing Officer finds ABA to be a related service necessary to allow Student to access her education, which should have been included on Student’s IEP. *See* 20 U.S.C. §1401(29); 20 U.S.C. §1414(d)(1)(A)(i)(IV), and *Perez v. Sturgis Pub. Schs.*, 598 U.S. 142, 143 S.Ct. 859 (2023).

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 her circumstances due to the failure to include a behavior goal directed toward maladaptive behaviors, the absence of a BIP, the absence of ABA therapy in the school setting, and insufficient time in Speech to address Student's deficits as a mostly nonverbal child. As discussed above, these points caused Student's IEPs to fail to be reasonably calculated to allow Student to progress in light of her circumstances and resulted in educational deprivation for Student. These points were, therefore, substantive denials of the provision of FAPE to Student.

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. Parents argue that the District failed to implement Student's IEP in many ways that resulted in substantive violations of the IDEA, and this Hearing Officer finds that those raised but not addressed herein did not constitute a denial of FAPE.

One of the alleged failures in IEP implementation was that Student's AAC was broken for a month between the March 2024 IEP meeting and April 2024 IEP meeting. This Hearing Officer finds that Student's AAC was broken for approximately four weeks in the spring. However, the IEP team agreed to repair it at the April 2024 IEP meeting. CBI Teacher testified that visuals were used at times. Since the AAC was broken for a limited time and

there was an alternative available for Student's communication, this Hearing Officer finds there was no deprivation of FAPE due to the broken AAC.

Second, Parents argue that Student's paraprofessional was improperly teaching Student, instead of Kindergarten Teacher, and this Hearing Officer finds that a preponderance of the evidence supports that Student was denied FAPE because her IEP goals were not regularly implemented by a certified teacher. Kindergarten Teacher testified she never worked one-on-one with Student and never picked up Student's AAC. Kindergarten Teacher would instruct the class, and paraprofessional would help Student with her modified school work. The District argues that its use of paraprofessionals is comparable to the practice at Compass and consistent with the recent guidance from the U.S. Dept. of Ed. Titled *Building and Sustaining Inclusive Educational Practices*.¹ However, the Dept. of Ed. guidance does not intend that a student's general education teacher have no contact with the student at all, as was the case with Kindergarten Teacher. First Grade Teacher testified her time with Student was approximately 10 minutes daily; however, First Grade Teacher exhibited little understanding of Student or her skills, in testifying several times that Student knew her phonetic sounds, did not recognize Student's IEP, and lacked awareness of whether Student went to the CBI classroom. Student's folder-holder for her kindergarten year was responsible for implementation of Student's IEP goals. There is no evidence that she was involved with Student's education, and she was non-renewed. On the kindergarten report cards, Student showed very little to no progress toward goals, which evidences an educational deprivation. Student was able to name her upper- and lower-case

¹ A copy of the recent guidance can be found at: <https://sites.ed.gov/idea/files/Inclusive-Educational-Practices-Guidance-01-16-2025.pdf>.

letters, could name numbers 1-20, and could name two dimensional shapes, but she had some of those skills prior to kindergarten. Because kindergarten paraprofessional was not a certified teacher or RBT trained, she was ill equipped to provide the behavioral support Student needed. RBT testified that paraprofessional ignored Student's frustration cues, resulting in behavior episodes. This resulted in behavioral regression and lack of progress toward Student's IEP goals.

District pointed that Student's medical issues may have caused her behavioral issues, and those would have been out of District's control. This Hearing Officer does not doubt that Student's behavior issues at times, particularly when there was no observable antecedent, resulted from pain or itching. Mother's testimony established that Student was experiencing both through the 2023-2024 school year and into the 2024-2025 school year. However, Student's ability to curb maladaptive behaviors for the two week period when ABA came into the school setting was convincing.

To her credit, Special Education Teacher stepped in to consult and provide support to Kindergarten Teacher, and she worked one-on-one with Student at times. However, Student's draft BIP was not properly implemented because Special Education Teacher and kindergarten paraprofessional lacked knowledge and training to implement the BIP of a mostly nonverbal child with Autism. Special Education Teacher created it based on the BIP created by Student's BCBA; however, she was not a behavior specialist and had no training in drafting BIPs or experience with ABA therapy. She testified that when Student would begin to show signs of frustration, such as whining that she would first attempt to "push through" and then would allow Student a break if Student escalated. Consequently, Special Education Teacher received the brunt of many of Student's frustrations in the form of

slapping, hitting, scratching, and pinching. Further, it was undisputed through documentation and testimony that Student's behaviors continued to escalate through the 2023-2024 school year, culminating with two episodes in May of 2024 in which Student was restrained. Prior to entering school at the District, Student's most challenging behavior was her failure to jointly attend to instruction, so it is clear that District's strategies to decrease Student's behaviors failed and resulted in educational deprivation for Student.

