

**ARKANSAS DEPARTMENT OF EDUCATION**  
**Special Education Unit**

<b>Father XXXXXX and Mother XXXXXXX,</b>	)	
<b>as Parents of</b>	)	<b>PETITIONER,</b>
<b>Student</b>	)	
	)	
<b>vs.</b>	)	<b>CASE NO. <u>H-19-24</u></b>
	)	
<b>OMAHA SCHOOL DISTRICT</b>	)	
	)	<b>RESPONDENT</b>

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**ORDER**

**NOW** on this 27<sup>th</sup> day of June, 2019, came on for hearing Petitioner's Request for a Due Process Hearing, Petitioners, **Father XXXXX and Mother XXXXXXX, as Parents of Student, XXXXXXX**, represented by John Elrod, Michael Sutton and George Rozzell, IV, Attorneys, and Respondent, **OMAHA SCHOOL DISTRICT**, represented by Marshall Ney and Katherine Campbell, Attorneys. This cause was submitted upon the pleadings, the testimony of witnesses, argument of Petitioner and Respondent, and other matters and things from all of which the Hearing Officer finds and Orders. Hearing dates were June 27<sup>th</sup>, June 28<sup>th</sup> and June 29<sup>th</sup>, 2019. Based upon the testimony of the witnesses and the evidence presented and admitted into the record of this proceeding, I make the following findings of fact and conclusions of law:

**ISSUES PRESENTED:**

Were the educational placements offered by Omaha School District (hereinafter referred to as District or Respondent) from March 18<sup>th</sup>, 2017 to March 18<sup>th</sup>, 2019 reasonably calculated to provide Student (hereinafter referred to as "Student") with a free, appropriate public education (hereinafter referred to as FAPE)?

- Did the District comply with procedural requirements of IDEA?
- Did District provide services in the Least restrictive Environment?
- Did the IEP contain inconsistencies and incorrect data?
- Did IEP measure goals and objectives adequately?
- Did District fail to provide Extended School Year?
- Did District fail to follow IEP?

If not, is Student entitled to be declared eligible to receive special education services as a result of the alleged failure of District to offer special education and related services?

## **PROCEDURAL HISTORY:**

This was the second of two Due Process Complaints filed by the Parents. The first went to full Hearing and an Order was entered finding that the District had denied Student FAPE between November 29, 2014 and November 29, 2016.

The current Due Process Complaint was filed the 18<sup>th</sup> day of March, 2019 by XXXX and XXXX, (hereinafter referred to as "Parents" or "Petitioners"), the parents and legal guardians of XXX XXX (Student). The Parents requested a Due Process Hearing because they believed the District has failed to comply with the Individual with Disabilities Act of 2004, 20 U.S.C. section 1400-1485, as amended (hereinafter referred to as "FAPE" or the "Act") and the regulations set forth by the Department by not providing the Student with appropriate special education services as noted in the statement of issues. At the time Parent filed the request for Due Process Hearing Student was an eight grade, male student, enrolled in the District.

In response to the Parents request for a Hearing, the department assigned the case to this Impartial Hearing Officer on the 18<sup>th</sup> day of March 2019 and time-lines were established and transmitted to the respective Parties by the Department. Opening Orders and Pre-Hearing Orders were drafted and a Pre-Hearing date of April 23<sup>rd</sup>, 2019 was set along with the Due Process Hearing dates of April 24<sup>th</sup>, April 25<sup>th</sup> and April 26<sup>th</sup>, 2019. Both Opening Orders and Pre-Hearing Orders were transmitted to the Parents and the District on March 21<sup>st</sup>, 2019 by the Hearing Officer. A Resolution Session was required to be conducted no later than April 2<sup>nd</sup>, 2019 which was held in a timely manner without the ability to resolve the issues.

On March 28<sup>th</sup>, 2019 the Hearing Offices received a Motion to Stay Proceedings from the District. That Motion was denied. On April 15<sup>th</sup>, 2019 a conference call was held between the Hearing Officer, Counsel the Parents and Counsel for the District to discuss the possibility of a Continuance. The Continuance was granted for good cause and on April 16<sup>th</sup>, 2019 an Order of Continuance was entered moving the Pre-Hearing date to June 25<sup>th</sup>, 2019 and the Due Process Hearing dates to June 26<sup>th</sup>, 27<sup>th</sup> and June 28<sup>th</sup>, 2019.

On June 4<sup>th</sup>, 2019 the Hearing Officer received and executed subpoenas from the Petitioner. On June 12<sup>th</sup>, 2019 the Hearing Officer received and executed subpoenas from the District. Also, on June 12<sup>th</sup>, 2019 the Hearing Officer received a Motion to Move the location of the Due Process Hearing to a location which would be more central and convenient to the Parties. The Motion was granted and an alternate location was selected for the Pre-Hearing Conference, however, none of the other statutory time-lines were modified.

On June 19<sup>th</sup>, 2019 five day disclosures and witness lists were exchanged by the Parties, both submitted timely. On June 25<sup>th</sup>, 2019 the Pre-Hearing Conference was held in the agreed alternate location. At this time Pre-Hearing Briefs were submitted and exhibit books were exchanged. Issues and the possibility of settlement were discussed along with remedies desired by the Parents. The Due Process Hearing commenced on June 26<sup>th</sup>, 2019 and continued through June 27<sup>th</sup> and June 28<sup>th</sup>, 2019 where it concluded at the end of that days testimony. The transcript was completed on July 12<sup>th</sup>, 2019 and provided to the parties on that date. Post Hearing Briefs were submitted on July 20<sup>th</sup>, 2019 in a timely manner. At that time the Hearing Officer had until August 8<sup>th</sup>, 2019 to prepare and publish the Final Order regarding this matter.

**FINDING OF FACT:**

The Student is an eighth grade, male student, enrolled in the Omaha School District, and has attended that District since first grade

The Student lives with his mother and stepfather.

The Student's stepfather has known the Student since the Student was 4 years old.

The Student has been tested and identified with Autism and ADHD, and thereafter with Tourette's and PTSD, and has had an IEP since the first grade.

This is the second request for a Due Process Hearing in three years.

The Student entered Homebound services in October 2016.

The Omaha School District is required to formulate and have the Student's IEP implemented as long as the Student is enrolled there, regardless of what facility the Student attends.

The mother and stepfather's sole request for relief is placement at Infinity Academy, a private program in Springfield, Missouri, which facility will not implement any IEP from the Omaha School District.

