

ARKANSAS DEPARTMENT OF EDUCATION

Special Education Unit



PETITIONER

VS.

Case No. H-23-25

**GREENWOOD SCHOOL
DISTRICT**

RESPONDENT

HEARING OFFICERS FINAL DECISION AND ORDER

ISSUES PRESENTED:

Whether the Greenwood School District (hereinafter “District” or “Respondent”) denied [REDACTED] (hereinafter “Student”) a free, appropriate, public education (hereinafter “FAPE”), between July 6, 2022, and January 4, 2023, in violation of certain procedural and substantive requirements of the Individuals with Disabilities Education Act of 2004, 20 U.S.C. §§1400-1485, as amended (hereinafter referred to as “IDEA”), by: (1) violating the Stay Put provision of the IDEA when Parent filed her Due Process Complaint H-23-02 on July 5, 2022, and the District implemented the IEP developed on May 20, 2022, that Parent was challenging in her Due Process Request H-23-02? and (2) by failing to provide Student a FAPE in the least restrictive environment (hereinafter “LRE”) because Student’s 2022-2023 IEP failed to include Applied Behavior Analysis (“ABA”) and Registered Behavior Technician (“RBT”) in the IEP or address Student’s maladaptive behaviors?

Procedural History:

On January 4, 2023, the Arkansas Department of Education (hereinafter referred to as the “Department” or “ADE”) received a request to initiate a due process hearing from [REDACTED] (“Parent” or “Petitioner”, as the Parent of [REDACTED] (hereinafter referred to as “Student”), against the Greenwood School District (hereinafter referred to as “District” or “Respondent”). Parent requested the hearing because she believed the District failed to comply with the Individuals with Disabilities Education Act of 2004, 20 U.S.C. §§1400-1485, as amended (hereinafter referred to as “IDEA”) and the regulations set forth by the Department by not providing Student with appropriate special education services, as noted supra in the statement of issues.¹

¹ See hearing officer File-Petitioner Complaint.

This is the third due process complaint filed by Parent. The first due process complaint filed by Parent was Arkansas Department of Education Due Process Hearing H-22-03. H-22-03 was filed on July 2, 2021. On August 20, 2021, this Hearing Officer received an email from Theresa Caldwell, parent's attorney, with the subject line Settlement Reached. In the body of the email Ms. Caldwell, stated that she wanted to let everyone know that settlement had been reached and asked that the hearing scheduled for August 23-25, 2021, be cancelled. This hearing officer then sent an email out to the parties cancelling the Due Process Hearing scheduled for August 23-25, 2021, based on Ms. Caldwell's earlier email stating the case had been settled. After not hearing from any of the parties, nor receiving a motion to dismiss, this Hearing Officer sent an email to the parties on September 14, 2021, stating that if I did not receive a motion to dismiss by September 17, 2021, I would issue an order dismissing the case with prejudice. I received a response from District's attorney stating they would take care of it. I did not receive a response from parent's attorney. At no point did either party notify this hearing officer that the case had not settled, or that the case needed to be rescheduled. On September 20, 2021, after not receiving any communication for thirty days and having been told the case was settled, I issued my order dismissing the case with prejudice. Parent filed her second due process hearing complaint H-23-02, on July 5, 2022, and a decision was issued on February 23, 2023. The records from the previous two hearings were incorporated with agreement of the parties into this hearing H-23-25.

At the time that Parent filed H-23-25 request for a due process hearing, Student was a 7-year-old boy who had just finished his fall semester of his first-grade year at [REDACTED] [REDACTED] within the Greenwood School District.² Student was a student with a

² See Hearing Officer File-Petitioner Complaint, pg. 2.

disability under 20 U.S.C. §1401(3). Student was diagnosed with a rare genetic condition involving the CTNNBI gene associated with muscle weakness, language delay, and intellectual problems. Additionally, Student has a diagnosis of Autism with Global Delay and profound speech language delay.³

In response to the Parent's request for a Due Process hearing, the Department assigned the case to an impartial hearing officer. Thereafter, Prehearing conference was scheduled for February 20, 2023, and the Due Process Hearing set for February 22-24, 2023.⁴ On February 11, 2023, counsel for Parent filed a motion to continue stating that she had another due process hearing scheduled for the week of February 22-24, 2023. This hearing officer granted a continuance, and the prehearing conference was rescheduled for April 10, 2023, and the Due Process Hearing rescheduled for April 12-14, 2023. The Due Process Hearing was held April 12, 13, 14, 2023, but was not completed. At the end of the Due Process Hearing on April 14, 2023, the parties agreed to continue the case and resume the Due Process Hearing on May 31, 2023, June 1 and 2, 2023. On May 19, 2023, counsel for Parent filed a motion for continuance stating a conflict with a family event out of state. The Parties agreed to continue the hearing on June 20-23, 2023. Testimony was heard June 20-23, 2023, but not completed and the parties agreed to continue the case until July 3, 2023, and July 5, 2023. On June 28, 2023, this hearing officer sent an email to the parties confirming the dates. Counsel for the District responded and stated that several witnesses were unavailable for the dates previously agreed to. On Thursday June 29, 2023, attorney for petitioner and this hearing officer were in another due process hearing and called attorney for the District. During the phone call the parties asked for a continuance and this hearing officer cancelled the July 3, 2023 and July 5, 2023 hearing dates

³ See Hearing officer file-Petitioner Complaint, pgs. 8-9.

⁴ See Hearing Officer file, Scheduling order.

and asked that one of the parties file a motion for a continuance. On July 5, 2023, counsel for the District filed a motion for a continuance explaining witnesses were unavailable. The Parties agreed to August 22-25, 2023, to complete the Due Process Hearing. Testimony was heard on August 22, 2023, and completed on August 23, 2023.

The Prehearing conference was conducted via zoom on April 10, 2023.⁵ Counsel for both the Parent and the District participated in the prehearing conference. During the prehearing conference, the parties discussed unresolved issues to be addressed at the hearing, as well as the witnesses and evidence which would be necessary to address the same.⁶

Thereafter testimony was heard in this case on April 12, 13, 14, June 20, 21,22,23, 2023, and August 22, 23, 2023.⁷

Present for the Hearing were Theresa Caldwell, attorney for Petitioner, Sharon Streett, attorney for the District, [REDACTED] Parent, Audra Alumbaugh (Zoom), Advocate, Demaris Barnett, Special Education Director.

The following witnesses testified in this matter: Brittany Shook, Jasmine Wright, Dean Denison, Emily Jordan, Dr. Sheila Barnes, Abby Ross, Demaris Barnett, [REDACTED] Mark Shumate, and Kallie Cooper.⁸

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

⁵ Transcript, prehearing conference.

⁶ Id.

⁷ It is important to note that there were several delays in this case because of document issues, health issues etc. Several hearing days did not begin on time or ended early because of these issues. There were long breaks to address said issues throughout the hearing days.

⁸ Transcripts, Vol. I-IX.

Both parties were offered the opportunity to provide post-hearing briefs in lieu of closing statements, and both timely submitted briefs in accordance with the deadline set by this Hearing Officer.⁹

Additionally, the facts from H-23-02 are included in the findings of fact in this case because this hearing officer believes the history is relevant. Parent is incorrect in her post hearing brief as to the timeline of this due process hearing. Parent states that the time frame starts on July 3, 2022 (the day after the filing of H-23-02) and ends on January 4, 2023. However, Parent filed H-23-02 on July 5, 2022, not July 3, 2022, as such the timeline for this hearing starts July 6, 2022, and ends January 4, 2023.

Findings of Fact

1. Student is a 7-old boy in the Greenwood School District. Student is a second-grade student at [REDACTED] within the Greenwood School District.¹⁰
2. In October of 2017, he was diagnosed with a rare gene mutation involving the [REDACTED] [REDACTED] associated with muscle weakness, language delay and intellectual problems.¹¹
3. In May 2019 Student was three years and two months old. Mary Scott, Ph.D. with Schmieding Developmental Center completed a neuropsychological evaluation. This evaluation, found Student to be severely delayed in cognitive development; nonverbal and using hand leading and occasional use of Picture Exchange Communication System (PECS) with prompting as communication strategies; and delayed adaptive behavior skills. The diagnoses made following this evaluation included Autism, Global Developmental Delay, and Profound Speech-Language Delay requiring very substantial

⁹ See Hearing Officer File-post hearing briefs.

¹⁰ See Hearing Officer File-Parent's Due Process Hearing Request.

¹¹ H-23-02, District Exhibits, pg. 276.

support Level 3. The examiner indicated that the evaluation was constantly modified, and behavioral intervention and therapeutic engagement was necessary to complete the tasks. The examiner indicated that Student's behavior negatively impacted his performance and thus the evaluation was thought to be an underestimation of Student's abilities. During this evaluation, Student was chewing and mouthing objects including a pacifier. Dr. James Cheshier, MD with Schmieding Developmental Center agreed with the findings of the evaluation of Autism Spectrum Disorder; Developmental Coordination; Mixed Receptive and Expressive Language Delay; and Global Developmental Delay.¹²

4. August 11, 2020, Amanda Chilton, Physical therapist with Learn. Play. Grow. Children's Therapy Services, found Student to have a functional range of motion but increased tightness and muscle tone bilaterally. Chilton noted that toe walking had decreased since beginning Botox injections [no date or provider specified]; but Student continued to curl toes when walking. Student was found to have a significant delay in all gross motor skills. Parent and Chilton agreed to continue hippotherapy in addition to outpatient therapy to improve ambulation skills.¹³
5. December 1, 2020, Corkie Howard, MS, CCC-SLP, with Learn. Play. Grow. Children's Therapy Services identified a profound expressive and receptive language delay. He was unable to complete formal evaluations of sound production but was observed to produce a small number of sounds /b, d, g, p, n, h/. According to the evaluation, Student did not possess many words and would be observed further as his language developed.¹⁴

¹² H-23-02, District Exhibits, pgs. 275-293.

