

**ARKANSAS DEPARTMENT OF EDUCATION
Special Education Unit**

IN RE:

XXXXX

Parents on behalf of XXXXX, Student

PETITIONER

VS.

CASE NO. H-17-19

OMAHA SCHOOL DISTRICT

RESPONDENT

HEARING OFFICER'S FINAL DECISION AND ORDER

ISSUES PRESENTED:

Whether the Omaha School District (hereinafter "District" or "Respondent") denied XXXXX (hereinafter "Student") a free, appropriate, public education (hereinafter "FAPE") between November 29, 2014 and November 29, 2016, 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 "IDEA"), by: (1) failing to conduct necessary evaluations to allow appropriate educational programming for Student; (2) failing to develop and implement an individual education plan (hereinafter "IEP") designed to provide educational benefit for Student through inclusion of appropriate goals, objectives, supports, and services; (3) failing to ensure that Student was not subjected to bullying by teachers and peers; and (4) failing to educate Student in the least restrictive environment (hereinafter "LRE").¹

¹ See Due Process Complaint, pp. 5-8. Parents' Complaint lists numerous actions that are alleged to constitute deprivations of FAPE. Some of the issues stated in Parents' Complaint were not addressed at the Due Process

PROCEDURAL HISTORY:

On November 29, 2016, the Arkansas Department of Education (hereinafter “Department”) received a written request from Parents to initiate due process hearing procedures on behalf of Student. Parents requested a due process hearing because they believed that the District failed to comply with the IDEA by failing to do the following: conduct necessary evaluations to allow appropriate educational programming for Student; develop and implement an appropriate IEP for Student; ensure that Student was not subjected to bullying by teachers and peers; and educate Student in the LRE.²

In response to Parents’ request for hearing, the Department assigned the case to an impartial hearing officer. Thereafter, the date of January 4, 2017 was set as the date on which a hearing would commence if the Parents and District failed to reach resolution prior to that time. Ultimately, following a continuance, the hearing of this matter was scheduled to begin on February 20, 2017.³

On February 13, 2017, a prehearing conference regarding this matter was conducted, via telephone. Counsel for both parties participated in the hearing. During the prehearing conference, the parties discussed unresolved issues to be litigated at the hearing of this matter, as well as the witnesses and evidence necessary to address same.

On February 20, 2017, the closed hearing of this matter commenced. Testimony was heard on February 20, 2017, February 21, 2017, March 6, 2017, and March 7, 2017.⁴ All

Hearing of this matter or in Parents’ Post-Hearing Brief. As such, the issues addressed in this Order are those that are considered to still be in dispute.

² *Id.*

³ See Hearing Transcript, Vol. I.

⁴ See Hearing Transcript, Vols. I-IV.

testimony was heard at the Omaha School District Administrative Offices. The hearing concluded on March 7, 2017.

The following witnesses testified in this matter: XXXXX (hereinafter "XXXXX"), XXXXX (hereinafter "XXXXX"), XXXXX (hereinafter "XXXXX"), XXXXX (hereinafter "XXXXX"), Howard M. Knoff (hereinafter "Dr. Knoff"), XXXXX, XXXXX (hereinafter "XXXXX"), XXXXX, XXXXX (hereinafter "XXXXX"), XXXXX (hereinafter "XXXXX"), XXXXX, XXXXX (hereinafter "XXXXX"), and Parents.⁵ Parents had the burden of proof regarding the issues raised in this case.

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, Danna J. Young, J.D., Hearing Officer for the Arkansas Department of Education, conducted a closed impartial hearing. Parents were represented by Theresa Caldwell (Little Rock, Arkansas) and the District was represented by Jay Bequette (Little Rock, Arkansas).

Both parties were offered the opportunity to provide post-hearing briefs, and both submitted briefs in accordance with the deadline set by this Hearing Officer.⁶

FINDINGS OF FACT:

Student is a twelve-year-old male (DOB 10/26/2004) who is enrolled in the Omaha School District. During the 2016-2017 school year, Student was enrolled as a sixth grader. However, as of the date that Parents filed their due process complaint, Student was not attending school at the District but, instead, was receiving weekly homework assignments from District to complete at home.

⁵ *Id.*

⁶ See Hearing Transcript, Vol. IV; Hearing Officer Binder of Pleadings and Orders.

Parent (mother) testified that Student has a diagnosis of Autism. Student did not speak until he was three and one half years old and, then, only spoke in one-word sentences.⁷ At that time, Student was unable to decipher pronouns correctly, was unable to tie his shoes, and had difficulty performing certain other manual tasks such as holding a pencil.⁸ Currently, Student is intelligent and often repeats things that he hears.⁹ He is very literal and has difficulty understanding when others are sarcastic or joking with him.¹⁰ Teachers described Student as a loving child that is eager to learn.¹¹ Functionally, Student is described as being on approximately the third-grade level.¹²

Prior to moving into the District, Student received speech services pursuant to an IEP that was developed for him while he was in kindergarten.¹³ Parent (mother) reported that Student's speech and language improved because of this therapy. Student began attending school in the District when he was in the first grade.¹⁴ At that time, Student had not been diagnosed with Autism Spectrum Disorder. During his first-grade year, however, he received a psychoeducational assessment that officially provided this diagnosis.¹⁵

Autism Spectrum Disorder, pursuant to the Diagnostic and Statistical Manual of Mental Disorders is "characterized by persistent deficits in social communication and social interaction across multiple contexts including deficits in social reciprocity, non-verbal behaviors used for social interaction and skills in developing, maintaining, and

⁷ Hearing Transcript, Vol. IV, p. 317.

⁸ *Id.* at p. 319.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Hearing Transcript, Vol. II, p. 8.

¹² *Id.* at 9.

¹³ *Id.* at p. 219.

¹⁴ *Id.* at 322.

¹⁵ *Id.* at 325-26.

understanding relationships.”¹⁶ Assessment of intellectual abilities can be complicated by social communication and behavior deficits inherent in the disorder; therefore, IQ scores in children with Autism Spectrum Disorder may be unstable. For this reason, it is necessary to assess intellectual ability on a regular basis.¹⁷

Based on a psychoeducational assessment conducted in the year 2011, it was noted that Student struggled in several functional aspects, including reading and listening comprehension. He had difficulty comprehending social situations and could not “generalize from social rules and principles.”¹⁸ It was also noted that Student was limited in incidental learning acquired through experience and had struggled to adapt to classroom routine.¹⁹

Educational Evaluations

Parents completed a social history form on September 16, 2011 regarding Student.²⁰ Approximately one month later, on both October 13 and October 27, 2011, Student underwent a psychoeducational evaluation.²¹ Student was six years old at the time of this evaluation. The following assessments were administered or considered: (1) social history and referral form; (2) school-administered testing; (3) Wechsler Intelligence Scale for Children, 4th Edition; (4) Woodcock-Johnson Test of Achievement; (5) Standard Score Regression Comparison 3.1; (6) Bender Visual-Motor Gestalt Test, 2nd Edition; (7) Test of auditory Processing Scales, 3rd Edition; (8) Behavior Assessment System for Children, 2nd

¹⁶ *Id.* at 218.

¹⁷ *Id.* at 220-21.

¹⁸ District’s Exhibits, p. 101.

¹⁹ *Id.*

²⁰ District’s Exhibits, pp. 97-99.

²¹ *Id.* at 118-27; Parents’ Exhibits, pp. 210-20.

Edition (teacher and parent rating scales); (9) Gilliam Autism Rating Scale, 2nd Edition; and (10) Asperger Syndrome Diagnostic Scale.²² Based on Student's performance on these assessments, he was diagnosed with Autism Spectrum Disorder, ADHD, Pervasive Developmental Disorder, Depressive Disorder NOS, Academic Problems, and Social Problems. It was recommended that Student be referred for specialized services with such accommodations as "relaxed time limits, assistance from an aide in the mainstream classroom, advanced notice before transitions, oral test administration, tests in alternative settings with fewer distractions, allowance for cool-down periods, one-on-one small group instruction, frequent verbal praise and encouragements, frequent cues to return to task, and opportunities to interact with peers in learning activities at his current social skill level."²³ It was also noted that Student should be considered for emotional/behavioral evaluation based on the fact that he exhibited poor impulse control, hyperactivity, excessive anxiety and depression, difficulty understanding academic concepts, social withdrawal, and overly short attention span.²⁴

On October 21, 2011, Student underwent a speech and language evaluation.²⁵ The following assessments were administered or considered: (1) Goldman-Fristoe Test of Articulation; (2) Oral and Written Language Scales; (3) Test of Language Development – Intermediate: Third Edition; (4) Oral Mechanism Examination; and (5) Hearing and Vision Screening Data. Student exhibited adequate articulation skills, moderate-to-severe receptive language delay, moderate-to-severe expressive language delay, normal vocal

²² *Id.* at 118; Parents' Exhibits, p. 210.

²³ *Id.* at 137.

²⁴ *Id.* at 106.

²⁵ *Id.* at 111-17.

parameters, normal fluency limits, and normal hearing acuity.²⁶ It was noted that assessment data reflected poor performance in spoken language, listening, speaking, semantics, and syntax. Student was found to be functioning below age expectancy in the areas of receptive language (understanding of language) and expressive language (use of language). Based on these findings, it was recommended that Student receive special education services to address his moderate-to-severe receptive and expressive language delay.²⁷

On August 3 and August 7, 2012, Student was given a psychological evaluation.²⁸ Student's diagnoses were nearly identical to those stated in the 2011 psychoeducational assessment.

On January 14, January 16, and January 23, 2015, Student was evaluated for occupational therapy needs.²⁹ Student was administered the following evaluations: (1) Test of Visual-Perceptual Skills (Non-Motor): 3rd Edition; (2) Bruininks-Oseretsky Test of Motor Proficiency: Second Edition; and (3) Test of Handwriting Skills: Revised. Clinical observations were also noted.³⁰ The results of these evaluations indicated that Student needed improved handwriting skills, decreased rigidity when out of routine, emotional self-regulation during situations involving peers in competitive play, improved overall manual coordination, and improved upper extremity endurance during writing tasks.³¹ Based on these needs, it was recommended that Student receive direct one-on-one occupational

²⁶ District's Exhibits, pp. 115-16.