**Witness Jennifer Robinson**

Testimony of the witness Jennifer Robinson was submitted by transcript of her deposition taken on January 29, 2019 in this case. Ms. Robinson testified she graduated from high school in 1991, worked at fast food and various jobs, then went to work in the mental health field and obtained her paraprofessional certification. When her children were older, she obtained a degree in social sciences, and then went back and obtained a Master's degree in teaching at the University of Central Arkansas in Conway, Arkansas. She testified she began working for the Omaha School District in August 2016. She testified she also worked at Vantage Point for nearly ten years, the last six as program director and overran the operations of the program. She worked with the teachers and the therapists, the community and families and the school districts to provide the best care for clients. She testified their plan was always to transition them back into public school and not remain in the therapeutic day treatment setting. The witness testified she was familiar with the IDEA Act, the ADA, the Rehabilitation Act and Section 504.<sup>1</sup> The witness testified she had worked for the Omaha School District two and a half years, so since 2016.<sup>2</sup>

When asked about October 6, 2016 being considered a watershed moment for the Student,

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<sup>1</sup> Deposition Transcript P. 4, line 5, through P. 6, line 15

<sup>2</sup> Deposition Transcript P. 6, line 18, through P. 6, line 20

the witness testified she had just started her teaching career. She testified her responsibilities were teaching literacy, which included language arts, reading, and she taught under the direction of Martha Hicks, who was the mentor for this witness. The witness testified she was on an ALP, an Alternative Learning Plan, and was not certified in special ed at that point, so Ms. Hicks helped the witness oversee her cases and the witness handled her lesson plans and teaching.<sup>3</sup> The witness testified that in the Fall of 2016 her direct involvement with the Student was that she worked with him teaching him language arts and reading. She testified she was going to be taking on social studies, but he never returned to school.<sup>4</sup>

The witness testified after the Fall of 2016 she had indirect involvement with the Student, as she sent home work for him, but never had interactions with him until around April or May, when it was determined she would do homebound services with Ms. Hicks. The witness testified she believed she did testing first, then began providing education in the home. The witness agreed there was a time gap, from October of 2016-ish until May of 2017 where no homebound services were provided to the Student by the District, but testified she did not know why, that they provided lessons, the work for the Student, and provided the answer keys and that type thing, but they did not go into the Student's home. The witness testified Administration would have the answer to that, Dr. Sherwood, Gwen Benton, and that Gwen Benton is an LEA now for Mountain Home, the witness thought.<sup>5</sup>

The witness testified an LEA is a liaison for special education, whose duty is to oversee the special ed students and binders and teachers, to provide them with training, and in 2016 that person was Gwen Benton, but now it is Missy Criner. The witness testified Ms. Criner took over the job in the summer of 2018.<sup>6</sup>

The witness testified she went to the Student's home in May of 2017, and between October 2016 and May of 2017 they were just leaving lesson plans with assignments at the front office to be picked up and taken home to the Student, then they would be brought back and they would be graded and entered into the computer. The witness testified she did social studies and language arts, and Ms. Hicks did science and math. The witness testified she could not speak for Ms. Hicks, but that the witness would try to have an assignment for each day. She testified she did not always get those back because she did not know that the Student understood them, but she could not speak for that. The witness testified the reason she thought the Student may not have understood was because some of the returned work would be answered in ways she thought maybe the Student was not grasping the concepts.<sup>7</sup>

As to the amount of work the witness was sending to hours in a classroom, the witness testified she was sending assignments she was actually doing with students in language arts, and that would be 48 minutes or so for one class. The witness testified she did not teach social studies to

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<sup>3</sup> Deposition Transcript P. 7, line 22, through P. 8, line 12 ;...

<sup>4</sup> Deposition Transcript, P. 7, line 22, through P. 8, line 2

<sup>5</sup> Deposition Transcript P. 8, line 3, through P. 9, line 1

<sup>6</sup> Deposition Transcript, P. 9, lines 6-23

<sup>7</sup> Deposition Transcript, P. 10, line 3, through P. 11, line 6

anyone else, so that would constitute two hours a day if those same things were in a classroom, five days a week, so ten hours weekly.<sup>8</sup>

As to why more was not done, the witness testified the persons in charge then were Gwen Benton and Dr. Sherwood, and Ms. Sherwood would have answered directly to the superintendent, Mr. Sherwood, who is now in Puerto Rico.<sup>9</sup>

The witness testified she seemed to recall there was an IEP meeting in May, when it was determined the Student would be retested, so she and Ms. Hicks began going to the Student's home and providing all the educational achievement tests. She could not recall how many times Ms. Hicks actually came with her, and testified she completed some herself in June, that they spread them out because they were kind of overwhelming for the Student. Estimating how often Ms. Hicks went with her, the witness testified she thought through May pretty much every time, and it was after school let out that Ms. Hicks did not and the witness continued on her own. The witness testified she thought that was when Ms. Hicks had her medical emergency, carbon monoxide poisoning, but the witness could not be sure. The witness testified she continued through the summer, but could not recall the number of days or number of hours, that she did it based on what she was able to do, what they were able to do, and how long the Student was able to perform. When he became agitated or anxious, the tics got worse and the session would usually be ended. Sometimes they might get 30 minutes, sometimes 2 hours, it just depended on how the Student did.<sup>10</sup>

As to a typical session with the Student from May on through the summer of 2017, the witness testified the Student did better in the mornings, but it depended on the day, that one-on-one she and the Student got along really well, but that certain subjects are hard for him, writing is very difficult, though the Student made huge strides in it, not only being able to write, but being able to take what he has in his mind and put it on paper. The witness testified that was a subject the Student would become frustrated with, easily irritated, and want to just throw up his hands. The witness testified with math the Student was grasping the concepts, doing really well and enjoying that, so they could go longer for math.<sup>11</sup>

The witness testified during that period (from May on through the summer of 2017), the Student was at 2<sup>nd</sup> or 3<sup>rd</sup> grade writing skills. The witness testified if the Student were to tell her a story for her to write down, he used higher-level thinking, but he was not able to get it and put it down on paper himself, which caused frustration.<sup>12</sup> As to language skills during that period, the witness testified the Student is to an extent able to communicate how he feels, but when he could not explain what he was feeling, you could see anxiety and anger, that he did not always know the words

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<sup>8</sup> Deposition Transcript, P. 11, line 7, through P. 12, line 13

<sup>9</sup> Deposition Transcript, P. 12, line 14, through P. 13, line 3

<sup>10</sup> Deposition Transcript, P. 13, line 6, through P. 14, line 25

<sup>11</sup> Deposition Transcript, P. 15, line 4, through P. 16, line 6

<sup>12</sup> Deposition Transcript, P. 16, lines 7-25

that went with the emotions. The witness testified the Student can, however, hold a conversation. The witness testified the Student was at 3<sup>rd</sup>, 4<sup>th</sup> grade level in math, that he could read really well in the 3<sup>rd</sup> and 4<sup>th</sup> grade books, and was reading all the time until he started Homebound services, then she could hardly get him to read at all. The witness testified she would bring in articles and they worked on them, and the Student for the most part did well with comprehension, but they were working on 3<sup>rd</sup>, 4<sup>th</sup> grade level. The witness testified she did not know what caused the Student to not want to read, and she was a witness to his growing frustrations.<sup>13</sup>