Third, Parents allege that Student's speech therapy was not properly implemented resulting in a lack of progress toward Student learning hear AAC. The evidence is mixed as to whether Kindergarten Speech Therapist provided the 120 minutes monthly prescribed in each of her Kindergarten IEPs. Kindergarten Speech Therapist's logs suggest the minutes were not completely provided; however, she explained that her weekly schedule better represented her time with Student. There was additional documentation and testimony of other witnesses that Kindergarten Speech Therapist consulted and provided time over and above what was set forth in Student's IEP. This Hearing Officer does not find that the burden of proof was met in order to make a determination that Kindergarten Speech Therapist failed to provide Student's 120 speech minutes monthly.

However, even if Kindergarten Speech Therapist was with Student for 120 minutes monthly, a preponderance of the evidence supports that Kindergarten Speech Therapist failed to implement Student's speech therapy properly. Kindergarten Speech Therapist was inexperienced, doing her fellowship under LEA, and yet, Kindergarten Speech Therapist covered 35-40 students during the 2023-2024 school year. She was clear on the number of students that she served; however, her knowledge of Student seemed very limited. She first testified that she served Student 120 minutes weekly, when she received 120 minutes

monthly. According to Kindergarten Speech Teacher, Student could not verbalize any common sounds for letters; she misinterpreted and mis-scored that goal. At the April 2024 IEP meeting the team determined Student had met her goal of spontaneous single word requesting, so that goal was discontinued. However, Kindergarten Speech Therapist admitted that Student was not independently requesting items on her AAC in May of 2024. In contrast, Student made speedy progress in learning to use her AAC to request desired items and met that goal in six weeks with the Ped's Plus Speech Therapist, Student did not know how to utilize the AAC, and the AAC was not set up for Student's easy access to items such as "bathroom" when Student began services in the summer of 2024. Further, the Ped's Plus Speech Therapist, First Grade Speech Therapist, and CBI Teacher, all quickly noticed that Student appeared to understand all or most of what was being said in verbal conversation, which confirmed the observation of Parents. However, Kindergarten Speech Therapist testified that Student's language delays were profound in receptive language, not just expressive. LEA and Kindergarten Speech Therapist asserted that Student's failure to progress was due to her "profound deficits." However, Student's rapid growth in six weeks of speech therapy over the summer of 2024 supports that Student is able to learn. The District also argued that the Ped's Plus can provide therapy in a nonacademic way that the District cannot provide; however, this Hearing Officer noted that both the Kindergarten Speech Therapist and the Ped's Plus Speech Therapist were having Student practice making requests with her AAC for Pinkalicious and bubbles.

CONCLUSION

This Hearing Officer finds a preponderance of the evidence establishes that the District significantly failed to implement Student's IEP by not providing certified teachers for

Student's academic and behavior goals, failure to properly implement Student's draft BIP, and failing to properly implement Student's speech goals, which resulted in the deprivation of educational benefit to Student as evidenced by her failure to progress in using her AAC in kindergarten, lack of academic progress, and behavioral regression. As discussed above, these were substantive denials of the provision of FAPE to Student.

REMEDIES

Having determined that the District denied FAPE to the Student, 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 she would have been had she 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 (8th Cir. 2020). ADE Spec. Ed. Rules §10.01.22. *Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ.*, 471 U.S. 359, 369 (1996). The Eighth Circuit Court of Appeals has previously held that movement to another school district does not prohibit a student from seeking compensatory education from a prior school district for violations of FAPE. *Indep. Sch. Dist. No. 283 v. A.C.*, 358 F.3d 769, 774 (8th Cir. 2001). Where a student's case concerns obligations that a prior district owed to a student and failed to meet, the remedy sought is compensatory. *Id.* "It does not matter where the [d]istrict has any present or future obligation to develop a new IEP . . . or to give [a student] further hearings." *Id.* Similarly, regarding compensatory education, "[w]hether District is able to provide FAPE prospectively is irrelevant to an award of

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

A. COMPENSATORY EDUCATION

This Hearing Officer found that Student was denied FAPE because her IEPs lacked behavior goals to target her maladaptive behaviors, there was no BIP, there was no ABA therapy, and the prescribed speech minutes were insufficient to meet Student’s needs of accessing her education, which were 120 minutes weekly or more. Further, the District violated IDEA in failing to implement Student’s IEP in the absence of certified instruction for Student and in failing to properly implement Student’s speech goals. Student experienced an adverse academic impact due to these violations as evidenced by Student’s lack of progress toward speech and academic goals, as well as behavioral regression.