²⁷ *Id.* at 116-17.

²⁸ *Id.* at 128-44; Parents' Exhibits, pp. 193-209.

²⁹ *Id.* at 145-51; Parents' Exhibits, pp. 232-38.

³⁰ *Id.* at 145; Parents' Exhibits, p. 232.

³¹ *Id.* at 150; Parents' Exhibits, p. 237.

therapy services for sixty minutes per week.³² The evaluation also included treatment goals, which were updated on May 7, 2015 and May 11, 2016 pursuant to Occupational Therapy Annual Reviews.³³ At both annual reviews, it was recommended that Student continue receiving occupational therapy services for sixty minutes per week.³⁴

District conducted an Existing Data Review on September 15, 2011, November 15, 2011, December 8, 2011, September 21, 2012, and December 17, 2014. District indicated on the December 17, 2014 Existing Data Review Decision Form that further data was needed regarding Student's achievement and developmental performance, as well as related services.³⁵ The Decision Form also stated that a new occupational therapy evaluation was needed, and that District needed to check all modifications and adaptations.³⁶ District did not seek a psychoeducational or psychological reevaluation of Student. All diagnostic tests relied on by District were from 2011 and 2012, except for those administered in 2015 during Student's occupational therapy evaluation.

Student's May 15, 2014 IEP

During the 2014-2015 school year, Student's fourth grade year, he received special education and related services pursuant to an IEP developed on May 15, 2014 (duration of services from August 8, 2014 to June 26, 2015).³⁷ Pursuant to the IEP, Student was scheduled to receive 1500 minutes of general education per week (science, social studies and pull outs)

³² District's Exhibits, p. 150; Parents' Exhibits, p. 237.

³³ *Id.* at 153-56; Parents' Exhibits, pp. 253-56.

³⁴ *Id.*; Parents' Exhibits, pp. 253-56.

³⁵ *Id.*

³⁶ *Id.*

³⁷ Parents' Exhibits, pp. 38-56. Although the development date of this IEP falls outside of the two-year statute of limitations, the services stated in the IEP were applied to Student throughout the remainder of the 2014-2015 school year. Because a portion of the 2014-2015 school year, specifically November 29, 2014 to the end of the school year, falls within the statute of limitations, this IEP must be considered.

and 600 minutes of special education per week (reading, written expression, math, and adaptive behavior).³⁸ Student was also to receive sixty minutes of occupational therapy each week.³⁹ Regarding special factors, the IEP stated that Student did not need any positive behavioral intervention or supports and was subject to the regular discipline policies of the District. In addition, the IEP stated that Student did not need any assistive technology devices or services.⁴⁰ Per the IEP, Student was to receive the following instructional modifications, supplemental aids, and supports: (1) reduced assignments and appropriate activities; (2) extra time for completing assignments and appropriate activities; (3) scribe for some writing activities; (4) preferential seating; (5) extra time for oral response when appropriate; (6) a peer to read materials; (7) use of calculator and scribe/talk to text for PARCC exam; (8) clearly defined limits; (9) frequent reminders of rules; and (10) praise for appropriate behavior.⁴¹

The IEP contained a statement in the “Student Profile Summary” indicating that Student’s “disability of autism” adversely affected his ability to “perform on grade level in reading, written expression and in mathematics,” noting that Student received instruction in these three subjects in the resource room.⁴² The Student Profile Summary referenced an Iowa Test of Basic Skills for second grade, stating that Student scored below basic in the areas of literacy and mathematics. In addition, the Student Profile Summary indicated that student had been administered three different assessments, specifically the Developmental Reading

³⁸ Parent’s Exhibits, p. 38.

³⁹ *Id.*

⁴⁰ *Id.* at 41.

⁴¹ *Id.* at 51-52.

⁴² *Id.* at 39.

Assessment (hereinafter “DRA”), the Zone of Proximate Development (hereinafter “ZPD”), and Dynamic Indicators of Basic Early Learning Skills (hereinafter “DIBELS”). Student’s DRA level was a 16, his ZPD level was between 1.3-2.3, and his DIBELS score was 41. There is no indication in the Student Profile Summary as to the meaning of these DRA, ZPD, and DIBELS assessment scores, although the summary states that Student “still shows needs in the areas of reading on grade level, fluency rate and vocabulary, and in writing on grade level.”⁴³

Student’s “Present Level of Performance” stated that Student’s skill strength areas were: (1) referring to information from illustrations and participating in discussions (third grade level); (2) reading stories (second grade level); (3) identifying the main idea and answering who, what, when, where, why and how questions about a text (second grade level); (4) learning and using new vocabulary (second grade level); (5) solving one and two step word problems by adding/subtracting within 100 (second grade level); (6) adding up to four two-digit numbers (second grade level); (7) understanding place value up to hundreds (second grade level); and (8) learning to ask questions about outside surroundings (second grade level).⁴⁴ The IEP stated that this information was obtained from classroom/curriculum based assessments, STAR assessments, comprehensive evaluation results, classroom observations, previous IEP goals, DIBELS, and DRA level. There was no indication as to the specific data provided by these various assessments except for the DIBELS and DRA, which were noted in the Student Profile Summary.⁴⁵

⁴³ *Id.* at 39.

⁴⁴ Parents’ Exhibits, pp. 42, 44, 46, 48.

⁴⁵ *Id.* at 42.

Student's May 15, 2014 IEP contained four annual goals, one for math, two for reading, and one for adaptive behavior.⁴⁶ Student's math goal stated that he would work with time and money, specifically solving word problems involving dollar bills, quarters, dimes, nickels, and pennies and using symbols correctly. This goal had four objectives, two of which dealt with solving problems and word problems "involving time with 80% accuracy by the end of the school year" and two of which dealt with solving problems and word problems "involving money with 80% accuracy by the end of the school year."⁴⁷ The IEP stated that Student did not meet any of these objectives and indicated that the goal was to be continued.

Student's IEP included two different reading goals. The first reading goal stated that Student was to "apply grade 4 reading standards to literature." This goal included the following three objectives: (1) describe in more depth a character, setting, or event in a story or drama, drawing on specific details in the text two out of five attempts by the end of the first semester; (2) describe in more depth a character, setting, or event in a story or drama, drawing on specific details in the text two out of five attempts by the end of the school year; and (3) writing with increased accuracy in use of mechanics three out of five attempts by the end of the school year.⁴⁸ Pursuant to the IEP, Student mastered this goal. The second reading goal stated that Student was to "read with sufficient accuracy and fluency to support comprehension." This goal included the following three objectives: (1) read with improved accuracy three out of four attempts by the end of the school year; (2) read with improved

⁴⁶ *Id.* at 42-49.

⁴⁷ *Id.* at 42-43.

⁴⁸ *Id.* at 44-45.

fluency three out of four attempts by the end of the school year; and (3) read with improved comprehension three out of four attempts by the end of the school year. Pursuant to the IEP, Student mastered this goal as well.⁴⁹

Student's adaptive behavior goal stated that he would have appropriate interpersonal interactions with peers by interacting appropriately 75% of the time by the end of the school year. This goal included two objectives, specifically addressing conversation and awareness of feelings. Pursuant to the IEP, Student did not master this goal and, as such, the goal was to be continued.⁵⁰

Parents participated in the preparation of Student's 2014-2015 IEP, and the IEP states that they made specific recommendations pertaining to math skills that they wanted Student to obtain. Parents also signed the IEP.⁵¹

Student's May 14, 2015 IEP

During the 2015-2016 school year, Student's fifth grade year, he received special education and related services pursuant to an IEP developed on May 14, 2015 (duration of services from August 17, 2015 to June 6, 2016).⁵² Pursuant to the IEP, Student was scheduled to receive 1450 minutes of general education per week (science, social studies and pull outs) and 650 minutes of special education per week (reading, written expression, math, and adaptive behavior).⁵³ Student was also to receive sixty minutes of occupational therapy each week.⁵⁴ Regarding special factors, the IEP stated that Student did not need any positive

⁴⁹ *Id.* at 46-47.

⁵⁰ Parents' Exhibits, pp. 48-49.

⁵¹ *Id.* at 42.

⁵² *Id.* at 21-37; District's Exhibits, pp. 1-17.

⁵³ *Id.* at 21; District's Exhibits, p. 1.

⁵⁴ *Id.*; District's Exhibits, p. 1.

behavioral intervention or supports and was subject to the regular discipline policies of the District. In addition, the IEP stated that Student did not need any assistive technology devices or services.⁵⁵ Per the IEP, Student was to receive the following instructional modifications, supplemental aids, and supports: (1) reduced assignments and appropriate activities; (2) extra time for completing assignments and appropriate activities; (3) scribe for some writing activities; (4) preferential seating; (5) extra time for oral response when appropriate; (6) a peer to read materials; (7) use of calculator and scribe/talk to text for PARCC exam; (8) clearly defined limits; (9) frequent reminders of rules; (10) praise for appropriate behavior; (11) calm redirection; and (12) cool down in room or alternate location as needed.⁵⁶ Other than the addition of “calm redirection” and the “cool down” modifications, Student’s modifications, supplemental aids, and supports are identical to the 2014-2015 IEP.

The IEP contained a statement in the “Student Profile Summary” indicating that Student’s “disability of autism” adversely affected his ability to “perform on grade level in reading, written expression and in mathematics.”⁵⁷ The Student Profile Summary referenced a third grade benchmark assessment, noting that Student scored “below basic” in the areas of literacy and “basic” in mathematics.⁵⁸ Also addressed in this section is Student’s performance on the following assessments: DRA, STAR Math, and STAR Reading. Student’s DRA level was 24, his STAR Math level was 3.0, and his STAR Reading level was 2.2. Student’s IEP notes that these scores had increased since the beginning of the 2014-2015 school year,

⁵⁵ *Id.* at 34; District’s Exhibits, p. 14.