The witness testified she saw the Student's Tourette's symptoms in September and October of the previous year, and he was still having them when she was doing Homebound services. The witness testified therapists and doctors were working to find the right treatment to eliminate them, and some of the meds made the Student more agitated. The witness testified when the Student was feeling overwhelmed, on sensory overload, you would start seeing the tics, you would have the agitation.<sup>14</sup> The witness agreed the Student's parents were very protective, very much advocates for the Student, adamant and at times pretty aggressive.<sup>15</sup> The witness testified she thought there was a point, she thought during the summer, that the Student was taken to the school for a short period of time, and then they went to the diner to eat, but the Student could not, that there was anxiety and tension in coming back to the school setting.<sup>16</sup>

The witness testified the last time she saw the Student was, she thought, was right before Christmas.<sup>17</sup> As to the Fall of 2017, the 2017-2018 school year, the witness testified she was providing Homebound services for the Student after school, and thought she was the only one other than occupational therapy and speech therapy.<sup>18</sup>

The witness testified the Homebound services she provided for the 2017-2018 school year were core subjects as the Student would allow. She testified she thought they had it down to 10 hours a week if the Student was able, that his IEP was written so that if the Student could not handle it he was not held to it, but he could have up to 10 hours, and sometimes he did more, sometimes less. The witness testified days the Student went to therapy were harder, that if the Student had therapy in the morning, afternoons were hard usually, and if she met with him the next day, a lot of times they were hard also. The witness testified it was speculation, but that she felt whatever was discussed in therapy caused the Student's mind to obsess and he would play thoughts over and over, so those days they usually would have to do something more relaxed and fun - they played games, they counted

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<sup>13</sup> Deposition Transcript, P. 18, line 1, through P. 19, line 17

<sup>14</sup> Deposition Transcript, P. 18, through P. 20, line 5

<sup>15</sup> Deposition Transcript, P. 20, lines 14-23

<sup>16</sup> Deposition Transcript, P. 21, lines 2-17

<sup>17</sup> Deposition Transcript, P. 22, lines 2-3

<sup>18</sup> Deposition Transcript, P. 22, line 10, through P. 23, line 4

money, did computers, although she testified she thought the computers came later.<sup>19</sup> The witness testified the Student immediately shut down when the computer showed Dawn Dillon's class

homepage, and told the witness that she (Ms. Dillon) was mean to him, that even the mention of Dawn Dillon's name set off the Student.<sup>20</sup>

As to discussions about the Student getting the education he needs and deserved, the witness testified she could not recall specific discussions, but testified she knew the parents wanted the Student to have as many hours as he could handle, but did not want the school to "break" the Student again, and that Gwen Benton ran the IEP meetings and there was paper documentation on the IEP's.<sup>21</sup>

The witness testified during that time the Student was progressing in math, and that he enjoyed science even though they could not call it that because the Student associated the word with Dawn Dillon. The witness also testified in some ways the Student took a step back, as he was not reading as much as when he was in school, but he was going for longer period of time and wanted to learn, was asking the right questions.<sup>22</sup>

The witness testified in the summer of 2018 she provided services for the Student as she was able, that she was gone and had surgery also, and did not think anyone else stepped in for her. She testified she was not able to provide many hours, that it depended also on the Student, that he got angry and did not understand why all the other kids were out of school and why he still had to do school work. She testified they did meet, but tried to do more outdoors-type things, maybe go down to the lake and look at rocks or pick up leaves and compare them or work on social skills, that type thing. The witness testified she could not recall how many hours, that they just did what she could do and what the Student could do.<sup>23</sup>

From 2018 to the time of the witness' deposition, the witness testified her involvement with the Student has been pretty limited. The witness testified the Student had written her letters and she had talked to him, and had been to his home before Christmas. She testified she began the year doing Homebound services for a few weeks before the District hired a Homebound Teacher, and Ms. Joanna took over then.<sup>24</sup>

The witness testified she is now teaching EAST, which is technology, student-led, problem based community learning using technology, that helps kids solve real-world problems with partners

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<sup>19</sup> Deposition Transcript, P. 24, line 3, through P. 25, line 11

<sup>20</sup> Deposition Transcript, P. 25, lines 12-23

<sup>21</sup> Deposition Transcript, P. 26, line 14, through P. 27, line 19

<sup>22</sup> Deposition Transcript, P. 27, line 20, through P. 28, line 19

<sup>23</sup> Deposition Transcript, P. 28, line 20, through P. 29, line 16

<sup>24</sup> Deposition Transcript, P. 30, lines 19-21, and P. 31, lines 3-11

in the community, and reading, not special ed.<sup>25</sup>

Again talking about her former employment before teaching, the witness testified Vantage Point is a therapeutic day treatment school for students kindergarten through 12<sup>th</sup> grade who have behavioral and mental health issues, providing therapy, medication, education, family therapy, the whole gamut. They worked with schools, if there was a referral to them, they would work with the school using the school's IEP, with the goal to help students get therapy, learn coping skills and receive medication if needed to help them be successful in the real world and acclimate them back into the public schools. The witness testified she worked there 6 years, and 4 years prior to that worked at Vantage Point as a paraprofessional in the classroom with students. The witness testified as a paraprofessional she guidance, direction and treatment plan set out by the therapists. The witness testified Vantage Point was in Harrison and still exists, but the therapeutic day treatment was transitioned or sold to Youth Bridge. The witness testified Youth Bridge is active in Harrison, and now they have the therapeutic day treatment program that is headquartered in Fayetteville. The witness testified she has been around this business for about 20 years. Before working at Vantage Point, the witness testified she worked at Ozark Counseling Services as a case manager, going into the schools and working with the schools, the teachers, on different behavioral skills to implement in the schools so the kid could be successful. The witness testified she also advocated for students in the court system to get services they needed.<sup>26</sup>

The witness agreed a 504 plan is a bit different than an IEP, and applies to children who come within the ADA, and testified it can be a short term plan, maybe someone has an illness, it could be diabetes, it covers things like a broken arm where a student might need extra resources while they are down. The witness testified the Student does not have a 504 plan, he has an IEP. The witness testified, as to the IDEA, the ADA and Section 504, she does not have as much educational expertise in those areas, that she was still learning at the point she asked to be taken out of special ed. The witness agreed the Student has autism and has exhibited Tourette's, and testified that she believes the Student has some depression, anxiety and ADHD. The witness agreed autism is an intellectual disability, a learning disability, and an emotional illness. The witness agreed that "learning" is a "major life activity," and the ADA does not permit discrimination a person with those type disabilities and the regular, normal population. The witness testified she was familiar with FAPE, and that she was trying to provide the Student with that. The witness agreed every school district has that legal obligation imposed on them by the federal government and by law, that such services are to be provided free of charge to FAPE eligible people in the public schools, to meet the unique needs of disabled individuals, either at home or in the classroom.<sup>27</sup>