¹³ H-23-02, Id., pg. 265-269

¹⁴ H-23-02, District Exhibits, pgs. 270-273.

6. December 3, 2020, Jennifer Marley, OTR/L with Learn. Play. Grow. Children's Therapy Services found Student had a significant delay in Activities of Daily Living (ADL) in areas of eating, grooming, bathing, dressing, and toileting. Additionally, he presented with difficulty processing sensory information.¹⁵
7. February 1, 2021, and February 8, 2021, Parent was provided two Notices of Conference to consider a referral for special education and related services.¹⁶ Parent requested a conference be rescheduled to March 8, 2021. At the referral conference the parent provided the neuropsychological evaluation from May 2019 as a summary of Student's abilities. The referral indicated that Student's delays in academics, development and behavior substantially impaired his daily activities and academic learning.¹⁷ The referral conference decision was to conduct evaluations for IQ, achievement, autism observations, classroom based assessments, adaptive behavior rating scale, social history, hearing and vision, PT, OT, and speech evaluations.¹⁸ The option to not evaluate was considered but the committee determined that updated information was needed.¹⁹ Parent agreed to the immediate implementation of the committee decision and provided consent to complete these evaluations.²⁰ During the referral conference, Parent requested that Student be provided ABA therapy at school and that Dr. Barnes' RBT and BCBA be allowed to come to school with Student so he could be placed in the general education classroom. The District's Special Education Director, Demaris Barnett, told Parent this could be discussed at a later meeting, but she

¹⁵ H-23-02, Id., pgs. 261-264.

¹⁶ H-23-02, Id., pg. 507.

¹⁷ H-23-02, Parent's Exhibits, pg. 124, District Exhibits, pg. 8

¹⁸ H-23-02, District's Exhibits, pg. 10.

¹⁹ H-23-02, Id., pg. 11.

²⁰ H-23-02, Id., pgs. 10-11.

needed to first talk to the Superintendent, John Ciesla.²¹

8. On March 9, 2021, Parent emailed the Superintendent expressing her concern about the lack of ABA therapy and a BCBA at school. She asked that Dr. Barnes' RBT and BCBA be allowed to attend school with Student so Student could be placed in the general education because of the peer modeling and socialization benefits from exposure to nondisabled peers.²²
9. March 11, 2021, Parent provided Student's most recent vision evaluation completed on October 19, 2020, by Brita S. Rook, MD with ACH Eye Clinic which indicated diagnoses of alternating esotropia; hypermetropia of both eyes; and developmental delay. Student is prescribed glasses for daily wear.²³
10. April 7, 2021, Jodi Kurstin, PT, DPT with Pediatric Therapy Connections completed the physical therapy evaluation for the Greenwood School District.²⁴ Evaluation determined that Student had severe gross motor deficits with limited range of motion; Ankle Dorsiflexion; and Knee Extension.²⁵ Student also presented with deficits that impact the efficiency of his movement and overall independence.²⁶
11. April 9, 2021, Sue Featherston, School Psychology Specialist for the Greenwood School District completed the psychoeducational evaluation including ratings of adaptive behavior and social history.²⁷ A behavioral observation was pulled from the May 2019 Schmieding evaluation which indicated that the evaluation was constantly modified and

²¹ H-23-02, Parent's Exhibits, pg. 139.

²² H-23-02, Id., at pg. 342.

²³ H-23-02, District Exhibits, pgs. 294-300.

²⁴ H-23-02, Id., pgs. 301-305.

²⁵ H-23-02, Id., pg. 303.

²⁶ H-23-02, Id.

²⁷ H-23-02, District Exhibits, pgs. 306-322.

behavioral intervention and therapeutic engagement was necessary to complete the tasks. The examiner indicated that Student's behavior negatively impacted his performance and thus the evaluation was thought to be an underestimation of Student's abilities.²⁸ A nonverbal assessment was used to assess Student's intellectual abilities because of the Student's weak fine motor skills, attention difficulties, and frequent distractibility. Student obtained a Nonverbal IQ of 47 which the examiner felt was not a valid assessment due to his inattention to tasks.²⁹ Two standardized assessments of academics were attempted but Student was not able to complete any of the tasks.³⁰ The examiner used observation, parent reports and informal assessment measures which indicated limited academic skills. He was observed to respond to his name being called and noises within his immediate environment but could not follow multistep directions.³¹ Student was in beginning stages of using his AAC device to request snacks primarily.³² Student continued to display significant delays in ADLs as per parent report.³³ Student displayed Severe Symptoms of an Autism Spectrum Disorder.³⁴ The conclusion of the evaluation gave recommendations that the committee consider the categories of Multiple Disabilities and Autism.³⁵

12. April 16, 2021, Deann Denison, M.S., CCC-SLP for the Greenwood School District completed a speech-language evaluation.³⁶ Hearing was screened informally through

²⁸ H-23-02, Id., at pg. 309.

²⁹ H-23-02, Id., at pg. 309.

³⁰ H-23-02, Id., at pg. 310.

³¹ H-23-02, Id.

³² H-23-02, Id., at pg. 311.

³³ H-23-02, Id., at pg. 312.

³⁴ H-23-02, Id., at pg. 313.

³⁵ H-23-02, District Exhibits, pgs. 302-322.

³⁶ H-23-02, Id., at pgs. 331-337.

observation and found to be functional for the purposes of the evaluations.³⁷ Speech evaluation indicates delayed expressive and receptive language abilities which are directly impacted by a limited phonetic inventory. Additionally, Student presents with pragmatic skills which are below average.³⁸

13. April 16, 2021, Chelsea Percy, OTR/L with A Plus Therapist, Inc. completed the occupational therapy evaluation for the Greenwood School District.³⁹ The evaluation revealed strengths as being sweet; motivated with rewards or preferred toy; redirected well; and supportive family.⁴⁰ Limitations identified include grasping; visual motor integration; visual perception; motor coordination; self-care; upper extremity and core strength; and sensory processing all of which are severely delayed.⁴¹
14. May 4, 2021 and May 11, 2021, Parent was given notice of conference scheduled for May 18, 2021 for committee review of the evaluations completed by the district and assist the committee in making programming and placement decisions for Student.⁴²
15. Parent requested a change of conference date to June 7, 2021.⁴³
16. On June 7, 2021, an evaluation conference was held. After initial introductions of all committee members, the physical therapist reviewed the evaluation with the committee.⁴⁴ The recommendation made to the committee was for Student to receive 90 minutes weekly of physical therapy at school because Student needs extra support with mobility and his age equivalency.⁴⁵ Goals recommended addressed both increasing strength of

³⁷ H-23-02, Id., at pg. 337.

³⁸ H-23-02, Id.

³⁹ H-23-02, District Exhibits, pgs. 323-330.

⁴⁰ H-23-02, District Exhibits, pgs. 323-330.

⁴¹ H-23-02, Id., at pg. 329.

⁴² H-23-02, Id., at pgs. 12-18.

⁴³ H-23-02, Id., at pg. 14.

⁴⁴ H-23-02, Evaluation Recording June 21, 2021, minutes 2:00 – 8:23.

⁴⁵ H-23-02, Evaluation Conference recording June 21, 2021. Minute 8:08.

core muscles, more efficient and accurate movements as well as increasing flexibility.⁴⁶ Student's occupational therapy evaluation was reviewed with committee.⁴⁷ The recommendation made to the committee was for the Student to receive 90 minutes weekly occupational therapy at school.⁴⁸ Goals recommended address upper extremity and core strength, fine motor strength, and sensory integration.⁴⁹ Student's speech-language evaluation was reviewed with committee.⁵⁰ The recommendation made to the committee was for 120 minutes weekly of speech therapy at school.⁵¹ Goals for speech therapy would incorporate increasing functional vocabulary through the use of LAMP ("Language Acquisition through Motor Planning") device or sign, using functional word approximations, following directions, making requests, improving self-regulation, taking turns in joint activities.⁵² Student's psychoeducational evaluation that was completed by Sue Featherston was reviewed with the committee by Carley Sykes school psychology specialist for the district.⁵³ Sykes points out that a large portion of the evaluation is from previous evaluations and via parent interviews.⁵⁴ Sykes reports that the evaluator did not feel that the evaluation was a valid measure of Student's abilities.⁵⁵ After completing a review of all the evaluations and recommendations from the evaluators, the committee first discussed the disability category for eligibility.⁵⁶

⁴⁶ H-23-02, Id., at minutes 6:65-8:06.

⁴⁷ H-23-02, Id., at minutes 8:28-15:03.

⁴⁸ H-23-02, Id., at minute 13:43.

⁴⁹ H-23-02, Id., at minutes 8:28-15:03.

⁵⁰ H-23-02, Id., at minutes 15:04-22:39.

⁵¹ H-23-02, Id., at minute 22:35.

⁵² H-23-02, Id., at minutes 22:35-23:27.

⁵³ H-23-02, Id., at minutes 23:34-28:53.

⁵⁴ H-23-02, Id., at minutes 23:46 and 28:04.

⁵⁵ H-23-02, Id., at minute 24:23.

⁵⁶ H-23-02, Id., at minute 22:35.