CONCLUSION

Because the District denied Student FAPE as described above, this Hearing Officer finds that the District should provide Student with compensatory education for education and services not received or not properly implemented during the 2023-2024 school year and for the fall semester of the 2024-2025 school year, including an insufficient number of speech therapy minutes and the implementation failure of the minutes that were provided.

B. PRIVATE SCHOOL TUITION REIMBURSEMENT

The legal analysis required for private school tuition reimbursement differs from the analysis required to determine whether a Student should receive compensatory education. Regarding compensatory education, the Eighth Circuit has stated “[w]hether District is able

to provide FAPE prospectively is irrelevant to an award of compensatory education,” but a claim for private school tuition must include proof that the school district cannot prospectively provide a FAPE. *Indep. Sch. Dist. No. 283 v. E.M.D.H.*, 960 F.3d 1073, 1085 (8th Cir. 2020). In *Indp. Sch. Dist. No. 283 v. E.M.D.H. by & Through L.H.*, 357 F. Supp. 3d 876, 891 (D. Minn. 2019), the district court reversed an award of private school tuition as compensatory education finding, “there is scant evidence concerning whether the District can provide a FAPE prospectively.”

Private school tuition reimbursement was raised in Parent’s Amended Complaint and requires an analysis of whether Student should receive reimbursement for private school tuition, which requires a determination of the sub-issues of (1) whether the District could prospectively provide Student with FAPE and (2) whether Student’s private school placement is appropriate or “proper.” The IDEA authorizes tuition reimbursement for placement in private schools in situations where a district is unable to provide an appropriate placement for a student and the private school placement, itself, is deemed appropriate. See *D.L. by Landon v. St. Louis City Sch. Dist.*, 950 F.3d 1057, 1066 (8th Cir. 2020). ADE Spec. Ed. Rules §10.01.22. *Sch. Comm. of Town of Burlington, Mass. v. Dep’t of Educ.*, 471 U.S. 359, 369 (1996). To receive the remedy of reimbursement for private school tuition, Parents must establish two requirements: that the school failed to provide a FAPE; and that the private school is an “appropriate” placement within the meaning of the IDEA. *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 242–43 n. 9, 129 S.Ct. 2484, 174 L.Ed.2d 168 (2009); *Sch. Comm. of the Town of Burlington, Mass. v. Dep’t of Educ. of Mass.*, 471 U.S. 359, 369, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985).

A claim for private school tuition must include proof that the private school “is an

‘appropriate’ placement within the meaning of the IDEA.” *Sneitzer v. Iowa Dept. of Educ.*, 796 F.3d 942, 948 (8th Cir. 2015) A private placement need not satisfy a least restrictive environment requirements to be appropriate. *C.B. ex re. B.B. v. Special Sch. Dist. No. 1, Minneapolis, Minn.*, 636 F.3d 981, 991 (8th Cir. 2001). Although the IDEA does require that students with disabilities be educated in the least restrictive environment pursuant to 20 U.S.C. §1412(a)(5), the principal that IDEA does not sacrifice a student’s access to FAPE to have him in a more integrated setting was recently confirmed by the Eighth Circuit Court of Appeals in *J.P. v. Belton School Dist. No. 124*, 40 F.4th 887 (8th Cir. 2022). Furthermore, to show an alternative placement for a student is “proper” within the meaning of IDEA, parents need not show the placement meetings state education standards. *T.B. ex rel. W.B. v. St. Joseph School Dist.*, 677 F.3d 844 (2012) (citing Individuals with Disabilities Education Act, § 601 et seq., 20 U.S.C.A. § 1400 et seq.). The Eighth Circuit Court of Appeals has previously held that movement to another school district does not prohibit a student from seeking compensatory education from a prior school district for violations of FAPE. *Indep. Sch. Dist. No. 283 v. A.C.*, 358 F.3d 769, 774 (8th Cir. 2001).

1. WHETHER THE DISTRICT CAN PROSPECTIVELY PROVIDE FAPE

At the March 2024 IEP meeting, the team increased Student’s special education minutes to be received in the CBI classroom, citing that small group instruction was necessary for Student to acquire skills specified in the IEP, behavior intervention strategies established in the child’s IEP require a degree of structure that cannot be implemented in a large group setting, and child’s behavior significantly impeded his or her learning and that of others, and additional individualized instruction is needed to facilitate learning. Student’s maladaptive behaviors had been interfering with her education since August of 2023, and

they escalated to the point that Student was restrained on two dates in May of 2024. Yet, the District still failed to implement a BIP or behavior goals.