⁵⁶ Parents’ Exhibits, pp. 32-33; District’s Exhibits, pp. 12-13.

⁵⁷ *Id.* at 22; District’s Exhibits, p. 2.

⁵⁸ *Id.*; District’s Exhibits, p. 2.

indicating that Student had made progress. The Student Profile Summary stated that Student still had deficits in the areas of reading on grade level, fluency rate, vocabulary, and writing on grade level.⁵⁹ Student's fourth grade teacher stated that Student needed to work on identifying the theme of a story, comparing stories from different cultures, reading and interpreting information in charts, graphs, timelines, and other illustrations, explaining how an author uses facts, details, and evidence to support points, writing stories with dialogue, writing research papers over extended periods of time, multiplying and dividing multi-digit numbers, fractions, decimals, using data on a plot line, learning how plants and animals adjust to their environment, weather, magnets, reasons for human settlements, branches of government, and identifying major historic events.⁶⁰ Student's "Present Level of Performance" is nearly identical to that stated in the 2014-2015 IEP.⁶¹

Student's May 14, 2015 IEP contained four annual goals, one for math, two for reading, and one for adaptive behavior.⁶² Student's math goal, as in the previous IEP, stated that he would work with time and money, specifically solving word problems involving dollar bills, quarters, dimes, nickels, and pennies and using symbols correctly. This goal had four objectives, two of which dealt with solving problems and word problems "involving time with 90% accuracy by the end of the school year" and two of which dealt with solving problems and word problems "involving money with 90% accuracy by the end of the school year."⁶³ These objectives were identical to the math objectives stated in the previous IEP

⁵⁹ *Id.* at 29; District's Exhibits, p. 2.

⁶⁰ *Id.* at 22; District's Exhibits, p. 3.

⁶¹ *Id.* at 24; District's Exhibits, p. 4.

⁶² Parents' Exhibits, pp. 30-31; District's Exhibits, pp. 10-11.

⁶³ *Id.*; District's Exhibits, pp. 10-11.

with the exception that they required 90% accuracy instead of 80% accuracy. The IEP stated that Student mastered these objectives by the end of the 2015-2016 school year.⁶⁴

Student's IEP included two different reading goals. The first reading goal stated that Student was to "apply grade 5 reading standards to literature." This goal included three objectives which were identical to the 2014-2015 reading goal requiring application of grade 4 reading standards to literature.⁶⁵ Pursuant to the IEP, Student mastered this goal. The second reading goal stated that Student was to "read with sufficient accuracy and fluency to support comprehension when in small settings as measured with 70% accuracy by the end of the school year." This goal included the following three objectives: (1) read with improved accuracy three out of five attempts by the end of the school year; (2) read with improved fluency three out of five attempts by the end of the school year; and (3) read with improved comprehension three out of five attempts by the end of the school year. Pursuant to the IEP, Student mastered this goal as well.⁶⁶

Student's adaptive behavior goal, which had not been met in the prior school year, was identical to that in the 2014-2015 IEP. Specifically, it stated that Student would have appropriate interpersonal interactions with peers by interacting appropriately 75% of the time by the end of the school year. Pursuant to the IEP, Student mastered this goal during the 2015-2016 school year.⁶⁷

⁶⁴ *Id.*; District's Exhibits, pp. 10-11.

⁶⁵ *Id.* at 28-29; District's Exhibits, pp. 8-9.

⁶⁶ *Id.* at 26-27; District's Exhibits, pp. 6-7.

⁶⁷ *Id.* at 24-25; District's Exhibits, pp. 4-5.

Parents participated in the preparation of Student's 2015-2016 IEP, and both provided signature on the document.⁶⁸

Student's May 13, 2016 IEP

During the 2016-2017 school year, Student's sixth grade year, he received special education and related services pursuant to an IEP developed on May 13, 2016 (duration of services from August 15, 2016 to June 2, 2017).⁶⁹ Pursuant to the IEP, Student was scheduled to receive 1550 minutes of general education per week (science, social studies and pull outs) and 650 minutes of special education per week (reading, written expression, math, and adaptive behavior).⁷⁰ However, the minutes were marked through and altered to show 1250 special education minutes instead of 650. There was no change to the general education minutes when the alteration to special education minutes was made.⁷¹ Pursuant to the IEP, Student was to receive sixty minutes of occupational therapy each week.⁷² Regarding special factors, the IEP stated that Student did not need any positive behavioral intervention or supports and was subject to the regular discipline policies of the District. In addition, the IEP stated that Student did not need any assistive technology devices or services.⁷³ Per the IEP, Student was to receive the following instructional modifications, supplemental aids, and supports: (1) reduced assignments and appropriate activities; (2) extra time for completing assignments and appropriate activities; (3) scribe for some writing activities; (4) preferential seating; (5) extra time for oral response when appropriate; (6) a peer to read

⁶⁸ Parents' Exhibits, p. 37; District's Exhibits, p. 17.

⁶⁹ *Id.* at 1-20; District's Exhibits, pp. 18-37.

⁷⁰ *Id.* at 1; District's Exhibits, p. 18.

⁷¹ *Id.*; District's Exhibits, p. 18.

⁷² *Id.*; District's Exhibits, p. 18.

⁷³ *Id.* at 15; District's Exhibits, p. 32.

materials; (7) use of calculator and scribe/talk to text for PARCC exam; (8) clearly defined limits; (9) frequent reminders of rules; (10) praise for appropriate behavior; (11) calm redirection; and (12) cool down in room or alternate location as needed.⁷⁴ Student's modifications, supplemental aids, and supports are identical to the 2015-2016 IEP.⁷⁵

The IEP contained a statement in the "Student Profile Summary" indicating that Student's "disability of autism" adversely affected his ability to "perform on grade level in reading, written expression and in mathematics."⁷⁶ The Student Profile Summary referenced a fourth grade benchmark assessment, noting that Student scored "below basic" in the areas of literacy and "basic" in mathematics.⁷⁷ Also addressed in this section was Student's performance on the following assessments: DRA, STAR Math, and STAR Reading. Student's DRA level was 28, his STAR Math level was 2.9, and his STAR Reading level was 2.5.⁷⁸ The Student Profile Summary stated that Student still had deficits in the areas of comprehending grade-level text, comparing and contrasting new ideas, staying on topic when speaking, spacing, writing, fine motor control/coordination, solving multi-step word problems, division of higher numbers, socialization, intolerance of change, self-regulation, attention, atypical language, behavioral rigidity, overstimulation, and obsessive tendencies.⁷⁹ Student's "Present Level of Performance" stated the same needs.⁸⁰

⁷⁴ Parents' Exhibits, pp. 16-17; District's Exhibits, pp. 33-34.

⁷⁵ *Id.*; District's Exhibits, pp. 33-34.

⁷⁶ *Id.* at 2; District's Exhibits, p. 19.

⁷⁷ *Id.*; District's Exhibits, p. 19.

⁷⁸ *Id.*; District's Exhibits, p. 19.

⁷⁹ *Id.*; District's Exhibits, p. 19.

⁸⁰ Parents' Exhibits, p.4; District's Exhibits, p. 4.

Student's May 14, 2015 IEP contained five annual goals, two for math, two for reading, and one for adaptive behavior. Regarding Student's math goals, the first goal stated that Student would solve problems involving measurement and estimation of intervals of time, liquid volumes and masses of objects. This goal had three objectives, specifically: (1) solve problems involving measurement and estimation of intervals of time in three out of four consecutive attempts by the end of the school year; (2) solve multi-step word problems involving money in three out of four consecutive attempts by the end of the school year; and (3) solve problems involving liquid volumes and masses of objects in three out of four consecutive attempts by the end of the school year.⁸¹ The second math goal provided that Student would apply and extend previous understanding of arithmetic to algebraic expressions.⁸² This goal included three objectives, specifically: (1) write expressions in which letters stand for numbers when in a small setting as measured with 75% accuracy by the end of the school year; (2) read expressions in which letters stand for numbers when in a small setting as measured with 75% accuracy by the end of the school year; and (3) evaluate expressions in which letters stand for numbers when in a small setting as measured with 75% accuracy by the end of the school year.⁸³

Student's IEP included two different reading goals. The first reading goal stated that Student was to cite textual evidence to support analysis of what text says, as well as inferences drawn from the text.⁸⁴ This goal included two objectives, specifically: (1) read informational text to find key ideas with 70% accuracy by the end of the school year; and (2)

⁸¹ *Id.* at 11; District's Exhibits, p. 28.

⁸² *Id.* at 12; District's Exhibits, p. 29.

⁸³ *Id.* at 12-13; District's Exhibits, p. 29-30.

⁸⁴ *Id.* at 7; District's Exhibits, p. 24.

read informational text to find supporting details with 70% accuracy by the end of the school year.⁸⁵ The second reading goal stated that Student was to conduct a short research project to answer a question. This goal included three objectives, specifically: (1) conduct short research project to answer a question, drawing on several sources and refocusing the inquiry when appropriate with 70% accuracy by the end of the school year; (2) write with increased understanding and use of grade level grammar in three out of four consecutive attempts by the end of the school year; and (3) use technology to type his own responses independently with increased accuracy in two out of four attempts by the end of the school year.⁸⁶

Student's adaptive behavior goal in the 2016-2017 IEP stated that Student "would demonstrate understanding of the concept of self by exhibiting characteristics of a positive self-concept 80% of the time by the end of the school year."⁸⁷ This goal included two objectives. The first objective stated that Student would demonstrate increased understanding of self by discriminating between behaviors showing positive and negative self-concept in four out of five attempts by the end of the school year. The second objective stated that Student would demonstrate comprehension of positive self-concept by discriminating between positive and negative examples of same in four out of five consecutive attempts by the end of the school year.⁸⁸

Parents participated in the preparation of Student's 2016-2017 IEP, and both provided signature on the document.