17. The committee, including the Parent, agreed that Student had multiple areas of deficit and that the most appropriate category for eligibility was Multiple Disabilities.⁵⁷
18. Committee discussed the provision of special education services with Mrs. Stenhouse presenting the option for some time in special education and general education.⁵⁸ Stenhouse explained that students who need to develop the soft-skills for a classroom (e.g., walking in a line with peers, sitting at a desk or table for group instruction, transitioning in the building with students of all ages) usually receive special education and general education for a few weeks.⁵⁹ Barnett shared that the goal is for a smooth transition to general education and to decrease time in special education as soon as possible.⁶⁰ The recommendation of Stenhouse was based upon the evaluations, observations reported during testing, and Stenhouse's years of experience and educational training in working with children - not his disability nor Student's measured intelligence. Mrs. Stenhouse acknowledged that was, "hard to . . . know what we should and shouldn't do without being able to see him in a classroom setting".⁶¹ The District made a recommendation of direct special education instruction to include 90 minutes of reading instruction, 60 minutes of written expression, and 90 minutes of math.⁶² A paraprofessional was suggested to help the Student navigate through the school. District asked if Student could attend the Summer School program at school in order to observe his behavior in the classroom setting with peers and working on a routine and have a

⁵⁷ H-23-02, Id., at minute 30:13. Parent's Exhibits, pg. 142.

⁵⁸ H-23-02, Id., at minute 30:34.

⁵⁹ H-23-02, Evaluation Conference recording June 21, 2021, minute 30:34.

⁶⁰ H-23-02, Id., at minutes 31:21, 31:49.

⁶¹ H-23-02, Id., at 32:20.

⁶² H-23-02, Id., at minutes 30:43, 32:35-32:46.

more informed opinion.⁶³ Parent did not want to agree to summer school without first addressing the issue of the Registered Behavior Technician (RBT). Once Parent understood that the summer school was only special education and not a general education summer program, she did not want Student to participate.⁶⁴

19. Dr. Sheila Barnes a BCBA-D attended the June 7, 2021 evaluation conference with Parent. Dr. Barnes stated that Parent wanted the Student in the general education classroom with his nondisabled peers and that she didn't want special education services for academics. Parent reiterated her position several times throughout the evaluation conference. Additionally, mom stated that she wanted Student to be accompanied by a Registered Behavior Technician supervised by Dr. Barnes as part of his Applied Behavior Analysis (ABA) program.⁶⁵ Demaris Barnett, the District special education coordinator stated in the evaluation conference that the RBT was not going to come to school with Student and made it known that the RBT was not up for discussion because she had contacted other school districts and the state department and was told that ABA was not a related service and therefore the District wasn't required to provide it.⁶⁶
20. Parent explains that Autism is a disability, and ABA is a therapy for that disability. She said Student can receive physical therapy, occupational therapy and speech therapy for disabling conditions but cannot have a behavior therapist to address his Autism diagnosis. Parent reiterated that she wanted general education classroom with supplemental aids and services, with an RBT under the supervision of Dr. Barnes, paid for by Medicaid.⁶⁷

⁶³ H-23-02, Id., at minute 32:55.

⁶⁴ H-23-03, Id., at minute 33:48.

⁶⁵ H-23-02, Id., at minutes 37:16, 52:28, 54:34, 100.02

⁶⁶ H-23-02, Id., at minutes 37:45, 39:44.

⁶⁷ H-23-02, Id., at minutes 37:55-39.44.

21. Parent also stated that she wanted general education instruction for Student and no special education instruction for academics.⁶⁸
22. There was extensive discussion about Parent providing a stroller for safety.⁶⁹
23. The District discussed a paraprofessional for Student and that the paraprofessional would be there to assist student around the campus, but would not be helping with academics.⁷⁰
- The District discussed having Student in the general education classroom with pullouts to address deficits. Parent once again stated that she wanted Student to start school in the general education classroom without special education pullouts for academics.⁷¹
24. Parent states that her goal is for Student to start in the general education classroom with the RBT and to phase that out once Student is comfortable. Parent doesn't know how long that will take, but she wants to try the general education classroom first. District says they would like to work up to that and Parent reiterates that she wants to start there with supplemental aids and services.⁷²
25. The issue of compromise is discussed during the evaluation conference and the Parent offers for the District to try Student in the general classroom with an RBT and if they believed it wasn't successful they could come back to the table and discuss their concerns.⁷³ The District states that parent could take child out early from school daily to receive his ABA therapy and it will not be counted against Student.⁷⁴

⁶⁸ H-23-02, Id., at minutes 41:03-41:15.

⁶⁹ H-23-02, Id., at minutes 47:14-48:10.

⁷⁰ H-23-02, Id., at minutes 49:51-51:00.

⁷¹ H-23-02, Id., at minute 54:10.

⁷² H-23-02, Id., at minutes 59:07-101:10.

⁷³ H-23-02, Id., at minutes 102:15-103:05.

⁷⁴ H-23-02, Id., at minute 105:34.

26. The District explains that they haven't seen ABA be generalized in the educational setting and that Parent is asking them to let someone in who doesn't work for the school district.⁷⁵ Dr. Barnes explains that her program generalizes across settings. She explains that they program for generalization across people, settings and behaviors. The District then explains that they don't think ABA is beneficial because they don't see it generalized across settings.⁷⁶
27. Parent offers to start Student in general education class with support and services (no RBT) and if Student isn't successful return to the table to discuss concerns. The District then states that they believe Student should start in the special education classroom and then move out. Student will still receive some general education classes. District believes this is the best road to success for Student.⁷⁷
28. District then proposes reducing time in special education. Parent states that a compromise would be to start in general education with an RBT and meet back in a month and if the District felt the RBT wasn't helping take it away.⁷⁸
29. Parent states that she will agree to special education if the District will allow the RBT. If Student thrives better in special education class than general education Parent is willing to revisit it. The District once again said no to the RBT, and declined to compromise.⁷⁹
30. The evaluation conference ends with Parent stating that the District should draft a purposed IEP and provide it to Parent. After that the team could reconvene and discuss the proposed plan.⁸⁰ There was no discussion about what would happen if Parent refused

⁷⁵ H-23-02, Id., at minutes 109:03-109:42.

⁷⁶ H-23-02, Id., at minutes 1:08.32-1:10.28.

⁷⁷ H-23-02, Id., at minute 1:13.52.

⁷⁸ H-23-02, Id., at minute 1:16.05.

⁷⁹ H-23-02, Id., at minute 1:20.15.

⁸⁰ H-23-02, Id., at minutes 1:30.29-1:33.04.

for Student to be placed in special education during the evaluation conference. Nor was there discussion that Parent could accept some items in the IEP and decline other services contained in the IEP.

31. On June 10, 2021, a Notice of Action was sent to parent. The Notice stated:

“The committee met and reviewed all available evaluation data including parent reports and concerns. The committee determined that Student does require some time in special education in order to address his educational and behavior needs. The IEP committee determined that Student qualifies for special education and related services including the following: physical therapy 90 minutes weekly (2X45 minutes), occupational therapy 90 minutes weekly (3X30 minutes), speech/language therapy 120 minutes weekly (4X30 minutes), special education Reading 45 minutes daily, special education math 45 minutes daily, and special education written expression 45 minutes daily. Behavior goals will be addressed across all settings. The committee determined that Student needs adult 1:1 supervision for all the time that he is on campus for safety and for academic support. Special education staff members will be cross-trained in order to cover absences and breaks of staff members. He will have a dedicated paraprofessional for 6 hours a day with a paraprofessional to be with Student when his dedicated paraprofessional is at lunch and on breaks. The committee offered specialized transportation with additional adult supervision; however, Parent said she will bring him to school. Student had a Nonverbal IQ of 47. He was not able to complete the Brigance or the WIAT-IV due to verbal language limitations. Mrs. Featherston observed that he did not point to any numbers, but pointed to some letters. He is able to let you know what he wants, like more mac and cheese, a specific toy to play with, etc.”⁸¹

Further, the Action contained, “The Greenwood School District and Parent could not come to an agreement on services for Student. Parent did not sign any of the special education paperwork (Evaluation/Programming Conference Decision Form, and Notice of Action) at this meeting. The IEP was in the process of being developed at this meeting and was not completed. A draft IEP was completed and the draft version will be sent to Parent’s email - per her request. An additional conference will be held after the draft document has been reviewed and the parent’s feedback has been provided.”⁸²

32. On July 2, 2021 the Parent filed her first due process complaint claiming that the proposed IEP would not provide the student with a free appropriate public education because it did not include ABA therapy.⁸³

⁸¹ H-23-02, District Exhibits, pg. 174.

⁸² H-23-02, Id., at 176.

⁸³ H-23-02, Id., at pgs. 19-38.

33. On July 8, 2021 a notice of conference was sent to the Parent for a Resolution conference.⁸⁴
34. July 9, 2021 Parent's counsel requested a change to the conference date to July 15 but needed to ensure that the Parent was available.⁸⁵
35. July 14, 2021, Parent's counsel was contacted regarding clarification of the issues in the complaint as they were different than those expressed during the conference.⁸⁶
36. July 22, 2021, Hearing officer reset hearing for August 4-6. District counsel requested a continuance for cause and the hearing was reset for August 23-25. July 23, 2021, District contacted Parent to offer LAMP training for Student's device on August 5 to which Parent initially indicated agreement.⁸⁷ However, Parent realized that her first due process hearing (H-22-03), had been set for August 4-6, 2021, therefore she stated she would have to wait and train later.⁸⁸
37. July 26, 2021, District offered to pay for the Parent's LAMP training on an alternate date or notification that she would be available on the August 5th date to which Parent responded she would be available.⁸⁹ August 3, 2021 District confirmed the Parent's registration for the LAMP training.⁹⁰
38. On August 14, 2021, District counsel on behalf of the District made an Offer of Settlement designed around what Barnes proposed during the evaluation conference.⁹¹
- Mrs. Streett, counsel for the District, provided the following as a settlement offer:

⁸⁴ H-23-02, Id., at pgs. 49-51.

⁸⁵ H-23-02, Id., at pg. 352.

⁸⁶ H-23-02, Id., at pg. 50.