The witness agreed that Springfield, Missouri is an hour away from Omaha, is large by Omaha standards, and has available to it more of these kind of services than Omaha or Harrison. The witness agreed that if needed services for the Student were available in Springfield and not Omaha or Harrison, it would be a good thing to utilize Springfield. The witness agreed that failure to perform

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<sup>25</sup> Deposition Transcript, P. 31, lines 12-19

<sup>26</sup> Deposition Transcript, P. 32, line 11, through P. 34, line 20

<sup>27</sup> Deposition Transcript, P. 35, line 17, through P. 38, line 25



an IEP would render meaningless the IEP itself.<sup>28</sup>

The witness testified the Student believes he was bullied by Dawn Dillon, that she treated him meanly and wasn't nice, and so he still has anger about that if it comes up, or if a memory pops up in his head, it could be random, not necessarily anything that is testified, and that she feels the family has been through a lot and she thinks the Student probably feeds off some of their anger and anxiety.<sup>29</sup>

The witness testified she was not involved in any of the October 6, 2016 matters.<sup>30</sup> The witness testified she was present at the Student's IEP meeting October 7, 2016, and testified also present were Dr. Sherwood, Dawn Dillon, the Student's parents, Martha Hicks, maybe Sandy Roberts, and it seemed there was another person she could not recall.<sup>31</sup> The witness testified she was aware of a situation in Holly Perry's keyboarding class where the Student was called out by her because he was twitching.<sup>32</sup> The witness testified the IEP meeting was very tense, and they were discussing placement for the Student, and she thought they discussed medical, but that since it's been a while she was not sure of everything that was discussed.<sup>33</sup>

The witness testified in January of 2018 the Student was crying in Ms. Duggan's classroom in a corner safe zone on a beanbag chair, that he felt he had been bullied. The witness testified she met with Ms. Baker, who handled it right away. The witness testified Ms. Baker taught math, but the witness believed, was not sure, that she was the Student's home room teacher.<sup>34</sup>

The witness confirmed she took the Student to a fund raising marathon with the Bergman School District with her own children, that they did not leave early, but they did not lollygag around after, that the Student was on sensory overload.<sup>35</sup> The witness testified she once found the Student hiding in a cove by the staff bathrooms, that she got down and talked to him and took him to her classroom, that it was over being told he could stop whatever, she did not recall, but testified it was a time the Student felt he was being bullied.<sup>36</sup> The witness testified there was a time she took the Student to her room and he went under the table and laid down and covered up with something, she

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<sup>28</sup> Deposition Transcript, P. 39, line 17, through P. 41, line 25

<sup>29</sup> Deposition Transcript, P. 43, line 18, through P. 44, line 2

<sup>30</sup> Deposition Transcript, P. 44, lines 8-13

<sup>31</sup> Deposition Transcript, P. 44, line 24, through P. 25, line 10

<sup>32</sup> Deposition Transcript, P. 45, line 22, through P. 46, line 2

<sup>33</sup> Deposition Transcript, P. 46, lines 8-25

<sup>34</sup> Deposition Transcript, P. 47, lines 14-25, and P. 48, lines 3-9

<sup>35</sup> Deposition Transcript, P. 48, line 19, through P. 49, line 3

<sup>36</sup> Deposition Transcript, P. 49, line 14, through P. 1

did not recall what.<sup>37</sup>

As to whether she was aware of some controversy between Ms. Hicks and Dawn Dillon, the witness testified she could not recall all the specifics, but that Ms. Hicks had called Dawn's daughter to the office to change clothes because she was dressed inappropriately per the dress code, and Dawn and angry and stopped Ms. Hicks in the hall, and there was some Face book stuff, but the witness did not know specifics.<sup>38</sup> The witness testified the Student perceived sitting on a beanbag chair to be

punishment, but testified some teachers may have pillows, some beanbags, some chairs, whatever the teacher sets up.<sup>39</sup>

The witness confirmed the Student had confided in her about nightmares, that it has to do with school and with Dawn Dillon, but she could not remember everything he told her.<sup>40</sup> The witness testified the Student recounted a story of what happened with Dawn Dillon when they did testing at the end of last year, that it was written down on the test, but they did not have it because it is State property.<sup>41</sup>

The witness testified the Student gets along well with people, that he wants interaction, and a part of him wanted to be back at school, he wanted his friends, so he would try, and at times he would ask to do it. There was a day in her classroom when the Student began to get anxious and looked like he was going to collapse. The witness testified they made different attempts throughout the entire time to school, that one day they might be able to walk on the campus, they never tried to go in the side where he felt everything had happened, and he would be okay, but then later the parents would say the Student had a really rough night at home. The witness testified the Student was fine with her in the moment, but then when he had a change to sit and process it, he developed the anxiety, anger and Tourette's and that type of thing from their report.<sup>42</sup>

The witness agreed that it would be more accurate to say rather than Gwen Benton answering to Mr. Sherwood, that the IEP team was responsible for making decisions regarding the Student's educational program, and testified Gwen Benton was responsible for making sure the file was adequate.<sup>43</sup>

The witness testified if the Student had a 504 plan, it would not have anything in it that is not

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<sup>37</sup> Deposition Transcript, P. 50, lines 8-16

<sup>38</sup> Deposition Transcript, P. 50, line 17, through P. 51, line 6

<sup>39</sup> Deposition Transcript, P. 51, lines 7-20

<sup>40</sup> Deposition Transcript, P. 52, lines 16-25

<sup>41</sup> Deposition Transcript, P. 53, lines 11-24

<sup>42</sup> Deposition Transcript, P. 54, line 22, through P. 56, line 7

<sup>43</sup> Deposition Transcript, P. 56, line 23, through P. 57, line 3

in his IEP, and that an IEP is a more extensive, educational version of a 504. The witness testified regarding a student with autism, the big difference between a 504 plan and an IEP is that the IEP goes more extensively into what the student needs, that it is more detailed and there is testing involved and a psycho educational assessment with a therapist.<sup>44</sup> The witness testified she had never worked anywhere with a student who had a 504 but not an IEP, as by the time students came to them, every possible option for the students had been exhausted, so they had gone through the process of special ed testing, and that resulted in an IEP.<sup>45</sup> Then the witness testified she had encountered students with a 504 but not an IEP, like with a broken arm or on crutches, for a short term. The witness also testified she had encountered students with an IEP but not a 504.<sup>46</sup>

The witness testified she thought the Student reported Dawn Dillon had called him stupid, but that she had never heard Dawn Dillon call any students names, nor had the witness seen Ms. Dillon mistreat the Student.<sup>47</sup> The witness testified she had never seen a teacher treat the Student in a way that she felt was unprofessional or inappropriate at Omaha School, nor had she seen the Student ever singled out by a teacher or a staff member.<sup>48</sup> The witness testified everyone loves the Student, that his personality is beautiful. The witness testified that once Dawn Dillon approached her tearfully, saying she felt there were communication difficulties and she did not know how to correct the situation, and even though she had tried different things the Student was having a really hard time.<sup>49</sup>