Expert Testimony Regarding Adequacy of Evaluations and IEPs

⁸⁵ Id. at 6-7; District's Exhibits, p. 24-25.

⁸⁶ Parents' Exhibits, p. 9; District's Exhibits, p. 26.

⁸⁷ Id. at 5; District's Exhibits, p. 22.

⁸⁸ Id.; District's Exhibits, p. 22.

Dr. Knoff testified in the due process hearing of this matter. Dr. Knoff holds a total of four degrees in psychology and school psychology, with one of these degrees being a doctoral degree in school psychology.⁸⁹ He has received numerous awards for his work, and has authored more than thirty publications and books. Dr. Knoff has served as an expert witness for various special education cases since the year 1989.⁹⁰

The most recent evaluation that assessed Student's cognitive ability and processing was conducted prior to Student's second grade year (2011). Dr. Knoff testified that there is no way to know, at present, what Student's cognitive ability and educational deficits are without additional testing.⁹¹ In addition, the latest speech evaluation for Student was from the same time period.⁹² Speech is a critical issue for kids with Autism.⁹³

Although Student has received some curriculum-based assessments throughout the years, such as the DIBELS or DRA, these assessments are not norm referenced. Norm-referenced assessments allow educators to measure a child's progress over time, as compared to same age peers. A child that is at a certain point on a bell curve, as compared to his or her peers, should be in approximately that same place on the curve in future assessments. If Student is at a lower percentile rank on subsequent norm-referenced tests, that is indicative that Student is not making the same amount of progress relative to his peers over the years.⁹⁴ Norm-referenced tests look at thousands of kids from every geographic place in the country and are balanced by gender, race, and disability. This allows for a true

⁸⁹ *Id.* at 314; Hearing Transcript, Vol. II, p. 213.

⁹⁰ *Id.* at pp. 314-23.

⁹¹ Hearing Transcript, Vol. II, p. 221-22.

⁹² *Id.* at 224.

⁹³ *Id.*

⁹⁴ *Id.* at 230.

comparison of how Student is progressing compared to his peers.⁹⁵ While it is known how Student is performing on curriculum-based assessments, there is no norm-based assessment information to indicate if Student has received benefit, *i.e.* actual progress, from his IEP.⁹⁶

Information that is available regarding Student indicates that, from first grade forward, Student was having difficulty with social interactions in the classroom. In addition, Student was exhibiting emotional and behavioral difficulties. Providing social skills training and positive behavioral intervention and supports throughout Student's education at District could have addressed these deficits.⁹⁷ Social skills training includes teaching kids how to listen, follow directions, ask for help, ignore distractions, respond to teasing, accept consequences, begin and end conversations, and have difficult conversations.⁹⁸

Student's May 15, 2014 IEP showed that Student, at the end of third grade, had a DRA level of 16, which is equivalent to a reading level expected at the middle of second grade. At the end of third grade, Student was essentially one and one half years below grade level regarding reading. Student's May 14, 2015 IEP showed that Student, at the end of fourth grade, had a DRA level of 24, which is the equivalent of a reading level expected toward the end of second grade. Between May 2014 and May 2015, Student's reading level increased half of a grade level.⁹⁹ Student's May 13, 2016 IEP showed that Student, at the end of fifth grade, had a DRA level of 28, which is the equivalent of a reading level expected at the end of second grade. Between the end of third grade and the end of fifth grade, Student made four

⁹⁵ *Id.*

⁹⁶ *Id.* at 231.

⁹⁷ Hearing Transcript, Vol. II, p. 227.

⁹⁸ *Id.* at 233.

⁹⁹ *Id.* at 246-47.

month of progress in reading.¹⁰⁰ Student was one and one half grade levels behind in reading at the end of third grade and, by the end of fifth grade, was three grade levels behind.¹⁰¹

Considering another reading assessment that was administered to Student, specifically the STAR reading assessment, Student's May 15, 2014 IEP showed that Student, at the end of third grade, had a STAR reading level of 0.9, which is equivalent to a reading level below first grade. Student's May 14, 2015 IEP showed that Student, at the end of fourth grade, had a STAR reading level of 2.2, which is the equivalent of a reading level expected in second grade. This STAR reading level is in line with the DRA results during the same period.¹⁰² Student's May 13, 2016 IEP showed that Student, at the end of fifth grade, had a STAR reading level of 2.3 to 2.5, which is the equivalent of a reading level expected at the middle of second grade. While there was progress between the end of third grade and the end of fourth grade, the progress plateaued from the end of fourth to the end of fifth grade.¹⁰³ No reading progress was made by Student between the end of fourth and the end of fifth grade pursuant to the STAR reading assessment. Both the DRA and the STAR reading assessments indicate that Student entered the sixth grade with a reading level of middle to end of second grade.¹⁰⁴

Regarding math, Student's May 15, 2014 IEP showed that Student, at the end of third grade, had a STAR math level of 1.3, which is equivalent to a math level expected of a student in early first grade. Student's May 14, 2015 IEP showed that Student, at the end of fourth

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 248; Defendant's Exhibits, p. 177.

¹⁰² *Id.* at 253-54.

¹⁰³ Hearing Transcript, Vol. II, pp. 253-54.

¹⁰⁴ *Id.* at 254; Defendant's Exhibits, p. 177.

grade, had a STAR math level of 3.0, which is the equivalent of a math level expected at the beginning of third grade. This was significant progress for one year. However, Student's May 13, 2016 IEP showed that Student, at the end of fifth grade, had a STAR math level of 2.9, which is a decrease from the end of the previous school year. While there was progress between the end of third grade and the end of fourth grade, the progress plateaued from the end of fourth to the end of fifth grade.¹⁰⁵ Student, moving into sixth grade, began the year at a lower math level than he had when he began fifth grade. Student began sixth grade three grade levels behind his peers in math.¹⁰⁶

Aside from academics, Dr. Knoff testified that Student would have greatly benefited from appropriate behavior goals given that Autism is characterized by social, emotional and behavioral issues. There were indications as early as 2011 and moving forward that Student was struggling behaviorally with attention deficit issues.¹⁰⁷ There are behavioral goals on Students fourth, fifth, and sixth grade IEPs; however, the goals are difficult to understand and focus on awareness. Student would likely struggle with awareness because Student was not receiving behavioral or social skills training so that he could gain awareness. In addition, nearly the same behavior goal appears on all three IEPs, despite the fact that the goal was not being met.¹⁰⁸ Finally, Student's IEPs dated May 15, 2014, May 14, 2015, and May 13, 2016 have the box regarding need for behavioral supports check "no." The summaries provided by teachers in the IEPs indicated behavior issues.

Bullying and Change of Placement

¹⁰⁵ *Id.* at 253-54.

¹⁰⁶ *Id.* at 255-56.

¹⁰⁷ *Id.* at 272.

¹⁰⁸ *Id.* at 277-78.

Between the end of September and beginning of October, 2016, Student began exhibiting tics, often described as “twitches,” while at school. The tics were minor at first, but gradually increased in frequency over time.¹⁰⁹ When Student was suffering from tics, he would have jerking, spastic movements and increased agitation. Student would sometimes make noises during episodes of this nature.¹¹⁰ The tics occurred even when Student was in a calm situation, which caused Student frustration.¹¹¹ Parent (father) reported that Student became more and more hesitant to go to school, making excuses in the morning for why he needed to stay home.¹¹² When Student was forced to attend school, he would often have bad days from an emotional standpoint.¹¹³ Parent (father) reported that Student would often begin to exhibit tics as he approached school.¹¹⁴

XXXXX is Student’s sixth grade resource teacher for math and was responsible for scheduling Student’s IEP meetings and administering other due process paperwork.¹¹⁵ Although XXXXX did not teach Student until the 2016-2017 school year, she was familiar with Student prior to sixth grade and knew his Parents personally.¹¹⁶

On September 20, 2016, Parent (father) was called by XXXXX and asked to come to the school and pick up Student. Parent (father) was told that Student was having a bad day. When Parent (father) arrived at District, he noticed XXXXX and Student standing in front of XXXXX’ office. XXXXX explained that another peer had been picking on Student and that she

¹⁰⁹ Hearing Transcript, Vol. III, p. 176.

¹¹⁰ *Id.* at 179.

¹¹¹ *Id.*

¹¹² Hearing Transcript, Vol. IV, p. 46, 48

¹¹³ *Id.* at 49.

¹¹⁴ *Id.* at 65.

¹¹⁵ Hearing Transcript, Vol. II, p. 29.

¹¹⁶ *Id.* at 6.

and XXXXX had disciplined the peer for his actions. XXXXX assured Parent (father) that the issue would not reoccur.¹¹⁷

Between September 20, 2016 and the first week of October, Parent (father) testified that Student was being bullied by XXXXX.¹¹⁸ XXXXX was Student's science teacher in fifth and sixth grades. Parent (father) alleged that XXXXX was nonresponsive when Student would report bullying, and that sometimes she would tell Student to stop being a tattletale and often order him to sit in the bean bag chair in her classroom.¹¹⁹ XXXXX testified that she had not seen XXXXX mistreat student and did not think that XXXXX would target Student for any reason.¹²⁰ In addition, Student never reported that he was afraid of XXXXX.¹²¹

XXXXX reported that Student was "wonderful" in class and was always happy and friendly to his peers. Student was willing to share his ideas in science and, academically, completed his work.¹²² Student did not have any traditional behavior issues in science class.¹²³ XXXXX has a "safe space" in her classroom, which consists of a bean bag where students can go sit on a voluntary basis if they feel that they need to cool down. Student took advantage of the safe space at times in XXXXX's class.¹²⁴ Student had some peer issues in XXXXX's class stemming from misunderstandings. For example, Student was upset when another peer told him to line up because he thought the peer was being bossy and

¹¹⁷ Hearing Transcript, Vol. IV, p. 51.