⁸⁷ H-23-02, Id., at pgs. 353-354.

⁸⁸ H-23-02, District Exhibits, pgs. 353-354.

⁸⁹ H-23-02, Id., at pg. 354.

⁹⁰ H-23-02, Id., at pg. 355.

⁹¹ H-23-02, Parent Exhibits, pg. 422, District Exhibits, pg. 52.

Identification under the category of Multiple Disabilities; 90 day IEP as a diagnostic placement with Dr. Barnes's proposal that Student be in general education with a paraprofessional; Occupational therapy; Physical therapy; Speech therapy; and no other direct special education. A written agreement with a description of how school, BCBA, and RBT will plan collaboratively for the student's competing needs for ABA therapy and educational instruction, what information will be shared and how they will share information. The outside RBT from Barnes' clinic would be allowed into the school under the District's existing policy for outside providers including copies of insurance, clear background checks, confidentiality agreements, notification of absence of RBT, daily check-in with the front office and most important a written agreement. District's offer included payment of reasonable attorney's fees with the settlement and that the District would be released of claims.⁹²

39. August 20, 2021, this Hearing Officer was notified by Mrs. Caldwell that a settlement had been reached and a motion to dismiss would be forthcoming to dismiss.⁹³
40. August 30, 2021, Barnett emailed Parent to determine if the date of September 17, 2021, was agreeable for a meeting to write an IEP for the Student. On the same date and ten days after Petitioner's attorney had notified IHO that a resolution had been reached, Petitioner's attorney, directed the parent "Don't respond" to the request to set a date for the IEP meeting.⁹⁴

⁹² H-23-02, District Exhibits, pgs. 52-53.

⁹³ H-23-02, Id., pgs. 59-60.

⁹⁴ H-23-02, Id., pg. 54.

41. On September 3, 2021, the District sent a notice of conference to Parent attempting to set up a time for IEP meeting to establish consent for placement and to develop an IEP for Student.⁹⁵
42. On September 10, 2021, the District sent a second notice of conference to Parent attempting to set up a time for an IEP meeting to establish consent for placement and develop an IEP for Student.⁹⁶
43. Parent never responded to the District's request for an IEP meeting. There was no IEP developed (only a purposed IEP) and the Parent did not sign a Notice of Action providing consent for placement and programming at this time. The District did allow the BCBAs and RBTs to attend school with Student. The kindergarten classroom teacher provided additional space in the classroom to accommodate the Student's RBT to sit near him. The kindergarten teacher pulled the Student for extra intervention small group time to work on reading skills. The District allowed the Parent to check the student out of classes early without penalty in order for him to access his private occupational, physical, and speech therapies.⁹⁷ The District provided support and accommodations as appropriate to Student without the provision of any special education services. In addition to the RBT, a paraprofessional was assigned to work with Student on academics in the classroom, provide direction for transitions, and encourage social interaction during appropriate times. A licensed teacher was assigned to do Student's campus based general education intervention "What I Need" WIN Time, one on one with Student.⁹⁸ Assessments and assignments were modified by the classroom teacher, and the interventionist in both

⁹⁵ H-23-02, Id., pgs. 55-56.

⁹⁶ H-23-02, Id., at 57-58.

⁹⁷ H-23-02, Id., at 800.

⁹⁸ H-23-02, District's Exhibits, 499-637.

mode of presentation and accepted response to accommodate the use of the Student's communication device. Materials from the classroom reading program, Foundations, were provided to the parent to inform any outside providers of order and method that the letters and sounds would be taught in the classroom. The materials used for intervention (WIN) time were copied and provided to the Parent as well, however, she returned them saying that they were not needed. When the teacher became concerned about Student's rate of progress in the general education classroom without special education services, the kindergarten teacher discussed her concerns with the Parent during midterm conferences. The teacher requested to increase his individual intervention time to address his deficit areas. However, the Parent denied the teacher from increasing intervention supports in general education.

44. Progress during the What I Need intervention time (WIN Time) August 2021 – March 2022, was based on accuracy with the level of prompting. The levels of prompting used from highest level of prompting to lowest: 1) Full physical prompt; 2) partial physical prompt; 3) modeling; 4) gesture; 5) verbal prompt; 6) positional prompt; 7) independent.

School Intervention Data	Level of Prompting and Percent Correct			
Labeling of colors	100% Modeling	95% Gesture	38% Independent	90% Positional
Imitating Lines and Curves	100% Full Physical	100% Partial Physical	58% Gesture	
Receptive Id. Capital Letters	100% Partial Physical	97% Gesture	50% Independent	89% Positional
Receptive Id. Lowercase Letters	20% Independent	70% Positional		
Capital Letter Sounds	33% Independent	70% Positional		
Numbers	100% Partial Physical	26% Gesture	86% Positional	
10 Frame Numbers	72% Gesture	90% Positional		

Receptive Id. of Sight Words	50% Gesture	87% Positional		
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45. In February of 2022, after a call with Suzy Wilson, assistant superintendent, who had spoken with Parent about having an IEP meeting, Mrs. Barnett, the LEA supervisor, sent Parent a Notice of Conference for an IEP meeting regarding Student.⁹⁹ Parent responded with an email requesting the IEP meeting be held on February 18, 2022, stating that they needed to discuss his IEP, phasing out the RBT, training the paraprofessional as well as the behavior specialist and teachers. Parent waived all timelines in favor of meeting quickly and stated that if they couldn't get these issues resolved she would need to file for a second due process hearing.¹⁰⁰
46. February 21, 2022, an IEP meeting was held, and Parent attended.¹⁰¹ An IEP was developed for Student. Parent emphasized the importance of teaching Student to communicate using his LAMP device. The IEP team agreed to allow Dr. Barnes to provide staff training.¹⁰² The District, as it had done previously, brought a draft IEP to the meeting.¹⁰³ The committee went through each page of the IEP getting the input of the parent on each page. Parent took out some of the goals and objectives that she felt were not needed at this time of the school year.¹⁰⁴ Parent stated she wanted to look at them again at the end of the school year. Parent did not think Student would benefit from any direct special education instruction. The committee discussed Student working on his letters, sight words, speech goals, and numbers for his goals until the end of this school

⁹⁹ H-23-02, Id., at pgs. 57, 360.

¹⁰⁰ H-23-02, Id., at pg. 361.

¹⁰¹ H-23-02, District Exhibits, pgs. 138-167

¹⁰² H-23-02, Parent Exhibits, pg. 148.

¹⁰³ H-23-02, Id., at pgs. 138-167.

¹⁰⁴ H-23-02, Id., at pg. 68.

year.¹⁰⁵ The committee determined that Student will receive speech/language therapy 60 minutes weekly in the general education classroom, special education reading 75 minutes weekly in the general education classroom, special education written expression 75 minutes weekly in the general education classroom, and special education math 225 minutes weekly in the general education classroom. Occupational therapy and physical therapy were considered, but Parent denied services at this time and felt his outside services were adequate. Parent did ask about Student's school therapies and the committee discussed that the school district will not bill Medicaid for related services. The team added a cool down room as an accommodation on the Student's IEP.¹⁰⁶ Parent did not want Student removed from the room for the cool down room unless it was a last resort. The committee determined that Student would be tested on state assessment individually. District agreed to Parent's request that Student be accompanied by a private RBT under the direction of a private BCBA and this will be faded out after instruction from the private BCBA (Dr. Barnes) to the school staff (teacher, paraprofessional, and behavior consultant).¹⁰⁷ The RBT will not be responsible for creating curriculum during the school day, will follow all school guidelines and expectations (such as signing in at the office daily, etc.) while on school grounds, and will follow the confidentiality agreement. Barnes stated she would come to the school and provide training for the staff and do modeling and coaching with the staff.¹⁰⁸ Barnes stated she will begin to fade out the RBT on week two or four after she begins her training.¹⁰⁹ The committee decided to

¹⁰⁵ H-23-02, Id., at pgs. 144-163.

¹⁰⁶ H-23-02, District Exhibits, pg. 142.

¹⁰⁷ H-23-02, Id., at pg. 140.

¹⁰⁸ H-23-02, Id., at pgs. 196-205.

¹⁰⁹ H-23-02, Id., at pg. 196.

do an annual review in May to look at new goals for the next school year. Parent signed the consent for placement in special education on March 4, 2022.¹¹⁰

47. May 20, 2022, an annual review was held.¹¹¹ Parent attended the meeting to review the student's progress for the IEP February – May 2022 period. During a review of factors associated with extended school year services, Mrs. Cooper, special education teacher reported that the District did not have any concerns about Student's behavior problems, there was no regression in behavior; however, Parent reported that "everyone's seeing it" outside of school.¹¹² She contributed it to his overstimulation and need for movement based upon comments from his occupational therapist.¹¹³ The District suggested allowing more sensory breaks during the day with access to a swing or trampoline in an effort to provide him with feedback and help to reduce the overload experienced during the day, yet the parent declined this offer for sensory breaks or sensory diet.¹¹⁴ The special education teacher reported that Student had made progress in special education as well as general education, but she felt that he could make more progress if he had some direct specialized instruction in a smaller group with decreased distractions, yet the Parent refused to allow this instruction for placement in general education.¹¹⁵ The District's occupational therapist ("OT") and special education teacher explained the benefits of a sensory diet to the Student's success and attention in the classroom and after school. The descriptions included the use of a swing, body sock, balance board, heavy lifting, and other activities to provide proprioceptive feedback which could be provided

¹¹⁰ H-23-02, Id., at pg. 67.

¹¹¹ H-23-02, District Exhibit's, pgs., 231-256.

¹¹² H-23-02, Annual review conference 5-2-22, at minute 42:00.

¹¹³ H-23-02, Id., at minutes 45:00-50:00.