In addition to instructional time, once the Student was on Homebound, in addition to the instructional time the witness spent at the Student's home as required by the IEP, she provided other avenues or reasons than just purely instructional, times she worked out where her son and the Student could hang out for social interaction, and there was the time she took him to the Color Run, the fundraiser at another school district.<sup>50</sup>

The witness testified every autistic child handles things differently, that sensory overload and taking himself away from the group is definitely a way to do that, that laying under a table is a coping skill, being safe, confined, and blankets. The witness testified the Student was receiving speech therapy to address difficulties perceiving emotions and intentions of others and communication, something many people with autism suffer from. The witness testified social skills development was taught, and that the longer these students are away from social interaction the harder it is to re-acclimate back into a population, so there is sensory overload. The witness testified even non-autistic people taken away from a social situation would have a hard time acclimating the longer they are

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<sup>44</sup> Deposition Transcript, P. 59, lines 6-14

<sup>45</sup> Deposition Transcript, P. 59, line 18, through P. 60, line 1

<sup>46</sup> Deposition Transcript, P. 60, lines 2-15

<sup>47</sup> Deposition Transcript, P. 60, line 17, through P. 61, line 11

<sup>48</sup> Deposition Transcript, P. 62, line 12-19

<sup>49</sup> Deposition Transcript, P. 63, lines 1-18

<sup>50</sup> Deposition Transcript, P. 65, lines 3-18

outside.<sup>51</sup>

The witness testified the Student wants to be around kids and even back in school, but the last couple of attempts to have the Student back at school did not go well, so the Student was not ready, and the witness felt a part of that was the Student felt his stepfather's anxiety.<sup>52</sup> When asked if she felt the stepfather's emotions about the situation played into the Student's inability to succeed to come back to school when she tried in the Fall of 2017, the witness testified she was sure it did to some extent.<sup>53</sup> The witness testified there was a time when speech therapy at the Student's home was irregular, but she believed during the last school year Sara Asay worked with the Student on social

cues, and the witness did not believe, at the beginning, before a speech therapist went to the Student's home there was speech therapy at the District.<sup>54</sup>

**Witness: Mother XXXXXXX**

Testimony of the Student's mother was that although her husband is not the biological father of the Student, he is in all ways the Student's father. The parents live in a home on 40 acres that overlook a branch of Table Rock Lake, in a small home, Student being the youngest of five children between the parents, and all the other children but one now living elsewhere. The Student's mother testified Student has been diagnosed before October 6, 2016 with autism and ADHD, and thereafter with Tourette's and PTSD.<sup>55</sup>

The witness testified October 6, 2016 at the Omaha School District was a watershed moment in her relationship with the Student and her concern and care for them, that the Student looked as if he was having seizures, that she could hear his elbows locking into place. The witness testified Tourette's manifests itself and is triggered by anxiety from hearing trigger words, such as Principal's office, science, bullying, homework, absent from school, and that sometimes they need not even be testified, sometimes they come out of nowhere, the Student getting stressed or thinking about things. The witness testified the name Dawn Dillon is a trigger, that she was the science teacher before the October 6, 2016 incident. The witness testified in depositions in the last due process, Dawn Dillon testified she had brain damage and could not recall dates, times or incidents.<sup>56</sup>

The witness testified that in March 2017 the Student was Homebound, but no instructors went

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<sup>51</sup> Deposition Transcript, P. 66, line 1, through P. 68, line 12

<sup>52</sup> Deposition Transcript, Page 69, line 25, through Page 70, lines 2-14

<sup>53</sup> Deposition Transcript, P. 71, lines 7-12

<sup>54</sup> Deposition Transcript, P. 71, line 17, through P. 72, line 9

<sup>55</sup> Vol. 1, P. 29, lines 14-25, through P. 32, line 4

<sup>56</sup> Vol. 1, P. 32, line 5, through P. 33, line 13

to the home to provide instruction or services from March until the end of the Spring semester, and that May 20, 2017, Jennifer Robinson and Martha Hicks showed up for testing for Dr. Nichols, for him to do an evaluation of the Student in July since the prior order required an evaluation be done. The witness testified Dr. Nichols was the psychologist chosen from Harrison by the school to evaluate the Student.<sup>57</sup> The witness testified that for March, April and May, the Student's stepfather would pick up materials from the school office, either from the secretary or Martha Hicks, who was over the Special Ed Department.<sup>58</sup>

The witness testified as far as she knew, Martha Hicks is still at the school district working with Special Ed students, and that she had started working with the Student's education at the beginning of his sixth grade year.<sup>59</sup>

The witness testified in the Spring of 2017 the parents were picking up the Student's school work consistently since the Student stopped going to school, and sometime in March they stopped picking up the homework because the school was sending home fifth and sixth grade work when it came to math or English, even though the Student could barely do second grade work in those classes, and the parents were sending notes the homework was not grade appropriate. The witness testified the parents and siblings were trying to explain the work to Student, but they were not teachers and no progress was being made. The witness testified the evaluation done by Dr. Nichols had the Student at second and beginning of maybe third grade per the Star testing. The witness testified they (the parents) just gave up in March because it was making the Student upset every time they sat down with him, he was thinking he was dumb and it was just making things worse. The witness testified this brought on tics and the Student's anxiety, and that autistic students need structure and consistency, and the parents and siblings had tried to work with the Student daily at a certain time.<sup>60</sup>

The witness testified there was no attempts to reintegrate the Student into the Omaha Public Schools until the summer of 2017, that Jennifer Robinson's appearances were sporadic, that the witness was not there, that the majority of the time the Student's stepfather was, who would call the witness and tell her when Ms. Robinson was there and when she was not and what they did that day. The witness testified she was employed and that the Student's stepfather was with the Student most of the time and also raises Beagles and trains dogs, but that if the Student was to be educated in a private academy they could not afford it, or the cost of getting the Student to and from, for example, Springfield, Missouri from Omaha on a daily basis.<sup>61</sup>

The witness testified no Benchmark tests were administered for the Student during the school year ending with 2017, nor did the school district provide, in the Spring of 2017, any talk-to-text software for the Student's writing. The witness testified the school district did provide the Student with a Chrome notebook during the Spring and Summer of 2017, through Jennifer Robinson. The

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<sup>57</sup> Vol. I, P. 35, line 22, through P. 37, line 3

<sup>58</sup> Vol. I, P. 37, line 4, through P. 37, line 23

<sup>59</sup> Vol. I, P. 37, line 25, through P. 38, line 12

<sup>60</sup> Vol. I, P. 39, line 1, through P. 41, line 13

<sup>61</sup> Vol. I, P. 43, line 6, through P. 44, line 1

witness testified when they turned on the Chrome notebook, it testified “Welcome to Dawn Dillon’s science class,” which upset the Student, and between the Tourette’s and anxiety he would almost lose control. The witness testified she talked to Jennifer Robinson about removing that from the computer screen and it was relayed to the IT at the school, but the computer was not removed from their home for six months to fix that, and that Jennifer Robinson tried several times to use the computer but every time was a fail because of the trigger words during the entire six months of time.<sup>62</sup> The witness testified that July 25, 2017, five days after Dr. Nichols’ evaluation, there was an IEP meeting as to the Student.<sup>63</sup>