¹¹⁸ *Id.* at 78.

¹¹⁹ *Id.* at 78, 137.

¹²⁰ Hearing Transcript, Vol. II, p. 25.

¹²¹ *Id.* at 28.

¹²² *Id.* at 126.

¹²³ *Id.*

¹²⁴ *Id.* at 132.

inappropriate.¹²⁵ Student never reported bullying to XXXXX and she did not observe bullying of Student by his peers.¹²⁶

XXXXX was defensive and disrespectful during parts of her testimony. Despite her demeanor, the information that XXXXX provided was corroborated by other witnesses and appears credible. XXXXX, as well as teachers XXXXX, XXXXX, and XXXXX, testified that they never witnessed Student being bullied at school.¹²⁷

During the first week of October 2016, although the specific date could not be recalled, Student came to XXXXX and complained that he felt bullied by another student.¹²⁸ Student reported that he had been told by another peer that he needed to put his name on his paper, and Student felt that he was being bullied by the peer on account of this incident.¹²⁹ XXXXX informed the appropriate teacher of the incident and talked through the issue with Student.¹³⁰ XXXXX never observed anybody bullying Student.¹³¹

On October 3, 2016, Student had an issue in keyboarding class. Student was experiencing tics and the keyboarding instructor, XXXXX, told Student to stop moving around in his seat. Parent (father) spoke to XXXXX about this issue and XXXXX told father at that time that she thought Student was moving around intentionally. XXXXX was not aware until her conversation with Parent (father) that Student had a diagnosis of Autism Spectrum Disorder.¹³²

¹²⁵ *Id.* at 135.

¹²⁶ Hearing Transcript, Vol. II, p. 158.

¹²⁷ Hearing Transcript, Vol. III, p. 203, 204, 229-30; Hearing Transcript, Vol. IV, p. 23.

¹²⁸ Hearing Transcript, Vol. II, p. 13.

¹²⁹ *Id.* at 13.

¹³⁰ *Id.*

¹³¹ *Id.* at 14.

¹³² Hearing Transcript, Vol. IV, p. 53.

On October 3, 2016, the same date as the keyboarding incident, some of Student's teachers, namely XXXXX and XXXXX, reported to XXXXX, Student's literacy special education teacher, that Student was struggling in their classes with peer relations during group work. Both XXXXX and XXXXX also reported to XXXXX that Student was having tics in their classes and recommended that an IEP meeting be scheduled to talk about the issue.¹³³ There was no report that Student was being bullied by others.¹³⁴ XXXXX contacted XXXXX and shared this information.¹³⁵

On this same date, October 3, 2016, XXXXX reported to Parent (mother) via telephone that Student had been exhibiting tics in class since early September, and that the tics seemed to be worsening as the school year progressed.¹³⁶ XXXXX felt that the worst tics were occurring in Student's science class, which was taught by XXXXX.¹³⁷ XXXXX came to this conclusion because another teacher, XXXXX had reported same on October 3, 2016. As a result of the tics and other teacher concerns, XXXXX notified Parent (mother) that she wanted to schedule an IEP meeting to address the issues raised by Student's teachers and consider additional modifications or placement.¹³⁸ In the process of scheduling a new IEP meeting, Parent (mother) notified XXXXX that she was going to schedule an appointment for Student to see a neurologist for the purpose of evaluating Student's tics.¹³⁹ XXXXX testified that she did not know the cause of the tics that Student was exhibiting, stating that there

¹³³ Hearing Transcript, Vol. III, p. 180, 232.

¹³⁴ Hearing Transcript, Vol. II, p. 15; Hearing Transcript, Vol. III, p. 180.

¹³⁵ *Id.* at 15, 99; Hearing Transcript, Vol. III, p. 180,

¹³⁶ *Id.*

¹³⁷ *Id.* at 26.

¹³⁸ *Id.* at 16.

¹³⁹ *Id.* at 26.

could have been a “a lot of different factors.”¹⁴⁰ XXXXX prepared and sent to Parents a Notice of Conference dated October 3, 2016. The Notice of Conference indicated that an IEP meeting would be held on October 7, 2016 at 8:00 a.m. to review and revise Student’s IEP.¹⁴¹

On October 4, 2016, Parent (father) came to District to talk with XXXXX, the elementary principal, about the incident that occurred regarding Student in keyboarding class.¹⁴² He also told XXXXX at that time that XXXXX had been bullying Student.¹⁴³ He specifically stated that Student was being ignored when reporting incidents of bullying to XXXXX and was being placed on a bean bag in the hallway when he became upset.¹⁴⁴ Parent (father) demanded XXXXX take action against XXXXX.

After talking with Parent (father), XXXXX pulled video footage and confirmed that Student had not been placed in the hallway on a bean bag.¹⁴⁵ XXXXX then interviewed Student regarding the allegations made by Parents.¹⁴⁶ Student said he was worried about peers bothering one of his friends. He also stated that some peers were loud and always told everyone to be quiet.¹⁴⁷ Student did not report to XXXXX that he had been bullied or called names by other peers.¹⁴⁸ After talking to Student, XXXXX then spoke to XXXXX, XXXXX, XXXXX, and XXXXX.¹⁴⁹ XXXXX completed the investigation by making sure that all necessary

¹⁴⁰Hearing Transcript, Vol. II, p. 27.

¹⁴¹ District’s Exhibits, p. 79.

¹⁴² Hearing Transcript, Vol. IV, p. 54.

¹⁴³ *Id.* at 86.

¹⁴⁴ District’s Exhibits, p. 511; Hearing Transcript, Vol. I, p. 27.

¹⁴⁵ District’s Exhibits, p. 511.

¹⁴⁶ Hearing Transcript, Vol. I, p. 25.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 23.

¹⁴⁹ *Id.* at 39.

teachers had been invited to Student's upcoming IEP meeting and contacting Parent (father) with an update.¹⁵⁰

On October 5, 2016, Student did not attend school.¹⁵¹ Student returned to school on October 6, 2016. On that date, Student began twitching uncontrollably while he was on the playground.¹⁵² Student was seen on the playground "hunched forward." He approached XXXXX and told her that he could not stop twitching and was afraid.¹⁵³ He was taken from the playground to the nurse's office.¹⁵⁴ XXXXX was told that Student's family would be called and she returned to the playground. XXXXX was in her classroom when she received a call from the elementary principal, XXXXX, and was asked to come and assist. XXXXX immediately reported to the nurse's station where she observed Student laying down, twitching uncontrollably from head to toe. Student appeared to be having spasms throughout his body and was crying and upset.¹⁵⁵ XXXXX talked to Student and told him to try and relax, reassuring him that Parent (father) was on the way to pick him up.¹⁵⁶ Parent (father) arrived and met XXXXX and Student in the lobby of the school office.¹⁵⁷ Parent (father) described Student's behavior by stating that it looked like Student was being electrocuted.¹⁵⁸ Every muscle in Student's body would contract and, at some point would release. When the contraction ceased, Student would collapse. Student was sweating profusely. Parent

¹⁵⁰ District's Exhibits, p. 511.

¹⁵¹ Hearing Transcript, Vol. IV, p. 87.

¹⁵² Hearing Transcript, Vol. I, p. 24.

¹⁵³ Hearing Transcript, Vol. II, p. 142.

¹⁵⁴ *Id.* at 128.

¹⁵⁵ *Id.* at 30-31.

¹⁵⁶ *Id.* at 31.

¹⁵⁷ *Id.* at 88.

¹⁵⁸ *Id.* at 89.

(father) described the contractions as lasting for approximately ten seconds at a time.¹⁵⁹ Between contractions, Student would apologize and say that he could not stop.¹⁶⁰

After assisting Student to the car, Parent (father) went to the office and demanded to see XXXXX.¹⁶¹ Unsatisfied with XXXXX's response, he then asked to see Dr. XXXXX, the school superintendent.¹⁶² Parent (father) spoke to Dr. XXXXX and reported to him that XXXXX was allowing Student to be bullied in her classroom.¹⁶³ He further stated that the bullying that Student was experiencing was causing him to have tics, explaining that Student was going to be taken to the emergency room momentarily.¹⁶⁴ Parent (mother) took Student to the emergency room for treatment as soon as Parent (father) was finished talking with Dr. XXXXX.¹⁶⁵

On October 7, 2016, the IEP team convened to discuss the concerns that had been raised regarding Student.¹⁶⁶ The following teachers attended the IEP meeting: XXXXX, XXXXX, XXXXX, XXXXX, and XXXXX. In addition, the Superintendent, Dr. XXXXX, was present for the meeting as well as the school counselor, XXXXX, and Parents (both).¹⁶⁷ The team talked about what was hindering Student's learning, including the tics. It was determined that the tics that Student was suffering were interfering with his education.¹⁶⁸

¹⁵⁹ Hearing Transcript, Vol. IV, p. 89-90.

¹⁶⁰ *Id.* at 90.

¹⁶¹ District's Exhibits, p. 512.

¹⁶² Hearing Transcript, Vol. IV, p. 93; District's Exhibits, p. 512.

¹⁶³ District's Exhibits, p. 507, 512; Hearing Transcript, Vol. I, p. 110.

¹⁶⁴ *Id.*; Hearing Transcript, Vol. I, p. 110.

¹⁶⁵ *Id.*; Hearing Transcript, Vol. IV, p. 95.

¹⁶⁶ *Id.* at 79.

¹⁶⁷ *Id.*

¹⁶⁸ Hearing Transcript, Vol. II, p. 36.