¹¹⁴ H-23-02, Id., at minute 54:00.

¹¹⁵ H-23-02, Id., at minutes 54:00-1:02.00.

across the day; however, when the Parent heard that the swing, balance boards, trampolines were located inside a special education classroom and that the Student would have to leave the general education classroom in order to access those items, she refused to allow him to access these for his sensory needs. Parent stated, “I would do it... I’ll just deal with it when I get to do it... at home.”¹¹⁶ The District expressed concerns about the rate of progress in all areas of academics and considered extended year services; however, the Parent declined instruction from certified classroom teachers to continue time at Dr. Barnes’ clinic. She requested that a list of weekly skills be sent home so that she could work more one on one at home.¹¹⁷ Parent along with Dr. Barnes had no objections to the recommended time in special education nor the goal areas to be addressed. Dr. Barnes indicated that the RBT was beginning to fade out at school and that the goal would be for the RBT to begin the first week of school and if everything went well to fade out completely.¹¹⁸ Parent did not sign the IEP created during the meeting but instead requested to take a copy and review it at home and “breathe” as it was a lengthy meeting with a lot of different information.¹¹⁹

48. Parent provided written feedback on the IEP for the 2022-23 school year.¹²⁰ On May 24, 2022, Parent emailed District to confirm changes from the District’s “Draft” IEP that were agreed to at the May 20, 2022 IEP team meeting. First, the District had removed Student’s RBT from the IEP, but the IEP team agreed that the RBT was needed for the beginning of the school year and may be needed throughout the school year, and the IEP

¹¹⁶ H-23-02, Id., at minute 1:04.00

¹¹⁷ H-23-02, Id., at minutes 1:04-1:08.

¹¹⁸ H-23-02, Id., at minutes 1:23-1:25.

¹¹⁹ H-23-02, Id., at minute 1:31.

¹²⁰ H-23-02, District Exhibits, pgs. 72-74, 230-260, 405.

should allow for that.¹²¹ Second, Parent noted the “Draft” IEP did not reflect the agreement reached during kindergarten to split equally special education minutes and general education minutes in reading, math, and writing. Thus, the “Draft” IEP minutes -- 30 minutes per day of reading, 90 minutes per day of math, and 30 minutes per day of writing -- needed to be cut in half.¹²² Third, Parent reiterated her concern that Student’s language goals were not appropriate because Student cannot differentiate between similar letter sounds, known as auditory discrimination. As a result, “Student spent most of his school year learning the same few letters . . .”¹²³ Fourth, Parent complained that, despite the IEP requiring everyone working with Student to be trained on the LAMP device, she knew that not everyone was trained and asked that everyone be trained before the start of first grade. Parent also reminded the District that if anyone needs to add an icon to the LAMP device, they should text or email her to add it.¹²⁴ And lastly, Parent reported that in two weeks Dr. Barnes taught Student the sound of all letters and numbers. Even so, the District refused to update his goals telling Parent they had to wait until he was reevaluated. Parent asked, “How long into the school year will it take to have that reevaluation and form a new goal?”¹²⁵

49. On May 27, 2022, the District responded to Parent’s email regarding changes to the IEP. The District agreed to Parent’s changes. In the email the District did state that “we have everyone signed up for the LAMP training who we anticipate will work with Student.

¹²¹ H-23-02, Parent’s exhibits, pg. 2.

¹²² H-23-02, Id.

¹²³ H-23-02, Id.

¹²⁴ H-23-02, Id.

¹²⁵ H-23-03, Id.

Most of the people working with him this year will be the same as last year, with the exception of the general education teacher.”¹²⁶

50. Student spent 2 years in Dr. Barnes Clinic receiving ABA therapy. In her Hope 4 Autism Clinic - Dr. Sheila Barnes, a doctoral level BCBA (“BCBA-B?”), provided Student with therapeutic level ABA services.
51. Prior to Student starting kindergarten, Dr. Barnes had gotten approval and developed a treatment plan for Student beginning March 13, 2021.¹²⁷
52. Dr Barnes’ treatment plan states that the rationale for services requested are:
“Student is a young male with significant deficits in social communication and social interaction. These deficits adversely affect his ability to use language to interact with his family within his home environment and in other settings. His mother reports that he bites others and has broken the skin. Currently he has no means of functional communication.”¹²⁸
53. On July 26, 2022, the parties held a resolution conference where there was an attempt to schedule direct training by Dr. Barnes for the persons who would be new to Student in the first grade.¹²⁹
54. The training with Dr. Barnes did not come to fruition, and so the District facilitated a meeting with personnel who had served Student in the spring of 2022 and the new personnel who would serve Student in the first grade so that they could provide

¹²⁶ Parent’s Exhibits, pg. 4.

¹²⁷ Parent’s Exhibits, pg. 243.

¹²⁸ Id.

¹²⁹ Resolution conference audio July 26, 2022.

information, and background about working with Student, as well as share information provided by Dr. Barnes and her RBT's.¹³⁰

55. Student was placed in a first-grade classroom with Mrs. Shook. Mrs. Shook has a Bachelor of Science in early childhood education, pre-K through fourth grade, and a Master's degree in school counseling. She taught pre-K for two years, and first grade for seven years.¹³¹
56. District assigned an experienced paraprofessional to work one on one with Student. District sent the paraprofessional through forty hours of ABA training online and LAMP training before school started.¹³²
57. On August 12, 2022, before school began, the Assistant Principal proposed a communication sheet to go back and forth between Dr. Barnes and the District to improve communication between the parties. Dr. Barnes stated her concerns about the communication sheet stating that it was seeking opinion rather than scientific data.¹³³
58. Dr. Barnes and her RBT came to the first day of school to observe Student. Additionally, people Student was familiar with were present to assist with his transition. Student's speech therapist, his special education teacher, and the District's BCBA from the previous school year were present.¹³⁴
59. On September 9, 2022, Parent sends an email to District stating that:

Due to the extreme influx in undesired behaviors Student has exhibited in the past few weeks, it is now medically necessary that he return to Dr. Barnes Clinic immediately for some intense in-patient ABA therapy. Over the next few weeks Student will be going to Dr. Barnes Clinic so she can address the regression of behaviors that have redeveloped in the recent weeks that I haven't seen in years!

¹³⁰ Hearing Transcripts, Vol. III., pgs. 121-122.

¹³¹ Hearing Transcripts Vol. I, pg. 14.

¹³² Hearing Transcripts Vol. III., pg. 117, Exhibits, Vol. III., pg. 209.

¹³³ Exhibits Vol. III., pgs. 110-112.

¹³⁴ Hearing Transcripts Vol. IV, pgs., 11, 20; Hearing Transcripts vol. V., pgs., 82, 121.

Please understand, these very behaviors he is presenting with in school and now throughout different aspects of his life, has been what I have been trying so hard to avoid. Your interference with his ABA therapy the past 4 weeks have erased 4 years of work!

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60. On September 9, 2022, in response to Parents email, the principal Kim Gill responded and requested that they set up a meeting.¹³⁶
61. After being made aware of Student's behaviors in Parent's September 9, 2022, email, the District's LEA supervisor wrote criteria for several behaviors and asked the District's BCBA to instruct the paraprofessional on how to gather data.¹³⁷ Additionally, the LEA supervisor then directed Student's paraprofessional to gather scatter plot data on his behavior so the LEA could see if it was improving or not.¹³⁸
61. On October 3, 2022, Parent sent an email to Jasmine Wright, explaining that while Parent isn't a BCBA she sat on the Board of ARKABA (Arkansas Association for Behavior Analysis) as a parent representative, and went on to explain that it goes against Ms. Wright's code of ethics to provide any behavioral analytic services without a parent's informed consent and Parent went on to state that she had not given Ms. Wright her informed consent.¹³⁹
62. On October 7, 2022, Dr. Barnes observed Student at school. Dr. Barnes became concerned that Ms. Wright (the District's BCBA) was providing ABA services to Student without parental consent and interfering with the RBT who was attending school with Student under the supervision of Dr. Barnes. Dr. Barnes stated one of the issues was the

¹³⁵ Exhibits Vol. 3, pg. 113.

¹³⁶ Exhibits, Voll. III, pg. 114.

¹³⁷ Exhibits, Vol. IV., pg. 284.

¹³⁸ Id., pgs. 285-290, 290-388.

¹³⁹ Exhibits, Voll. III., pg. 115.

use of the timer with Student. She was concerned that Wright and district staff were using the time to signal the end of a reinforcing activity. Teaching student that the timer meant “I’m losing something of value”. Dr. Barnes explained that the timer should only be used to signal a reinforcer, letting Student know, “you are going to get something you want.” Dr. Barnes stated that as a result just bringing out the timer would trigger maladaptive behaviors.¹⁴⁰

62. On October 7, 2022, Parent again sent an email to Jasmine Wright in which she stated: “ Jasmine, you continue to disregard my previous email about administering analytics services. You have not properly identified your role with my child, obtained any form of consent, or bare minimum returned my email addressing my concerns while continuing to administer services to my child. If this continues, I will have no choice but to file an ethics complaint”¹⁴¹
63. On October 11, 2022, Dr. Barnes sent an email to the Parent and Ms. Wright stating that she was officially notifying Ms. Right that she intends to fulfill her ethical obligation to report that Ms. Wright has provided ABA services to Student without parental consent and despite Parent objections.¹⁴²
64. On October 11, 2022, parent sent an email to Kallie Cooper, stating that she has noticed Student missed minutes with her and asked her to let her know how many minutes he had missed.¹⁴³
65. On October 13, 2022, Kallie Cooper, responded to Parent’s October 11, 2022, email stating that Student missed 3 literacy sessions, and 3 math sessions without a substitute.