Looking at the IEP, the witness testified it reflected the Student’s strengths to include learning and using new vocabulary using appropriate grammar and phonics, that the Student’s weaknesses showed him needing assistance in reading, that he had a very low word recognition, basic reading skills, that he struggled with passage comprehension and fluency, and his phonetic skills scored very low. The witness testified the IEP showed the Student’s strengths to be his weaknesses, the exact same thing, which made no sense.<sup>64</sup>

The witness testified also present at the IEP meeting besides herself was Gwen Benton (who is no longer there), but who was the liaison who traveled from district to district at that time, prior to Missy Criner, dealing with IEP’s, overseeing them, making sure they were written correctly, but they do not normally meet with the student (the witness testified Gwen Benton never met the Student, that Missy Criner did once). The witness testified that also present at the IEP meeting were Jennifer Robinson, Martha Hicks, Dr. Sherwood (the Superintendent of Schools, who is no longer there), and the Student’s stepfather. The witness testified she did not believe she had sat in an IEP meeting with this school that was shorter than five hours.<sup>65</sup>

The witness testified the IEP showed the Student’s strengths in math to include place value, measurement and volume, and finding data using graphs and charts, but the witness did not agree with that. The witness testified the Student could not put simple math concepts and facts together, so he would be able to achieve those other things. The witness testified the Student was shown to be struggling in four out of five areas in classroom adaptive behaviors, and the witness testified the Student had a hard time adjusting to schedule changes, disappointments, when he had a teacher calling off half the time and the Student was sending text messages to her (Jennifer Robinson) wondering if she was even going to show up the next day because she was sick all the time. The witness testified Jennifer Robinson showed no consistency in the summer of 2017, the school year of 2017-2018, and the beginning of the 2018-2019 school year, they never knew on a daily basis when or whether she would be showing up at all, and that such a lack of structure stressed the Student, which was why at the beginning of the 2018 school year it was so important to the parents that everyone understand the Student needed the teacher to come in the mornings and that was relayed several times to the new people at the school, since they all came in during the summer of 2018. The witness testified Jennifer

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<sup>62</sup> Vol. I, P. 44, line 1, through P. 45, line 23

<sup>63</sup> Vol. I, P. 45, line 24, through P. 46, line 8

<sup>64</sup> Vol. I, P. 49, line 15, through P. 50, line 9

<sup>65</sup> Vol. I, P. 50, line 10, through P. 51, line 20

Robinson was the only teacher supplied for the Student during Homebound services in the summer of 2017, and she was supposed to be monitored by Martha Hicks. The witness testified Jennifer Robinson was to have provided one hour daily, five days a week for the Student, and that the parents requested it be mornings, which was the best time for the Student to be fresh and ready to learn. The witness testified they could prove 35% of the time Jennifer Robinson did not show up.<sup>66</sup>

The witness testified there were five-plus IEP meetings during the summer of 2017 and the school year 2017-2018.<sup>67</sup> Discussing the IEP daily hygiene goals for the Student and the percentages shown on the document, the witness testified the scores were teacher-opinionated, there was no data, no charts measuring percentages, and that they were never asked about the Student taking showers, etc., so there was nothing to back up what was listed there.<sup>68</sup>

Looking at the IEP English goals, the witness testified there were no charts, no data, nothing to show that the Student did percentages as shown. The witness testified that the Student still had not mastered an increase in the number of sentences he writes in a narrative, and that, in fact, the Student has a hard time writing, but that if he had speech-to-text program provided by the School maybe he could have done that. The witness testified JoAnna Jaro had out of her own pocket provided the Student with the Speech to Text, and also supplied teaching materials out of her own pocket, and that Ms. Jaro had complained to the witness the school district was not giving her what they were telling the parents they were going to be giving her, such as pencil grips (so she bought them herself). The witness testified that by the last IEP, in January, the district finally brought in a different General Ed teacher named Ms. King, who told Ms. Jaro where to go find different assignments online.<sup>69</sup>

The witness testified Ms. Jaro showed up at the Student's home with a new computer with a Speak to Text on it in May of his year which she bought herself.<sup>70</sup> Discussing the Student's math skills, the witness testified if it was not done repetitively, consistently, the Student loses it.<sup>71</sup> The witness testified she was pleased with the speech therapy and occupational therapy provided for the Student by the district.<sup>72</sup>

The witness testified they asked for extended services for 2018, but they were not provided by the district.<sup>73</sup> The witness testified Jennifer Robinson came to the Student's home during the summer of 2018 to visit and brought her son to play and brought a new puppy, and they swam and ate pizza

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<sup>66</sup> Vol. I, P. 51, line 24, through P. 57, line 4

<sup>67</sup> Vol. I, P. 57, lines 18-24

<sup>68</sup> Vol. I, P. 58, line 25, through P. 61, line 17

<sup>69</sup> Vol. I, P. 65, lines 1 through 25

<sup>70</sup> Vol. I, P. 66, line 1, through P. 67, line 4

<sup>71</sup> Vol. I, P. 168, lines 4-25

<sup>72</sup> Vol. I, P. 70, line 10, through P. 71, line 8

<sup>73</sup> Vol. I, P. 72, lines 5-9

and played, and the witness saw on Ms. Robinson's time cards that she had charged the district for hours of coming to the ho use all summer long to visit and have her son play with the Student, without any true instruction. The witness testified on Ms. Robinson's Face book it shows in July she was on vacation with her family in Washington, but her time cards show she charged the district that she was at the Student's home educating him when she was not.<sup>74</sup>

Discussing the denial of extended services in the summer, the witness testified the documents presented showing Jennifer Robinson tested on April 11, 2018 and April 17, 2018, and each test showed 75, the witness testified those do not show a true, accurate test as to regression or recoupment.<sup>75</sup>

The witness testified Anne Colvin recommended summer services for 2018, but the parents were told in May there would be no such services because of testing results. The witness testified when JoAnna Jaro began executing the IEP in September, she only had the goals on the IEP until April of 2019, that she did not have the full IEP, and that the parents wanted her to have it since amendments to it had trigger words and a lot of things were changing. The witness also testified there were inaccuracies--there was a part mentioning a child with Down's Syndrome, which was not this Student, and the witness guessed it was a cut-and-paste, as the Student does not need assistance with being reminded to go to the bathroom, that he is a high functioning autistic child.<sup>76</sup>