In addition to Student's tics, the IEP team talked about the fact that group work was an issue for Student because he had difficulty taking instruction from other students in the group, as well as difficulty understanding the intentions of those students.¹⁶⁹ The IEP team made the decision to take Student out of general education classes and move him temporarily to the resource room for those subjects.¹⁷⁰ In total, Student was going to be in special education classes five hours per day after the move, with only pull outs, lunch, eagle time (home room), and recess outside of the special education setting.¹⁷¹ This move was going to be temporary until Student could see a neurologist and it could be determined what was happening.¹⁷² A Separate Programming Conference Decision form, dated October 7, 2016, indicated that Student would be moved to special education for five hours a day and that the committee would reconvene within one month.¹⁷³ Parents signed this document.¹⁷⁴ Other options considered at the meeting were to leave Student in current placement or, alternatively, to change placement so that Student was moved only out of general education science.¹⁷⁵

Parent (father) raised the issue of bullying at the IEP meeting, and was upset because he felt that the IEP team was not addressing the bullying allegations.¹⁷⁶ At that time, XXXXX told Parent (father) that no bullying had occurred in her classroom.¹⁷⁷ Parent (father) then addressed Dr. XXXXX and asked him to confirm that he and Dr. XXXXX had talked the day

¹⁶⁹ *Id.* at 37.

¹⁷⁰ Hearing Transcript, Vol. I, p. 133.

¹⁷¹ Hearing Transcript, Vol. II, p. 54; District's Exhibits, p. 79.

¹⁷² *Id.* at 38; Hearing Transcript, Vol. III, p. 189, 205, 241.

¹⁷³ District's Exhibits, p. 79.

¹⁷⁴ *Id.*

¹⁷⁵ Hearing Transcript, Vol. II, p. 39, 154-55; Hearing Transcript, Vol. III, p. 205.

¹⁷⁶ Hearing Transcript, Vol. IV, p. 169.

¹⁷⁷ Hearing Transcript, Vol. II, p. 54.

before about Student being bullied at school.¹⁷⁸ XXXXX became angry that Parents had talked to Dr. XXXXX about issues in her classroom without first consulting her. XXXXX told Dr. XXXXX during the meeting that Dr. XXXXX had thrown her “under the bus.”¹⁷⁹ XXXXX felt like the teachers, including herself, should have been made aware of any particular issues with Student before Parent (father) made a report to the superintendent.¹⁸⁰ The meeting lasted all total between fifteen and thirty minutes before Parent (father) became angry, said he was finished listening, signed the necessary forms, and abruptly left with Parent (mother).¹⁸¹ Following the IEP meeting, Dr. XXXXX spoke with XXXXX about her confrontational behavior during Student’s IEP meeting, as well as the allegations of bullying.¹⁸²

On October 21, 2016, a meeting was held with Dr. XXXXX, XXXXX (LEA) and Parent (father).¹⁸³ Notes documenting the meeting indicate that the meeting seemed productive and solutions were discussed to address Parents’ concerns.¹⁸⁴

Student was eventually diagnosed has having Tourette’s Syndrome.¹⁸⁵ Parent (mother) has documented as many as seventy tics during a fifteen-minute time period.¹⁸⁶ Student currently has nine distinctive tics and is being treated by a behavioral psychologist and a pediatric neurologist.¹⁸⁷ Student takes two different medications on a daily basis, specifically Zoloft and Risperdal.¹⁸⁸ Parent (father) believes that Student’s diagnosis was

¹⁷⁸ District’s Exhibits, p. 507; Hearing Transcript, Vol. I, p. 135.

¹⁷⁹ Hearing Transcript, Vol. II, p. 138.

¹⁸⁰ *Id.* at 114, 188; Hearing Transcript, Vol. I, p. 135.

¹⁸¹ Hearing Transcript, Vol. IV, p. 372; Defendant’s Exhibits, p. 507; Hearing Transcript, Vol. I, p. 119.

¹⁸² Defendant’s Exhibits, p. 507; Hearing Transcript, Vol. I, p. 140, 148.

¹⁸³ Hearing Transcript, Vol. I, p. 153.

¹⁸⁴ District’s Exhibits, p. 508.

¹⁸⁵ Hearing Transcript, Vol. IV, p. 172.

¹⁸⁶ *Id.* at 333.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 340.

triggered by the stress that he was experiencing at school on account of bullying behavior.¹⁸⁹ No medical record exists to support this conclusion.

Student's change in placement to five hours per day of special education classes was never implemented.¹⁹⁰ After the October 7 IEP meeting, Student attended school only one day, specifically October 11. On October 31, 2016, District received a note stating that Student needed to be home schooled. Dr. XXXXX spoke with Parent (father) and clarified that Parents were seeking homebound services for Student.¹⁹¹ Weekly assignments have been sent home for Student since October 17, 2016.¹⁹² The District and Parents made attempts to schedule IEP meetings between October 31, 2016 and the date that Parents filed a due process complaint. To date, homebound services have not been officially addressed on an IEP, however, District is continuing to send homework home on a weekly basis for Student to complete.¹⁹³

CONCLUSIONS OF LAW AND DISCUSSION:

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.¹⁹⁴ 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 United States 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

¹⁸⁹ *Id.* at 159.

¹⁹⁰ Hearing Transcript, Vol. II, p. 104.

¹⁹¹ Parents' Exhibits, p. 112; District's Exhibits, pp. 509-10; Hearing Transcript, Vol. I, p. 154.

¹⁹² Defendant's Exhibits, p. 505.

¹⁹³ Hearing Transcript, Vol. IV, p. 197; Parent's Exhibits, pp. 113-15.

¹⁹⁴ 20 U.S.C. § 1412(a); 34 C.F.R. § 300.300(a).

provide FAPE as required by federal law. 458 U.S. 176, 206-07 (1982); *K.E. ex rel. K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795, 804 (8th Cir. 2011). 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 receive educational benefits. *Id.*; *K.E. ex rel. K.E.*, 647 F.3d at 804.

Procedural Violations of FAPE

It must first be determined whether District complied with the procedures set forth in the IDEA. In the present case, Petitioner asserts that District failed to conduct reevaluations of Student at least every three years as required by the Act. IDEA regulations, specifically 34 C.F.R. § 300.303, provide that a child receiving special education services pursuant to the IDEA must be reevaluated at least every three years, unless the parent and school agree that such reevaluation is not necessary.

In the present case, Student was administered a psychoeducational assessment in September and October 2011, a speech and language evaluation in October 2011, and a psychological evaluation in August 2012. District conducted Existing Data Reviews following each evaluation, specifically on September 15, 2011, November 15, 2011, December 8, 2011 and September, 2012. There was no other evaluation activity until December 17, 2014, when an Existing Data Review was conducted and Student's IEP team determined that Student needed an updated occupational therapy assessment. Thereafter, Student's occupational therapy reevaluation was conducted in January 2015.

Based on the foregoing facts, it is the opinion of this Hearing Officer that there was no procedural violation regarding the timing of Student's reevaluations. Student was initially evaluated in the year 2011. Approximately one year later, in August 2012, Student was given a psychological evaluation and an Existing Data Review was conducted in September 2012. Based on the regulation, no reevaluation was required until September 2015. District engaged in an Existing Data Review with Parents on December 17, 2014, a few months shy of this deadline.

Substantive Violations of FAPE

Having analyzed the first prong of the FAPE analysis, it is now necessary to consider whether the District substantively denied FAPE to Student. At the time of the due process hearing in this matter, Eighth Circuit law provided that if a student received "slight" or "de minimis" progress, then he or she was not denied educational benefit. *K.E. ex rel. K.E.*, 647 F.3d at 810; *Paris Sch. Dist. v. A.H.*, 2017 WL 1234151 (W.D. Ark 2017). On March 22, 2017, however, the United States Supreme Court "rejected the 'merely more than *de minimis*' standard that had previously been the law of the Eighth Circuit." *Paris Sch. Dist.*, 2017 WL at 4 (citing *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1, No. 15-827*, 2017 WL 1066260, 580 U.S. __ (2017)).

In *Endrew F.*, the standard set forth by the Court is "markedly more demanding" as compared to the "merely *de minimis*" test outlined in *Rowley*. *Endrew F.*, 2017 WL 1066260, at *1000. The Court stated the following:

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

providing “merely more than de *minimis*” progress from year to year can hardly be said to have been offered an education at all. For children with disabilities, receiving instruction that aims so low would be tantamount to “sitting idly . . . awaiting the time when they were old enough to “drop out.”

Andrew F., 2017 WL 1066260, at *1001 (citations omitted). The Court held that the IDEA requires, even demands, more. Specifically, the IDEA requires that students under the Act be provided with an “educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Id.*

In the present case, Parents asserted that the District failed to provide FAPE to Student when it: failed to conduct necessary evaluations to allow appropriate educational programming for Student; failed to develop and implement an IEP designed to provide educational benefit for Student through inclusion of appropriate goals, objectives, supports, and services; failed to ensure that Student was not subjected to bullying by teachers and peers; and failed to educate Student in the LRE. These issues are hereby addressed below.

Evaluations. The IDEA requires that initial evaluations and reevaluations meet certain requirements. 34 C.F.R. § 300.304. Specifically, a public agency must utilize a “variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child.” *Id.* at § 300.304(b)(1). In addition, evaluations and reevaluations must assess all areas related to Student’s suspected disability, “including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. *Id.* at § 300.304 (c)(4).

In the present case, District failed to provide FAPE to Student when it failed to conduct a comprehensive reevaluation of Student in December 2014. The record established that Student was comprehensively evaluated in 2011 when he was in the first grade. At that time,

Student received a psychoeducational evaluation, followed by a speech and language evaluation, and, approximately a year later, a psychological evaluation.

On December 17, 2014, within the three-year required timeline for reevaluation, Student's IEP team reconvened to perform an Existing Data Review. At that time, Student's most recent psychoeducational assessment, as well as most recent speech and language evaluation, were more than three years old. In addition, Student's most recent psychological assessment was more than two years old. Nonetheless, the IEP team determined that viewing classroom assessments and the existing assessments from 2011 and 2012 was sufficient. The only evaluation that the team determined was needed was an occupational therapy assessment.