¹⁴⁰ Exhibits, Vol. III., pg. 138, Hearing transcripts, Vol. IV., pgs. 29-32, 36-37,

¹⁴¹ Id., at. Pg. 116.

¹⁴² Id., at pg. 117.

¹⁴³ Exhibits, Vol. III, pg. 133.

She further explained they would be making those up by adding 15 minutes to 9 of his math sessions and 6 of his literacy sessions.¹⁴⁴

64. On October 13, 2022, Mr. Shumate the assistant principal sent an email to Parent requesting dates and times for a meeting.¹⁴⁵
65. On October 20, 2022, Dr. Barnes and Parent met with the Principal and Assistant principal and shared Dr. Barnes concerns from when she observed Student on October 7, 2022, and provided some recommendations.¹⁴⁶
66. On October 25, 2022, Dr. Barnes sent an email outlining recommendations she made at the October 20, 2022, meeting. Dr. Barnes recommendations included:
1. Align SPED instruction to gen ed instruction (gen ed instruction is evidence based)—this was because of Dr. Barnes’s observation on October 7, 2022, that Student’s general education teacher was using evidence-based reading program but that special education teacher was not.
 2. implement teaching trials that include transfer procedures (follow prompted trial with a non-prompted trial)
 3. Use time ONLY to signal an “improving condition” not a “worsening condition”.
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67. Student’s maladaptive behavior increased as the school year went on in both frequency and duration. Examples of maladaptive behavior include:
- a. September 16, 2022, Student grabbed and pulled Mrs. Jordans’s hair, threw her glasses across the room, and ripped an earring out of her ear. He had

¹⁴⁴ Id., pg. 134.

¹⁴⁵ Id., at pg. 131.

¹⁴⁶ Recording of October 20, 2022, meeting.

¹⁴⁷ Exhibits, Vol. III, pg. 138.

another outburst where he threw her glasses for the second time and pulled her hair.

b. October 12, 2022, Student hit and gave paraprofessional a black eye.

Student was crying, screaming, thrashing, hitting, and biting.

c. November 9, 2022, Student was crying, slamming, head banging, hitting/pulling hair and screaming.

d. December 6, 2022, Student crying, thrashing, hitting, biting, throwing, screaming, pulling hair.¹⁴⁸

68. There was no evidence presented that the District ever discussed these behaviors with Parent or sought to address behaviors with any type of interventions.

69. Dr. Barnes testified that as a result of the District's failure to address Student's maladaptive behaviors, and review his IEP, Student's maladaptive behaviors escalated "to the point I was concerned about self-injurious behavior and getting hurt in the school environment..." Dr. Barnes testified that she had no doubt that Student would hurt himself or others in the school environment because the behaviors got worse and worse.¹⁴⁹

70. On December 28, 2022, Parent sent an email providing District with a letter from Student's Doctor concerning Student's inability to remain in the school environment. The Letter from Student's doctor stated:

"I follow Student (student's name) in my Internal Medicine -Pediatrics Practice. Student has a history of Pervasive Developmental Delay. He is currently having an educational emergency and requires immediate clinical services so he can

¹⁴⁸ Exhibits Vol. IV., pgs. 288-390.

¹⁴⁹ Hearing transcripts, Vol. IV, pgs. 52-54.

receive medically necessary therapy until his behavior is under control enough to reintegrate into a regular classroom. I am recommending homebound school to allow for re-initiation of intensive psychosocial rehabilitation through ABA therapy. Please contact me with any additional questions or concerns.”¹⁵⁰

DISCUSSION AND CONCLUSIONS OF LAW

General Legal Principles

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

In the role of factfinders, special education hearing officers are charged with the responsibility of making credibility determinations of the witnesses who testify. *Albright ex rel. Doe v. Mountain Home Sch. Dist.* 926 F.3d 943 (8th Cir. 2019), *J. P. v. County School Board*, 516 F.3d 254, 261 (4th Cir. Va. 2008). This hearing officer found each of the witnesses who testified to be credible in that they all testified to the facts to the best of their recollection; minor discrepancies in the testimony were not material to the issues to be determined and, in any event, were not deemed to be intentionally deceptive.

The weight accorded the testimony, however, is not the same as its credibility.

¹⁵⁰ Parent Exhibits pg. 93. District Exhibits, pgs. 144.

Some evidence, including testimony, was more persuasive and reliable concerning the issues to be decided, discussed as necessary below. The documentation and testimony were sometimes conflicting, although this hearing officer does not necessarily find that any one witness was intentionally untruthful, these inconsistencies did play a role in this hearing officer's decisions. 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.

Applicable Legal Principles

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

Districts meet the obligation of providing FAPE to eligible students through development implementation of an IEP that is " 'reasonably calculated' to enable the child to receive 'meaningful educational benefits' in light of the student's individual circumstance". The U.S. Supreme Court considered the application of the *Rowley* standard, and it observed that an IEP "is constructed only after careful consideration of the child's present levels of achievement,

disability, and potential for growth.” *Endrew F. v. Douglas County School District* RE-1, 137 S. Ct. 988, 999, 197 L.Ed.2d 335, 350 (2017). The IEP must aim to enable the child to make progress. The essential function of an IEP is to set out a detailed individualized program for pursuing academic and functional advancement in all areas of unique need. *Endrew F.*, 137 S. Ct. 988, 999 (citing *Rowley* at 206-09). The *Endrew* court thus concluded that “the IDEA demands ... an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” 137 S. Ct. at 1001, 197 L.Ed.2d at 352.¹⁵¹

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

"The IEP is 'the centerpiece of the statute's education delivery system for disabled children.' " *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.* RE-1, U.S. 137 S. Ct. 988, 994, 197 L. Ed. 2d 335 (2017) (quoting *Honig v. Doe*, 484 U.S. 305, 311, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988)). An IEP is a comprehensive program prepared by a child's "IEP Team," which includes teachers, school officials, the local education agency (LEA) representative and the child's parents. An IEP must be drafted in compliance with a detailed set of procedures. 20 U.S.C. § 1414(d)(1)(B). An IEP must contain, among other things, "a statement of the child's present levels of academic achievement," "a statement of measurable annual goals," and "a statement of the special education and related services to be provided to the child." *Id.* §

1414(d)(1)(A)(i). A free appropriate public education (FAPE), as the IDEA defines it, includes individualized goals, "specially-designed instruction" and "related services." Id. § 1401(9).

"Special education" is "specially designed instruction . . . to meet the unique needs of a child with a disability"; "related services" are the support services "required to assist a child . . . to benefit from" that instruction. Id. §§ 1401(26), (29). A school district must provide a child with disabilities such special education and related services "in conformity with the [child's] individualized education program," or "IEP." 20 U.S.C. § 1401(9)(D).

When formulating an IEP, a school district "must comply both procedurally and substantively with the IDEA." *Rowley*, at 206-07 A procedural violation occurs when a district fails to abide by the IDEA's safeguard requirements. A procedural violation constitutes a denial of a FAPE where it "results in the loss of an educational opportunity, seriously infringes the parents' opportunity to participate in the IEP formulation process or causes a deprivation of educational benefits." *J.L. v. Mercer Island Sch. Dist.*, 592 F.3d 938, 953 (9th Cir. 2010). A substantive violation occurs when an IEP is not "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances," *Endrew F.* The IDEA further provides that if a parent refuses to consent to the receipt of special education and related services, or fails to respond to a request to provide such consent, "the local educational agency shall not be considered to be in violation of the requirement to make available a free appropriate public education to the child for the failure to provide such child with the special education and related services for which the local educational agency request such consent." 20 U.S.C.

§1414(a)(1)(D)(ii)(III)(aa). Although a parent always retains the right to withhold consent, after consent is withheld, the school district cannot be held liable for denying a FAPE. Additionally when parents waive their children's rights to services, school district may not override their

wishes. *Fitzgerald ex rel. S.F. v. Camdenton R-II School District*, 439 F.3d 773 (8th Cir. 2006); *Schoenfeld v. Parkway School District*, 138 F.3d 379 (8th Cir. 1998).

Pursuant to Part B of the IDEA, states are required to provide a FAPE for all children with disabilities between the ages of three and twenty-one. 20 U.S.C. § 1412(a); 34 C.F.R. §300.300(a). In 1982, in *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, the U.S. Supreme Court addressed the meaning of FAPE and set forth a two-part analysis that must be made by courts and hearing officers in determining whether a school district has failed to provide FAPE as required by federal law. 458 U.S. 176, 206-07 (1982). Pursuant to *Rowley*, the first inquiry that a court or hearing officer must make is that of whether the State, i.e. local educational agency or district, has complied with the procedures set forth in the IDEA. Thereafter, it must be determined whether the IEP(s) developed pursuant to IDEA procedures was reasonably calculated to enable the student to make appropriate progress in light of his specific circumstances. *Endrew F.*

PROCEDURAL VIOLATION OF IDEA

Regarding the first inquiry, that of whether the District complied with the procedures set forth in the IDEA, this hearing officer notes that Parent alleges that District violated the stay put provision of IDEA by implementing the IEP developed on May 20, 2022, not agreed to by Parent and after Parent filed a due process hearing request challenging the May 20, 2022 IEP.¹⁵² This hearing officer agrees.