Discussing academic needs, the witness testified she did not understand why the IEP written by Jennifer Robinson would talk about the Student doing fifth grade work when he was actually scoring on a second grade and early third grade level.<sup>77</sup> The witness also criticized the Goals Progress document, as it discusses maintaining conversations with peers and transitioning from tasks and school environments, when he was Homebound.<sup>78</sup> The witness agreed there was no IEP listing trigger words between May of 2017 and January of 2019, and testified the Tourette's, which is non-vocal, go out of control when he hears those words used.<sup>79</sup>

Discussing no Benchmark testing of the Student having been done in May of 2017, the witness testified it was requested, and they talked about it after May of 2017, then that summer at an IEP meeting it was an "Oops, we forgot," per Gwen Benton.<sup>80</sup> Discussing Star testing of February 6, 2019 and April 1, 2019 for the Student, the witness confirmed that the documents show the Student's math

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<sup>74</sup> Vol. I, P. 72, line 10, through P. 73, line 9

<sup>75</sup> Vol. I, P. 75, line 21, through P. 77, line 24

<sup>76</sup> Vol. I, P. 79, line 5, through P. 81, line 19

<sup>77</sup> Vol. I, P. 82, line 6, through P. 83, line 4

<sup>78</sup> Vol. I, P. 83, line 5, through P. 84, line 5

<sup>79</sup> Vol. I, P. 86, line 20, through P. 87, line 22

<sup>80</sup> Vol. I, P. 87, line 23, through P. 88, line 8



and reading scores were below his grade level.<sup>81</sup>

Discussing Infinity Academy, the witness testified she found it when searching the internet for schools for children with autism or special needs, as she did not believe the Student could ever return to the Omaha school district. The witness testified Infinity Academy has autistic children who are higher on the autism spectrum, like Student, that it is not a school for autism with nonverbal and other children that have more hardships with it, that Student has been there many times. The witness testified the Student went to camp last summer for a week, the parents would drive him in the morning and pick him up in the afternoon, June 11-15, that the Student enjoyed it, the kids are just like him, and the teachers know how to handle the students there because they are trained for it. The witness testified there is a six to one ratio for teacher per student, that there are maybe 25 students. The witness testified the students there go on field trips, they help figure out careers and figure out jobs if they are not at the educational level of going to college, but some do go to college. The witness testified they are accredited out of California. The witness testified the Student goes on Fridays for social day, activities, that they have parties and he has made friends there. The witness testified that Student is excited to go, and he was included in their Eighth Grade Graduation so he could feel a part of something. The witness testified the Student is not enrolled there, but she did pay a \$75 application fee, and the annual tuition is \$12,500. The witness testified Infinity does their own IEP, which they instead call a Learning Plan, but they also do an IEP. The witness testified Infinity testified the Omaha school district's IEP had no substance to it, that there was nothing in it to teach the Student, and they wanted no part of Omaha school district to write an IEP if he was going to attend Infinity.<sup>82</sup>

The witness testified the parents have family to transport the Student to Infinity Academy, and that so far there has been no school, no homework (one of the Student's trigger words), only play time for Student there.<sup>83</sup> The witness agreed that the Omaha School District offered, under certain conditions, to pay for the Student to receive instruction at Infinity at its own expense, but that Infinity Academy rejected the offer. The witness testified she had no choice but to keep the Student enrolled in the Omaha School District, and the Omaha School District would require the Student to have an IEP. The witness testified she had not seen what a final Individualized Service Plan from Infinity might look like, but agreed that a sample Individualized Service Plan relating to the Student based on information provided by the parents was provided by Infinity. Looking at the email official response from Infinity as to why they did not want to accept the Student into their facility with participation of the Omaha School District, the witness confirmed Infinity was not accredited in the State of Missouri, it offered curricula through Accellus Academy which is accredited through the State of California, and should any of Infinity's students graduate before they complete their accreditation process, Accellus would reciprocate California graduation requirements back to Missouri, but they were unable to verify if the same process is eligible for Arkansas. The witness verified Infinity uses its own individualized student plans specifically aligned with their curriculum and school resources, and sent parents a draft for the Student in an email dated June 26, 2018. The witness further admitted the Infinity document states it was not subject to DESE guidelines, scope or sequence and were not required to implement

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<sup>81</sup> Vol. I, P. 95, line 24, through P. 98, line 14

<sup>82</sup> Vol. I, P. 98, line 15-24, and Vol. I, P. 102, line 14, through P. 106, line 9

<sup>83</sup> Vol. I, P. 109, line 16, through P. 111, line 4

an ISP, and that, while they would collaborate with the team in the Omaha School District to align goals and objectives, they declined serving as manager or implementer of an IEP from another environment.<sup>84</sup> The witness agreed it was a good thing for the District to maintain compliance with the Arkansas Department of Education, and that Infinity declined to manage or implement another environment's IEP, and that no where was there any language that there was no substance to the Omaha IEP.<sup>85</sup>

The witness admitted she and her husband signed off on the Student's IEP's.<sup>86</sup> The witness admitted she had an attorney present at the last IEP meeting, and that they took extra time to review it before signing.<sup>87</sup>

When asked why the witness did not allow Dr. Nichols to evaluate the Student for Emotional Disturbance, the witness testified it was because it took Anne Colvin, who began seeing the Student in February of 2017, six months to diagnose PTSD, and Anne Colvin objected to Dr. Nichols doing an Emotional Disturbance evaluation in July of 2017.<sup>88</sup> When questioned as to whether or not she had followed all of Dr. Colvin's recommendations, the witness denied not attempting to transition the Student back to Omaha School District, the witness testified they did not keep the Student in martial

arts because they could not afford it and the witness testified extracurricular activities were doing Infinity Academy and sporadic time at the gym at the YMCA.<sup>89</sup>

The witness denied that the Omaha School District had offered for the Student to take the ACT Aspire in a neutral location in the Spring of 2017 but she refused, the witness denied the School offered to provide Star testing to the Student during the 2017-2018 school year on a computer-based method but she rejected that, and the witness denied the school offered five hours of Homebound instruction weekly in July of 2017 but she testified the Student could not tolerate that much.<sup>90</sup>

The witness testified she did not know Dr. Nichols wanted to provide treatment for the Student, that they rejected the school's offer to pay for a medical evaluation of the Student in the Fall of 2018 and then they did it, as she wanted to be able to pick a doctor, that they were given a list of doctors from which to choose, and they picked a different one from Dr. Nichols. The witness testified she guessed she refused, she did not know that she rejected, having the Student receive the Special

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<sup>84</sup> Vol. I, P. 111, line 5, through P. 119, line 5