The regulations do not expressly provide that District repeat all assessments that were initially conducted in 2011 and 2012. It is expressly stated, however, that District must assess *all areas* related to Student's suspected disability. (emphasis added). In December 2014, Student was in the middle of fourth grade, yet he was performing at a second-grade level in math and reading. At a minimum, testing above and beyond classroom assessments (DRA, DIBELS, STAR Math, STAR Reading) was necessary for the purpose of assessing general intelligence and academic performance. Finally, numerous teachers testified that Student had difficulty interacting with peers and often misunderstood the intention of comments made to him. There were references in Student's IEPs to social difficulties and there was a goal in each IEP for the purpose of addressing adaptive behavior and navigating social situations. Given this information, District should have taken steps to evaluate Student's social and emotional status in December 2014.

Without proper evaluations, it is impossible to appropriately program for Student. Here, District failed to obtain sufficient information in December 2014 to determine what academic, social, and behavioral needs Student had at that time. As such, District's failure to conduct a comprehensive evaluation constituted a denial of FAPE.

IEPS. The IEP is the guiding document and primary method for providing special education services to disabled children under the IDEA. *Honig v. Doe*, 484 U.S. 305, 311 (1988). "Through the development and implementation of an IEP, the school provides a FAPE that is 'tailored to the unique needs of a particular child.'" *Paris Sch. Dist.*, 2017 WL 1234151, at *5 (citing *Endrew F.*, 2017 WL 1066260, at *1000). 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." 2017 WL 1066260, at *1000. For most students, to comply with this standard, providing FAPE "will involve integration in the regular classroom and individualized special education calculated to achieve advancement from grade to grade." *Id.* However, in the event that this is not possible, the education of a disabled child still needs to be "appropriately ambitious" in light of a student's individual circumstances. *Id.*

Every IEP, pursuant to the IDEA, is required to include the following: (1) a statement of a student's present levels of academic achievement and functional performance; (2) a description of how a student's disability affects his or her involvement and progress in the general education curriculum; (3) annual goals that are measurable, as well as a description

as to how progress toward stated goals will be measured; and (4) a description of special education and related services provided to student. 20 U.S.C. § 1414(d)(1)(A)(i)(I)-(IV).

In *Andrew F.*, the disabled student in question had been diagnosed with Autism. Andrew, a fourth grader, had attended school in the Douglas County School District from the time he began preschool. 2017 WL 1066260, *996. Even though he was described by his teachers as having a “sweet disposition,” he continued to exhibit behavioral issues in the classroom that inhibited his ability to access learning. For example, he would scream in class, climb over furniture and other students, and elope from school. *Id.* Andrew’s IEPs “largely carried over the same basic goals and objectives from one year to the next,” a fact that indicated a lack of meaningful progress toward his goals. *Id.* The Tenth Circuit Court of Appeals affirmed the Federal District Court’s decision that, although Andrew had not made “immense educational progress,” the objectives on his IEP were sufficient to show at least minimal progress. *Id.* at *997. The United States Supreme Court vacated the judgment of the Tenth Circuit Court of Appeals and remanded the case for further proceedings consistent with the more demanding standard outlined in its opinion. *Id.* at *1002.

In the present case, it is the opinion of this Hearing Officer that Student’s IEPs covering the time period from November 29, 2014 to November 29, 2016 were not reasonably calculated to enable Student to make progress appropriate in light of his specific circumstances.

First, Student’s IEPs developed on May 15, 2014, May 14, 2015, and May 13, 2016 cover Student’s fourth, fifth, and sixth grade school years. As stated previously, District failed to comprehensively reevaluate Student in December 2014, resulting in District

subsequently programming based upon evaluations that were three to six years old (depending on which IEP is being considered). There is no way to know, at this point, what Student's cognitive ability and educational deficits truly are without additional testing. In addition, it is quite possible that Student needs speech therapy, but there is no recent evaluation to address this possible educational deficit. The key to crafting appropriate IEPs is to be armed with knowledge of a child's specific deficits and present level of performance. Unfortunately, District failed to obtain all necessary information in this case, resulting in inappropriate IEPs for three consecutive years.

Second, considering the curriculum-based assessments that were given to Student, a review of the data indicates that Student made little to no progress in reading and math between the beginning of fourth grade and the beginning of sixth grade. Considering Student's DRA scores, he began fourth grade with a DRA level of 16 and, two years later, entered sixth grade with a DRA level of 28. While this may appear to be progress in the sense that the numbers increased, the reality is that Student's reading level progressed from middle of second grade to end of second grade in a two-year period. This is woefully insufficient considering Student's individual circumstances. Although Student has Autism Spectrum Disorder, there is evidence that he is capable of learning and, therefore, there is no indication that Student is unable to progress if receiving the appropriate programming. Another reading measure, the STAR reading assessment, shows the same results. While Student was slightly more than a grade level behind at the end of third grade, he is now more than three grade levels behind.

Regarding math, Student's level has regressed in the last two years. Student's STAR math level at the beginning of fourth, fifth, and sixth grades, respectively, were 1.3, 3.0, and 2.9. While it appears that Student made significant progress in math between the beginning of fourth and the beginning of fifth grades, his progress has completely stalled since the beginning of fifth grade. In light of Student's *de minimis* to no progress in reading and math, it is the conclusion of this Hearing Officer that Student's IEPs are not reasonably calculated to enable Student to make progress appropriate in light of his specific circumstances.

Third, a review of Student's May 15, 2014, May 14, 2015, and May 13, 2016 IEPs shows that Student's goals, even though they contain minor differences, have essentially been repeated on each IEP. In addition, some of the goals, quite frankly, are vague and difficult to understand. This is particularly true of the adaptive behavior goals. The fact that Student's goals were often repeated raises two possibilities. Either Student is never reaching the stated goals or, alternatively, District is repeating the same goals despite the fact that those goals have been met. Either way, Student's IEP goals are not reasonably calculated to enable Student to make progress appropriate in light of his specific circumstances.

Fourth, the assessments that are on file for Student reference social issues, as well as emotional and behavioral difficulties. However, Student has never received any specific social skills training. The May 15, 2014, May 14, 2015, and May 13, 2016 IEPs each contain one adaptive behavior goal; however, as Dr. Knoff pointed out, the goals are stated in such a way that they require Student to have a level of awareness about social situations and skills. The only way for Student to gain the necessary awareness needed to be successful in social situations is for Student to be exposed to social skills so that he can begin to learn and

recognize them. For these reasons, Student's IEPs have not been reasonably calculated to enable Student to make progress appropriate in light of his specific circumstances on account of the fact that they lack a provision for social skills training, as well as appropriate social skills goals.

Considering these deficits in totality, it is the conclusion of this Hearing Officer that Student's May 15, 2014, May 16, 2015, and May 17, 2016 IEPs are inappropriate in that they are not reasonably calculated to enable Student to make progress appropriate in light of his specific circumstances. While Student's IEPs might have been sufficient under the *Rowley* standard, they are certainly inadequate in light of the more demanding standard set forth in *Andrew F.*

Bullying. There is little guidance from the Eighth Circuit as to the issue of whether bullying can constitute a violation of FAPE under the IDEA. The only case that appears to be somewhat on point is *Sneitzer v. Iowa Dept. of Educ.*, 796 F.3d 942. In *Sneitzer*, the student, K.S., had several diagnoses including Asperger Syndrome, Obsessive Compulsive Disorder, Mood Disorder, Adjustment Disorder, and Tourette's Syndrome. 796 F.3d at 943. Although there were numerous issues raised in the case, one of the allegations made by K.S. was that she had been bullied by her peers. Specifically, she alleged that she had been bullied, in violation of FAPE, when a classmate held a knife to her neck and said "I'm going to cut you, bitch." In addition, there was a second incident in which Student claimed that she was poked by another student repeatedly. *Id.* at 945. Regarding both incidents, the school investigated and took appropriate action. Although the Eighth Circuit Court of Appeals does not expressly state that bullying can constitute a denial of FAPE, it addressed the two bullying incidents in

its determination of whether FAPE had been denied to K.S. Specifically, the Eighth Circuit Court of Appeals stated:

The ALJ further found, and we agree, that each incident of bullying that was reported to the school was promptly investigated and resolved, and the district presented substantial evidence refuting the claim that K.S. was subjected to ongoing bullying or harassment. K.S.'s one-on-one paraprofessional who accompanied K.S. nearly every day . . . testified that she had never witnessed K.S. being bullied by other students, nor did K.S. report to her that K.S. had been bullied.

Id. at 950.

In the present case, Parents have alleged that Student was bullied by peers at school, and that XXXXX, Student's science teacher, was (1) nonresponsive when Student sought help, and (2) punitive toward Student by requiring him to sit on a bean bag chair in her room when he continued to push the issue. Parents assert in their Due Process Complaint that Student suffered anxiety as a result of the bullying and that the anxiety triggered Student's Tourette Syndrome. Parents further assert that District administration did nothing to address the issue and investigate. Considering all testimony, it appears that there were four alleged incidents of bullying.

First, there was testimony from Parent (father) and XXXXX that Student was bullied by another peer. The incident upset Student, and XXXXX called Parents to request that they pick up Student from school. When Parents arrived to pick up Student, XXXXX told Parent (father) that another Student had picked on Student and that another teacher, XXXXX, had disciplined the child at fault. XXXXX assured Parent (Father) that steps would be taken to ensure that there were no other similar incidents.

Second, during the first week of October 2016, Student told XXXXX that he felt bullied by another Student. When asked details about the incident, Student told XXXXX that another peer had told Student that he needed to put his name on a class paper. XXXXX took action and informed the appropriate teacher of the incident.

Third, Parents assert that Student was bullied in keyboarding class by his keyboarding teacher, XXXXX. There was testimony that Student was experiencing tics in class and XXXXX instructed Student to stop moving in his seat. Parent (father) testified that he went to the school on October 3, 2016 to address this issue with XXXXX. In discussing the issue with Parent (father), XXXXX admitted that she had told Student to stop moving in his seat. She explained that she did not know that Student had a diagnosis of Autism Spectrum Disorder.