The IDEA codifies the goal that "all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(d). In addition, the IDEA mandates that

¹⁵² H-23-02 was filed on July 5, 2022.

participating states extend various procedural protections and administrative safeguards to disabled children, parents, teachers, school officials, and educational institutions. 20 U.S.C. § 1415. For example, under the IDEA, parents are entitled to notice of proposed changes in their child's educational program and, where disagreements arise, to an "impartial due process hearing." Id. § 1415(b)(2) & (f). Once the available avenues of administrative review have been exhausted, aggrieved parties may file a civil action in state or federal court. Id. § 1415(i)(2)

The IDEA includes a number of procedural safeguards "that guarantee parents both an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decisions they think inappropriate." *Honig v. Doe*, 484 U.S. 305, 311-12, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988). One of those safeguards is the "stay-put" provision; during the pendency of mediation, a due process hearing, or judicial review, "the child shall remain in the then current educational placement" unless the parent and school officials agree to an interim or permanent change. 20 U.S.C. § 1415(j). *M.M. v. Special School Dist.*, 512 F.3d 455, 463 (8th Cir. 2008), *Light v. Parkway C-2 School Dist.*, 41 F.3d 1223, 1227-28, (8th Cir. 1994).

"Because the stay-put provision is in effect, the parent must agree to any change in education services." *M.M. v. Special School Dist.*, 512 F.3d 455, 464 (8th Cir. 2008).

Here an annual review was held on May 20, 2022. At this meeting there was discussion about ABA therapy being phased out during Student's first grade year. The discussion included that the RBT, under the direction of Dr. Barnes, would start the year and then fade out as Student adjusted to the transition and District staff gained instructional control from the RBT. However, when Parent received a copy of the proposed IEP she immediately noticed that the District had removed ABA therapy and Student's RBT from the IEP even though the IEP team had agreed that the RBT was needed for the beginning of the school year and may be needed throughout the

school year, and that the IEP should allow for that.¹⁵³ On May 24, 2022, four days after Student’s annual review, Parent provided written feedback on the IEP for the 2022-23 school year.¹⁵⁴ On May 24, 2022, Parent emailed the District to confirm changes from the District’s “Draft” IEP that were agreed to at the May 20, 2022 IEP team meeting. Parent stated that First, the District had removed Student’s RBT from the IEP, but that the IEP team had agreed the RBT was needed for the beginning of the school year and may be needed throughout the school year, and the IEP should allow for that.¹⁵⁵ Second, Parent noted the “Draft” IEP did not reflect the agreement reached during kindergarten to split equally special education minutes and general education minutes in reading, math, and writing. Thus, the “Draft” IEP minutes -- 30 minutes per day of reading, 90 minutes per day of math, and 30 minutes per day of writing – needed to be cut in half.¹⁵⁶ Third, Parent reiterated her concern that Student’s language goals were not appropriate because Student cannot differentiate between similar letter sounds, known as auditory discrimination. As a result, “Student spent most of his school year learning the same few letters . . .”¹⁵⁷ Fourth, Parent complained that, despite the IEP requiring everyone working with Student to be trained on the LAMP device, she knew that not everyone was trained and asked that everyone be trained before the start of first grade. Parent also reminded the District that if anyone needs to add an icon to the LAMP device, they should text or email her to add it.¹⁵⁸ And lastly, Parent reported that in two weeks Dr. Barnes taught Student the sound of all letters and numbers. Even so, the District refused to update his goals telling Parent they had to wait until he was reevaluated. Parent asked, “How long into the school year will it take to have

¹⁵³ H-23-02 Parent Exhibits, pg. 2.

¹⁵⁴ District Exhibits, pgs. 72-74, 230-260, 405.

¹⁵⁵ H-23-02 Parent’s exhibits, pg. 2.

¹⁵⁶ Id.

¹⁵⁷ Id.

¹⁵⁸ Id.

that reevaluation and form a new goal?”¹⁵⁹ Although there was evidence that the District agreed to the changes requested by the Parent, the 2022-2023 IEP was not changed to reflect the reinstatement of ABA therapy or the presence of an RBT. A resolution conference was held in July, 2022 and again Parent was told that Dr. Barnes and her RBT would be able to attend school with Student the first few weeks of 2022-2023 school year and hopefully fade out as District personnel gained instructional control.¹⁶⁰ Evidence presented showed that the Parent and the District never agreed to the proposed 2022-2023 IEP and that the Parent believed they were operating off of the last agreed upon IEP developed in February of 2022. Once Parent filed her Due Process Hearing Request H-23-02, on July 5, 2022, Stay put went into effect and the last agreed IEP including placement and services was the IEP developed in February of 2022. The District implemented the proposed IEP developed in May of 2022, without agreement of the Parent and after she had filed her due process complaint challenging said IEP, and in doing so violated the Stay Put provision under IDEA.

Based on all the evidence and testimony the District implemented the 2022-2023 IEP after the Parent filed her Due Process Complaint H-23-02 and thus procedurally violated the Stay Put provision of IDEA.

SUBSTANTIVE VIOLATIONS OF IDEA

Having analyzed the first prong of the FAPE analysis, specifically that of procedural violations, and determined that the District violated the Stay Put provision under IDEA when it implemented the IEP developed on May 20, 2022, it is now necessary to consider whether this procedural violation resulted in a substantive denial of FAPE to Student. Even if a school district violated IDEA procedures, it does not automatically follow that the school district has denied the

¹⁵⁹ Id.; Hearing transcripts Vol. VI, pgs. 20-25.

¹⁶⁰ Hearing transcript Vol. VI, pgs. 26-27.

child a FAPE. *K.E. v. Indep. Sch. Dist.* 15, 647 F.3d 795, 804 (8th Cir. 2011). “An IEP should be set aside only if procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits.” *Lathrop R-II Sch. Dist. v. Gray ex rel. D.G.*, 611 F.3d 419, 424 (8th Cir. 2010) (quoting *Indep. Sch. Dist. No. 283*, 88 F.3d at 562).

Here, the District is correct that the differences in the two IEPs were negligible. Parent fully participated in the development of both IEPs. The two IEPs, the one written in February 2022 and the one written in May 2022, had few differences between them. In the 2022-2023 IEP developed in May 2022, the present levels of performance were updated. The goals were updated to reflect first grade standards and the student’s progress. The private BCBA was left off the May 2022 IEP. Although ABA therapy was never listed on any IEP as a special education service or a related service, it was listed on the February 2022 IEP under “other factors to be considered.”¹⁶¹ However, beginning the first day of school in the fall of 2022, the District allowed Dr. Barnes and her RBT’s to provide ABA therapy at school and this continued throughout the fall semester. Because there were few changes to the February 2022 IEP and even though the District did not include ABA therapy or Dr. Barnes or the RBT on the May 2022 IEP, the District did allow ABA services by a private BCBA to continue for Student at school. Based on the evidence supra it is the opinion of this hearing officer that the District’s procedural violation of IDEA’s stay put provision did not compromise Student’s right to an appropriate education, seriously hamper Parent's opportunity to participate in the formulation process or cause a deprivation of educational benefit to Student. As such the District did not substantively violate IDEA.

¹⁶¹ Exhibits Vol. III, pg. 56.

II. Whether the District’s IEP for 2022-2023 school year provides the student with a free appropriate public education in the least restrictive environment.

The IEP is the guiding document and primary method for providing special education services to disabled children under the IDEA. *Honig v. Doe*, 484 U.S. 305, 311 (1988). “Through the development and implementation of an IEP, the school provides a FAPE that is ‘tailored to the unique needs of a particular child.’” *Paris Sch. Dist.*, 2017 WL 1234151, at *5 (citing *Endrew F. v. Douglas Cnty. Sch. Dist. RE-I*, 137 S. Ct. 988 (2017), at *1000). An IEP is not designed to be merely a form but, instead, a substantive document that is developed only after a district has carefully considered a student’s “present levels of achievement, disability, and potential for growth.” *Id.* (citations omitted). Pursuant to *Endrew F.*, a district “must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F. v. Douglas Cnty. Sch. Dist. RE-I*, 137 S. Ct. 988 (2017) *1000. For most students, to comply with this standard, providing FAPE “will involve integration in the regular classroom and individualized special education calculated to achieve advancement from grade to grade.” *Id.* However, in the event that this is not possible, the education of a disabled child still needs to be “appropriately ambitious” in light of a student’s individual circumstances. *Id.*

Under the IDEA, an IEP must include “a statement of measurable annual goals, including academic and functional goals” that is “designed to” meet the needs resulting from the child's disability so that the child can “be involved in and make progress in the general education curriculum” and “meet each of the child's other educational needs that result from the child's disability.” 20 U.S.C. § 1414(d)(1)(A)(i)(II). A school district also must revise an IEP as is “appropriate to address ... any lack of expected progress toward the annual goals and

in the general education curriculum,” “the results of any reevaluation,” or information about the child provided by the parents. *Id.* at § 1414(d)(4)(A)(ii). *K.E. v. Independent School Dist. No. 15*, 647 F.3d 795 (8th Cir. 2011).

An IEP must be drafted in compliance with a detailed set of procedures. 20 U.S.C. § 1414(d)(1)(B). An IEP must contain, among other things, "a statement of the child's present levels of academic achievement," "a statement of measurable annual goals," and "a statement of the special education and related services to be provided to the child." *Id.* § 1414(d)(1)(A)(i). A free appropriate public education (FAPE), as the IDEA defines it, includes individualized goals, "specially-designed instruction" and "related services." *Id.* § 1401(9). "Special education" is "specially designed instruction . . . to meet the unique needs of a child with a disability"; "related services" are the support services "required to assist a child . . . to benefit from" that instruction. *Id.* §§ 1401(26), (29). A school district must provide a child with disabilities such special education and related services "in conformity with the [child's] individualized education program," or "IEP." 20 U.S.C. § 1401(9)(D). Parent asserts that the District failed to develop an appropriate IEP at the May 20, 2022, annual review conference. IDEA requires that IEPs include the following: (1) a statement of a student’s present levels of academic achievement and functional performance; (2) a description of how a student’s disability affects his or her involvement and progress in the general education curriculum; (3) annual goals that are measurable, as well as a description as to how progress toward stated goals will be measured; and (4) a description of special education and related services provided to student. 20 U.S.C. § 1414(d)(1)(A)(i)(I)-(IV). ““An IEP is a snapshot, not a retrospective,” and we must “take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated.”” *K.E. v. Independent School Dist. No. 15*, 647 F.3d 795, 808

(8th Cir. 2011) When evaluating whether the District has met its substantive obligation under the IDEA, the Court must look at whether the District "offer[ed] an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew*, 137 S. Ct. at 999. The educational program established by an IEP should be "appropriately ambitious in light of [the child's] circumstances" and should give the child "the chance to meet challenging objectives." *Id.* at 1000. The Supreme Court has cautioned that the question of whether an IEP affords a FAPE is a case-specific inquiry. *Id.* at 1001.