Student was primarily receiving instruction from her paraprofessional during kindergarten. Her kindergarten teacher did not interact with her. The Kindergarten Speech Therapist did not yet have her certification but was serving 35-40 students, and she did not have an understanding of Student's capabilities. Student's First Grade Teacher does interact with Student for about 10 minutes per day, but she has no knowledge of Student's IEP, BIP, schedule or capabilities. District's Behavior Specialist failed to produce a BIP for Student between September and May of the 2023-2024 school year. These facts lead this Hearing Officer to conclude that District Staff is spread too thin and is unable to prospectively provide FAPE to Student.

Further, the District is unwilling to permit Student's ABA therapy to occur in the school setting during academic time, which is precisely when Student needs it because those are less preferred activities. The CBI Teacher appeared knowledgeable and invested in Student; however, LEA expressed that ABA therapy could not be permitted in the CBI room because then other students would want their ABA therapists in the room. BCBA testified that Student needs approximately 35-40 hours of ABA therapy across settings to progress. That Student would count to ten for the ABA therapist when District staff could not elicit that response highlights that Student requires ABA therapy in the academic setting to access her education. Student can move forward more quickly with her current BCBA and RBT because she would need to establish a rapport before moving forward with new ABA therapists. ABA Therapy can be a related service if it is necessary to allow Student to access her education, and based on the evidence presented, this Hearing Officer finds ABA to be a related service

necessary to allow Student to access his education during the period at issue. *See* 20 U.S.C. §1401(29); 20 U.S.C. §1414(d)(1)(A)(i)(IV), and *Perez v. Sturgis Pub. Schs.*, 598 U.S. 142, 143 S.Ct. 859 (2023). Due to the District's inability to reign in Student's behaviors over the course of the spring and fall semesters of the 2023-2024 school year, despite alterations to special education time and changes in goals, the District's declining to permit the hours of ABA therapy in the educational setting that Student needs to access her education at this time, and the failure to create a BIP over the course of the 2023-2024 school year, Student's experienced a deprivation in her education, and for these reasons, this Hearing Officer finds that the District is unable to prospectively provide FAPE to Student.

2. WHETHER COMPASS IS AN APPROPRIATE PLACEMENT FOR STUDENT

Regarding whether Student's placement at Compass is appropriate, the District acknowledged on Student's IEP that Student needed the small group and more structured setting to learn, and Compass provides that. At Compass Student can receive behavioral and academic instruction in a classroom with children of similar age and ability. Student can also receive OT, Speech, PT, and ABA therapy using Student's BCBA and RBT in the educational setting. Parent's insurance will pay for full-time ABA therapy, OT, PT and Speech. Student's existing ABA therapists would be encouraged at Compass because they have rapport, know Student's signs of frustration, and know how far they can push Student.

A nonverbal child is not a problem at Compass, in fact Compass has served nonverbal students well because it is a smaller setting, and Compass has other students who use an AAC to communicate. Compass teaches students in the way they understand and at each student's pace. Compass does not have a specific curriculum for students who need a functional curriculum; Students work on the specific skills they are needing. Compass

Academy would start by screening Student to assess her skills and then program her reading using Wilson reading when they are ready for it, math, and writing for her skill level.

Compass has one teacher and one paraprofessional in each classroom. Compass currently has 147 students and approximately half are elementary students, and there is a functional group of four to ten right now. For the 147 students, Compass has 15 “lead teachers.” Of those 15 teachers, only five are certified teachers, with the remaining having “various degrees,” and three of the certified teachers are certified in special education. The requirement for being a teacher at Compass is having a degree and experience with children, which could come from a day care setting. Compass prefers that its teachers have a degree in the area they teach, but it is not required. For example, one Compass literacy teacher has a degree in psychology, and another has a Master’s Degree in literacy.

Compass Academy utilizes paraprofessionals to help track progress or work with students in the classroom, help with feeding, toileting, self-care, and assisting at recess. Teachers plan instruction, not paraprofessionals, but paraprofessionals help carry out instruction as needed and directed by the teacher. The ATLAS exam is not appropriate for students with special needs, so Compass uses other exams to assess their students.

Student has not started at Compass because Parent has no way to get her there. Compass Director confirmed that the District currently transports one student from the District to Compass daily in an SUV. Compass Academy is a year-round school to prevent regression. Tuition is \$9,500.00 per year. There is a \$200.00 new student fee and a \$150.00 renewal fee each year. After reviewing the ability of the Compass Academy, to provide Student’s education, this Hearing Officer finds that Compass Academy is an appropriate placement for Student.