Fourth, Parents alleged that Student was being picked on in XXXXX's class and that XXXXX was non-responsive to Student's requests for assistance. Parents also alleged that XXXXX required Student to sit on a bean bag chair in her classroom when Student continued to tell XXXXX that he was being bullied.

On October 4, 2016, Parent (father) spoke with XXXXX about the keyboarding incident and his belief that XXXXX was allowing Student to be bullied in her class. XXXXX initiated an investigation. Two days later, Parent (father) spoke to Dr. XXXXX about the same issues and Dr. XXXXX began his own investigation. On October 7, 2016, at an IEP meeting regarding a change of placement for Student, Parents became angry because they did not feel that their allegations had been addressed.

It is the opinion of this Hearing Officer that only one of the four alleged incidents *might* constitute bullying. Specifically, the incident wherein Student was picked on by another peer is undisputed, and there was confirmation that the student at fault was disciplined. In response to this issue, XXXXX took swift action to address the situation and ensure that the peer that picked on Student was disciplined. She then called Parent (father) and reported what had happened, offering assurances that the issue was addressed. As such, this incident was promptly investigated and resolved.

Regarding the incident reported verbally to XXXXX by Student, it is the opinion of this Hearing Officer that being told to put one's name on a school paper does not constitute bullying. It is quite possible that Student perceived that he was being bullied by his peer, but that is attributable to Student's misunderstandings of social situations.

Regarding the keyboarding incident in XXXXX's classroom, it is the opinion of this Hearing Officer that telling a Student to sit still in a chair is not bullying. Admittedly, XXXXX would not have told Student to sit still if she had known that he was Autistic and experiencing uncontrollable tics. Because XXXXX did not know Student's diagnosis and had not been made aware of Student's recent tics, her statement to Student was made without intention to harm. XXXXX talked to Parent (father) about the issue and the incident was resolved.

The majority of testimony dealt with Parents' allegations that XXXXX was bullying Student and allowing other Students to do the same. XXXXX was disrespectful and rude while testifying, and it is easy to see how her abrasive personality could be misunderstood. Nonetheless, there is no evidence that XXXXX bullied Student or allowed Student to be bullied. Neither XXXXX, nor any of Student's other teachers, saw XXXXX mistreat Student.

XXXXX had taught Student the prior year as well and there were no previous issues. Student never reported that he was afraid of XXXXX, and the fact that Student reported a previous incident of perceived bullying to XXXXX is evidence that Student could verbalize when he felt mistreated. XXXXX reported that Student had some peer issues in class stemming from misunderstandings; however, other teachers also testified they had experienced the same thing in their classes or on the playground. Finally, Parent(father) reported to XXXXX that XXXXX had placed Student in the hall on a bean bag chair as punishment. When investigating this complaint, however, video footage showed that this incident did not occur. There is simply not sufficient evidence that XXXXX was bullying Student or allowing him to be bullied.

In addition, XXXXX and XXXXX conducted a thorough investigation after Parents alleged that XXXXX was bullying Student. XXXXX interviewed Student and XXXXX, as well as Student's other teachers. Aside from the lack of evidence in the record, it is clear that District took action to investigate Parents' allegations and attempt to resolve the issue.

In summary, it is likely that only one, if any, of the alleged incidents constituted bullying. Regardless, all incidents were promptly and thoroughly investigated. Regarding the allegations against XXXXX, there is insufficient evidence to conclude that she bullied Student or allowed Student to be bullied. As such, these incidents and the District's response thereto do not constitute a violation of FAPE.

Change of Placement and LRE. A change in educational placement refers to whether a student is moved from one type of program to another type. It can also occur in situations where there is a "significant change in the student's program even if the student remains in the same setting." *Parrish v. XXXXXville Sch. Dist.*, 2017 WL 1086198 *15 (W.D. Ark. 2017). A

school has an obligation to consider a parents' concerns regarding a proposed placement because "the core of the IDEA is 'the cooperative process that it establishes between parents and schools.'" *Id.* (citing *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 53 (2005)).

Regarding educational placements, the IDEA requires that students with disabilities be educated in the least restrictive environment pursuant to 20 U.S.C. §1412(a)(5). There is a "strong preference in favor of disabled children attending regular classes with children who are not disabled," resulting in a "presumption in favor of public school placement." *C.J.N. by S.K.N. v. Minneapolis Pub. Sch.*, 323 F.3d 630 (8th Cir. 2003), *cert. denied*, 540 U.S. 984 (2003). However, the IDEA "significantly qualifies the mainstreaming requirement by stating that it should be implemented to the 'maximum extent appropriate.'" *Pachl v. Seagren*, 453 F.3d 1064, 1067 (8th Cir. 2006); *see also* 20 U.S.C. § 1412[a](5). Essentially, a disabled student should not be separated from his or her peers unless the services that make segregated placement superior cannot be "feasibly provided in a non-segregated setting." *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983). The requirement to mainstream is not applicable when it "cannot be achieved satisfactorily." *Pachl*, 453 F.3d at 1068. As such, it is permissible to remove a disabled child from a mainstream environment when he or she would not benefit from mainstreaming or when the "marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting." *Roncker*, 700 F.2d at 1063.

On October 7, 2016, Student's IEP team met and discussed moving Student from his general education classes into the special education resource room because of medical concerns and academic deficits, specifically tics and Student's increased difficulty working

in group settings. Parents were notified of the meeting on October 3, 2016, and the meeting was scheduled at a time that they could attend. Although Parents abruptly left the October 7, 2016 IEP meeting, it is undisputed that they were present while the IEP team was discussing the proposed change, and that they signed the Notice of Decision regarding same. This form indicated that Student would be attending special education classes in the resource room for five hours per day, and that the IEP team would meet in early November, 2016 to reconsider the placement. Based on these facts, it is the opinion of this Hearing Officer that there was a change in placement and that Parents were given an opportunity to fully participate in the October 7, 2016 IEP meeting and voice their opinions. Given that there was a change of placement, the issue to consider now is whether the placement chosen by Student's IEP team constituted the LRE for Student.

The October 7, 2016 change of placement was recommended by Student's IEP team because Student was having academic difficulties in classes, as well as experiencing worsening tics. When Student was suffering from tics, he would exhibit jerking, spastic movements, increased agitation and noises. Parents alleged that Student was being bullied and, thus, was suffering anxiety that was leading to the progression of Student's tics. Although it was not confirmed that Student was being bullied, Student's teachers agreed that Student was likely having tics because he was suffering from anxiety.

On October 3, 2016, XXXXX spoke to Parent (mother) about her concerns regarding Student. Parent (mother) indicated that she was going to seek an appointment with a neurologist. An IEP meeting was scheduled for October 7, 2016.

On October 6, 2016, the day before the scheduled IEP meeting, Student suffered a significant medical episode at school. While Student was on the playground, he began twitching uncontrollably from head to toe and appeared to be having spasms throughout his body. These spasms would last for approximately ten seconds at a time. Student was taken to the nurse and, eventually, picked up by Parents and taken to the emergency room. On October 7, 2016, the IEP team met to discuss the concerns that had been raised regarding Student. The team talked about what was hindering Student's learning, including the tics. The IEP team decided to temporarily move Student out of all general education classes and into the resource room full time.

In light of Student's circumstances as of October 7, 2016, it is the opinion of this Hearing Officer that the change of placement resulted in Student being placed in the LRE. It was apparent that Student was having very serious medical issues. Because the IEP team thought that Student's tics were anxiety driven, it was appropriate to move Student to the special education resource room where there would be less activity, less peer interaction, and staff with which Student had great rapport, namely XXXXX and XXXXX. Had the change in placement been permanent in nature, this would have been problematic. However, because the placement was for approximately thirty days, it was appropriate in light of the circumstances. Student's IEP team was under the impression that Parents were going to seek a neurological consult. In addition, moving Student to the resource room for five hours per day would likely remove any stimuli and allow XXXXX and XXXXX to investigate what, if anything, might be contributing to Student's tics in the school setting.

For the foregoing reasons, it is the opinion of this Hearing Officer that Student's change of placement was appropriate, and that the temporary placement represented the LRE for Student at that time. As such, the change of Student's placement to the special education resource room for five hours per day did not constitute a violation of FAPE.

Conclusion. Having considered Parent's allegations of substantive due process violations, and in light of the findings and conclusions *supra*, it is the conclusion of this Hearing Officer that Student was denied FAPE between November 29, 2014 and November 29, 2015 as a result of substantive violations of the IDEA.

ORDER:

The results of the testimony and evidence warrant a finding for the Parents. Specifically, Parents introduced sufficient evidence in the record to establish by a preponderance of the evidence that District denied Student FAPE between November 29, 2014 and November 29, 2016 by failing to comprehensively reevaluate Student, as well as failing to provide IEPs reasonably calculated to enable Student to make progress appropriate in light of his specific circumstances. In light of these findings, District is hereby ordered to take the following actions regarding Student:

- (1) By or before May 15, 2017, District shall seek all necessary evaluations, including, but not limited to, a psychoeducational evaluation, a speech and language evaluation, and an occupational therapy evaluation, for purpose of obtaining a comprehensive understanding of Student's academic, social, and behavioral deficits. All evaluations are to be paid for by District.

(2) Within one month after receiving all necessary evaluations for Student, but under no circumstances later than August 1, 2017, District shall reconvene Student's IEP team to develop and update Student's IEP based on the information received from the updated evaluations (regardless of whether Student is able to return to school or whether he needs homebound services).

(3) During Student's 2017-2018 school year, the IEP team shall meet once per semester to review Student's progress and determine whether the IEP being implemented is resulting in Student progress.

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/ Danna J. Young

HEARING OFFICER

04/14/2017

DATE