In the present case an annual review was held on May 20, 2022 and an IEP developed for Student's 2022-2023 school year.¹⁶² Parent argues that the 2022-2023 IEP was not reasonably calculated to enable Student to make progress appropriate in light of Student's individual circumstances, because it did not include ABA therapy as special education or related services and failed to include an adaptive behavior goal identifying Student's expected progress and how progress would be monitored.¹⁶³ The record shows that the IEP developed for Student on May 20, 2022, contains Student's present levels of academic achievement and functional performance, how his disability affects his involvement and progress in the general education curriculum, annual goals that are measurable and a description of special education and related services provided to Student.¹⁶⁴ On May 24, 2022, Parent emailed the District to confirm the changes she thought should be made to the draft IEP after her review. Specifically, Parent asked:

1. "The District had removed Student's RBT from the IEP, but the IEP team agreed that the RBT was needed for the beginning of the school

¹⁶² H-23-02, Recording of May 20, 2022, annual review.

¹⁶³ Parent's post hearing brief pg. 6

¹⁶⁴ District's Exhibits, pgs. 231-256.

year and may be needed throughout the school year, and the IEP should allow for that.

2. Parent noted the “Draft” IEP did not reflect the agreement reached during kindergarten to split equally special education minutes and general education minutes in reading, math, and writing. Thus, the “Draft” IEP minutes -- 30 minutes per day of reading, 90 minutes per day of math, and 30 minutes per day of writing -- needed to be cut in half.
3. Parent reiterated her concern that Student’s language goals were not appropriate because Student cannot differentiate between similar letter sounds, known as auditory discrimination. As a result, “Student spent most of his school year learning the same few letters . . .”
4. Parent complained that, despite the IEP requiring everyone working with Student to be trained on the LAMP device, she knew that not everyone was trained and asked that everyone be trained before the start of first grade. Parent also reminded the District that if anyone needs to add an icon to the LAMP device, they should text or email her to add it”.¹⁶⁵

On May 27, 2022, the District emailed Parent and agreed to Parent’s changes to the draft IEP.¹⁶⁶ Because the IEP developed on February 22, 2022 was for only a nine week period, there were few changes made for Student’s 2022-2023 school year. There were adjustments to Student’s goals and objectives. In the 2022-2023 IEP, there are six language arts goals and two math goals.¹⁶⁷ At the time that 2022-2023 IEP was developed Student’s maladaptive behaviors

¹⁶⁵ H-23-02, Parent’s Exhibits, pg. 2.

¹⁶⁶ Id., pg. 4.

¹⁶⁷ H-23-02, District Exhibits, pgs. 237-252.

were few and Student had a relatively successful kindergarten year. This hearing officer finds, as I did in H-23-02, that at the time the 2022-2023 IEP was developed it was “reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.”

The IEP team with the exception of Parent and Dr. Barnes has argued from the beginning that Student did not need ABA therapy. Further the District has stated that if it was determined Student did require ABA therapy it was ready and willing to provide ABA therapy through its staff BCBA. Parent has consistently stated that she wanted Student’s ABA therapy provided by a private BCBA with a private RBT in the school setting. The District acquiesced and allowed ABA to be provided by a private RBT under the direction of a private BCBA (Dr. Barnes). The evidence shows that instead of the two groups working together as a team, the BCBA and RBT worked on behavior, and the District implemented Student’s IEP. However, these two groups did not work cohesively. Once the District agreed to allow the RBT and the BCBA to be part of the IEP team, they had an obligation to work with them and not interfere, and the RBT and BCBA had a similar obligation to work with the District. Both groups failed its obligation to work cooperatively for the better of Student. Because of this failure, Student’s behavior deteriorated and worsened in both scope and duration. I disagree with the District that the data shows Student’s behaviors decreased over the fall semester of 2022. Parent notified the District of her concerns about Student’s behavior and was told numerous times by the District that they just didn’t see that behavior at school. The District’s own data which encompasses more than 100 pages of exhibits shows that Student pulled hair, hit his paraprofessional causing a black eye, threw glasses, thrashed his body around, bruised his back by thrashing in his chair, banged his head, bit at least one adult breaking the skin, hit others, bit others, screamed, cried, etc.¹⁶⁸

¹⁶⁸ Exhibits Vol. IV., pgs. 290-391.

Additionally, District data shows that Student's behaviors continued throughout the Fall 2022 semester and the District didn't notify Parent, didn't hold an IEP meeting to address the worsening behaviors, perform a functional behavior analysis, develop a plan to address the behaviors, or consult the private BCBA about Student's ongoing maladaptive behaviors. This failure resulted in Student being taken out of school because Dr. Barnes, Student's pediatrician and Parent all agreed that Student required "immediate clinical services so he can receive medically necessary therapy until his behavior is under-control enough to reintegrate into a regular classroom."¹⁶⁹ Dr. Barnes testified that she was concerned that because of Student's worsening maladaptive behaviors he might seriously injure himself or someone else.¹⁷⁰

This hearing officer agrees with the parent that the IEP was no longer appropriate after Student's maladaptive behaviors at school worsened. The IEP is a living document and can and should be changed when Student's needs change and that is what the District failed to do here. As with other components of the IEP, strategies used to address behavior must be reviewed to determine if they are working; and if not, they must be revised. 20 U.S.C. §1414(d)(4)(A)(ii)(I)-(V). This may require a functional behavioral assessment ("FBA"), a detailed assessment of the function of the inappropriate behavior (e.g., avoiding tasks or seeking attention), and a behavior intervention plan ("BIP") that seeks to replace the inappropriate behavior with desired behavior and to impose appropriate consequences for inappropriate behavior. The failure to implement a BIP as a part of the IEP may result in a denial of FAPE. See *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1030 (8th Cir. 2003). Here, Student's behaviors increased in intensity and duration but the District failed to hold an IEP meeting to address Student's behaviors. Even as the 2022 fall semester continued and Parent voiced her concerns about Student's behavior, and eventually

¹⁶⁹ Exhibits Vol. III., pg. 144.

¹⁷⁰ Hearing Transcript, Vol. IV, pg. 52.

began checking Student out early to attend Dr. Barnes's clinic for therapy because of Student's worsening maladaptive behaviors the District failed to act. This hearing officer finds this to be a substantive violation of IDEA. The District's failure to properly address Student's worsening maladaptive behavior meant that Student's IEP was no longer reasonably calculated to enable him to make progress appropriate in light of his circumstances. The District started collecting behavior data on Student in early September, 2022. At least by October, 2022, the District knew or should have known that Student had significant maladaptive behaviors that needed to be addressed. Student was missing more and more instruction as the fall semester continued because of his maladaptive behaviors. This culminated in Student needing per his pediatrician, "immediate clinical services so he can receive medically necessary therapy until his behavior is under control enough to reintegrate into a regular classroom. I am recommending homebound school to allow for re-initiation of intensive psychosocial rehabilitation through ABA therapy." As mentioned above, District continued to collect behavior data on Student throughout the fall 2022 semester but never held an IEP meeting, conducted a functional behavior analysis, or anything else to address Student's worsening maladaptive behaviors.

Having considered Parent's argument that Student's 2022-2023 IEP was not reasonably calculated to enable Student to make progress appropriate in light of Student's individual circumstances, and in light of the findings and conclusions *supra*, it is the conclusion of this hearing officer the 2022-2023 IEP developed for Student on May 20, 2022 was reasonably calculated to enable Student to make progress appropriate in light of the child's circumstances", however, once Student's maladaptive behaviors worsened and the District failed to act, Student's 2022-2023 IEP was no longer reasonably calculated to enable Student to make progress

appropriate in light of his individual circumstances and thus the District substantively violated the requirements of IDEA.

Conclusion

The results of the testimony and evidence warrant a finding for the Parent. Specifically, Parent introduced sufficient evidence in the record to establish by preponderance of the evidence that District denied Student a FAPE between October 1, 2022, to January 4, 2023. The denial of FAPE did not occur until Student's maladaptive behavior worsened and warranted action by the District. The District did not have notice of Student's worsening maladaptive behavior prior to October 1, 2022, and therefore the denial of FAPE did not occur before October 1, 2022.

District is hereby ordered to take the following actions regarding Student:

1. Within 30 days the District is to conduct a Functional Behavior Assessment (FBA) to determine the function of Student's maladaptive behaviors and recommend appropriate programming to address Student's maladaptive behaviors. The FBA shall be conducted by a BCBA that is not an employee of the District.
2. Within 30 days after the completion of the FBA the District shall convene an IEP meeting to discuss and determine a plan to address Student's maladaptive behaviors. At a minimum the IEP team shall consider the FBA and any other data or relevant information. The District shall invite Dr. Barnes (since she has worked on maladaptive behaviors with Student for several years) to participate in the discussion regarding Student's maladaptive behavior and possible programming. The District shall also have the BCBA who conducted the FBA attend the IEP meeting to discuss his/her findings.

If Parent also alleges that the District's conduct constitutes disability discrimination in

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

Finality of Order and Right to Appeal:

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

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

IT IS SO ORDERED.

Dana McClain

HEARING OFFICER

10/20/2023

DATE