C. TRANSPORTATION

When a hearing officer concludes that a school district failed to provide FAPE and the private placement was suitable, they must consider all relevant factors in determining whether reimbursement for some or all of the cost of the child's private education is warranted. *Forest Grove Sch. Dist. V. T.A.*, 557 U.S. 230, 247, 129 S.Ct. 2484 (2009). Under IDEA, a student's home school district remains responsible for transportation pursuant to 20 U.S.C. §1412(a)(10)(B)(i)(child placed in private school entitled to all IDEA rights); 34 C.F.R. §300.325(c) school district still responsible for compliance with IDEA); 20 U.S.C. §1401(26)(A)(“Related Services means transportation . . . ”); 34 C.F.R. §300.34 (same); ADE Spec. Ed. Rules §2.56 (same). “Transportation includes [t]ravel to and from school and between schools.” 34 C.F.R. §300.34(c)(16). However, in Arkansas, a transfer student, who attends a school district through school choice, or the transfer student's parent is responsible for the transportation of the transfer student to and from the school in the nonresident district where the transfer student is enrolled. Ark. Code Ann. § 6-18-1904(d).

This Hearing Officer notes that Student lives in Alexander, Arkansas and has attended the District since kindergarten. This Hearing Officer further notes that the District already provides transportation to Compass daily for another Student, which is only relevant to this matter in this Hearing Officer's determination of the level of burden it would impose on the District to require the District to provide transportation to Student. Here, this Hearing Officer has broad discretion in crafting its remedy, the District's inadequacies and the timeframes detailed above are consequential, and the available compensatory remedies are limited. Student cannot go back and reclaim the quality instruction and therapy minutes lost

between August of 2023 and January of 2025, and Student is unlikely to be able to tolerate or benefit from additional therapy sessions beyond those that she would receive at Compass. Therefore, this Hearing Officer grants Parents' request that the District provide transportation for Student to and from Compass each day Compass is in session for one year as a portion of Parents' remedy.

FINAL CONCLUSIONS AND ORDERS:

Upon consideration of all the testimony and evidence, this Hearing Officer finds that a preponderance of the evidence 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 time that Student attended the District. District is hereby ordered to take the following actions regarding Student:

1. Finding the District is unable to prospectively provide Student FAPE and that Compass Academy is an appropriate placement for Student, this Hearing Officer grants the request for placement at Compass and reimbursement for one year's tuition of \$9,500.00 and the new student fee of \$200. District shall reimburse parents within 30 days of Parent's production of a paid invoice (or invoices) to Compass up to \$9,700 from the date of this order through July 31, 2026.
2. Parents request for transportation of Student from District to Compass each day that Compass is in session is granted for the period from the date of this order through July 31, 2026.
3. Further, as compensatory education for District's failure to implement Student's speech therapy, this Hearing Officer grants Parents reimbursement for any out-of-pocket expenses related to Student's attendance of Pediatrics' Plus for speech therapy from June 1,

2025 to July 31, 2025, including but not limited to mileage at a rate of 52 cents per mile for each mile Student is transported to and from Pediatric's Plus during that period of time. Within 60 days of Parent's production of Student's attendance record to establish the dates of travel and a print out of Google Maps or other reliable resource establishing the number of miles required to transport Student from home to Pediatrics Plus from June 1, 2025 to July 31, 2025.

4. If Parent enrolls Student in the District for the 2026-2027 school year, District is ordered to take steps necessary to begin an FBA within Student's first thirty days of attending classes, to produce a BIP for Student within Student's first 60 days of attending classes, to reevaluate Student within sixty days of Student's enrollment with Student's BCBA or RBT present, and to provide Parent a facilitated IEP meeting through the Arkansas Special Education Mediation Project operated by the UALR Bowen School of Law. Student's IEP 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. Further, 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. Parents also alleged that the District's conduct constitutes disability discrimination in the Consolidated Case pursuant to §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794(a) or Title II of the Americans' with Disabilities Act, 42 U.S.C. § 12131-12165. This Hearing Officer has no jurisdiction over disability discrimination claims. *See* ADE Spec. Ed. Rules §10.20.01. Therefore, to the extent Parents' due process complaints raise disability discrimination claims, those claims are dismissed.

FINALITY OF ORDER AND RIGHT TO APPEAL:

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

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

IT IS SO ORDERED.

/s/ Debby Linton Ferguson

HEARING OFFICER

3/19/2025

DATE