<sup>85</sup> Vol. I, P. 122, line 6, through P. 123, line 12

<sup>86</sup> Vol. I, P. 124, lines 1-14

<sup>87</sup> Vol. I, P. 126, line 21, through P. 127, line 24

<sup>88</sup> Vol. I, P. 131, line 2, through P. 132, line 7

<sup>89</sup> Vol. I, P. 132, line 8, through P. 133, line 18

<sup>90</sup> Vol. I, P. 133, line 19, through P. 134, line 10

Ed instruction at a neutral location, as everyone kept saying they were okay with going to the house. The witness disagreed the Student's completed homework was not consistently returned. The witness disagreed that there were multiple days she canceled the Student's Homebound instruction because she testified he could not tolerate it on those days except for a few times, and disagreed that there were days when the Homebound instructor was in their home and the Student went into his room and shut the door and the teacher was told to leave early.<sup>91</sup> The witness confirmed the Student told her he was sad he was not in school.<sup>92</sup>

The witness testified, as to speech and OT that sometimes they canceled and sometimes the parents canceled. The witness confirmed that a while back the OT provided pencil grips for the Student but he refused to use them because they were pink.<sup>93</sup> When asked about the District providing compensatory education hours for the Student, the witness testified they agreed and signed off on the District providing 90 hours of Comp Ed to begin the week of May 30 and continue until the hours were exhausted, and that the District additionally offered 28 hours of OT Comp Ed to begin once the school year resumed in August due to Student rapport with his current therapist. The witness confirmed she did not complain about hours not being provided until this hearing. The witness confirmed she refused to allow Dr. Nichols to evaluate the Student for Emotional Disturbance.<sup>94</sup>

The witness agreed the School was voluntarily paying for cognitive behavioral therapy for Student with Dr. Colvin, paying for mileage to and from Springfield for that therapy, paying for eye movement desensitization and reprocessing that was performed, paying for mileage to and from speech and OT, paying for home internet, and provided the Chrome book for Student. The witness testified she did not know if the Chrome book came with Voice to Text software, nor had she asked about that.<sup>95</sup> The witness agreed they spent social time with Jennifer Robinson, but the witness did not agree it was educational time, but testified they were close. When asked did she consider Jennifer Robinson's social time with the Student to be for him, the witness testified she considered it social for them all, and admitted that one of the goals and objectives on the Student's IEP was socialization.<sup>96</sup>

The witness agreed that JoAnna Jaro was hired as an instructor for the Student specifically devoted exclusively for the Student's Homebound instruction, and that was her only job. The witness testified the primary reason in the change from Jennifer Robinson to JoAnna Jaro was because Jennifer did not have the certification to be teaching.<sup>97</sup> The witness testified that her earlier testimony she had

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<sup>91</sup> Vol. I, P. 135, line 17, through P. 137, line 18

<sup>92</sup> Vol. I, P. 137, lines 19-21

<sup>93</sup> Vol. I, P. 137, line 22, through P. 138, line 22

<sup>94</sup> Vol. I, P. 139, line 7, through P. 141, line 24

<sup>95</sup> Vol. I, P. 142, line 13, through P. 144, line 3

<sup>96</sup> Vol. I, P. 144, line 4, through P. 147, line 21

<sup>97</sup> Vol. I, P. 147, line 22, through P. 148, line 16

never asked that Jennifer Robinson be replaced was in error, as they did request a certified teacher<sup>98</sup>

The witness agreed Dr. Colvin recommended applied behavior analysis therapy for the Student, that Dr. Colvin recommended an ABA specialist, that Infinity does not utilize or employ any ABA specialists, and that as of the time of this trial the witness had no evidence that Infinity will even include objective goals and fact-based assessments as part of his curriculum and service delivery for the Student.<sup>99</sup>

The witness testified Philip Mothered, Ph.D., is a licensed psychologist out of Mercy in Springfield, Missouri, who had the opportunity to perform an evaluation of the Student, and in January of 2017 he concluded in a report that the Student denied having any post-traumatic symptoms.<sup>100</sup>

The witness testified Dr. Savage is the one who does the eye functioning, that she is a licensed professional counselor, and that she took history for part of her evaluation from the witness.<sup>101</sup> The witness testified she did not recall reporting that the Student's tics had increased significantly because of boredom due to the time he spends watching and playing video games, then admitted she had reported the Student's tics had increased significantly over the previous week and that she suspected it was associated with boredom and the time he spends watching and playing video games.<sup>102</sup>

As to Dr. Savage's note report saying the therapist had explored the possibility of re-engaging the Student into school-based activities to reduce boredom, stimulate the Student mentally and further work through past trauma in an adaptive manner, which also set out this witness was supportive but demonstrated some reservation as to how the Student's stepfather would support to respond to such

a plan, the witness testified both she and the Student's stepfather liked the idea, but that both she and the stepfather had reservations, regardless of what was on the document.<sup>103</sup> The witness agreed that Student has tics and anxiety at home when doing homework, and that a person's strength can also be their weakness.<sup>104</sup> The witness agreed everything Dr. Nichols recommended was to help reduce the impact of Autism Spectrum Disorder in the classroom, and it was understood the Student at the time the report was created was going to be transitioning back to a school setting, and testified they were

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<sup>98</sup> Vol. I, P. 148, Line 15, through P. 149, line 9

<sup>99</sup> Vol. I, P. 149, line 13, through P. 150, line 23

<sup>100</sup> Vol. I, P. 150, line 24, through P. 151, line 12

<sup>101</sup> Vol. I, P. 151, lines 17-25

<sup>102</sup> Vol. I, P. 152, lines 1-5, through P. 153, line 4

<sup>103</sup> Vol. I, P. 153, line 22, line 22, through P. 154, line 12

<sup>104</sup> Vol. I, P. 158, lines 4-12

going to start trying that in July, and that all the recommendations were for a classroom setting.<sup>105</sup>

The witness denied ever rejecting the notion of the Student receiving a Benchmark test, and testified the first time they heard about it was in May, she believed, but was not sure of the date. She also testified they did not know it had to be done with a Homebound student.<sup>106</sup> The witness testified there had been speech or occupational therapy appointments canceled on her part, due to a spring break, a doctor's appointment, and a calendar issue, then OTA with TheraPlay was sick once, then had a death in her family.<sup>107</sup> The witness testified she was happy with TheraPlay services in Harrison, and that those same services are offered in Springfield, Missouri.<sup>108</sup>

As to what an ABA is, an Applied Behavior Analyst as to school situations, the witness agreed her earlier testimony was that to her knowledge Infinity Academy did not have one, and testified neither does Omaha at the school, but that Springfield, Missouri has one.<sup>109</sup> The witness testified Infinity is strictly a day treatment program, and that the Student had been there approximately five Fridays (with no educational instruction), and one five-day summer camp and approximately 5-6 days into a second fourteen day summer camp (all with no educational instruction). The witness testified they say the age range at Infinity is 11-18.<sup>110</sup>

#### **Witness: Donna Van Kirk**

The witness Donna Van Kirk testified she is a private practice psychologist in Fayetteville. She holds a Bachelor's and a Master's degree from the University of Northern Colorado. Her Master's was in counseling, and she worked as a juvenile probation officer, State of Idaho, after which time she obtained her doctorate in the counselor education program at the University of Arkansas. She has been a licensed psychologist since 1982. She testified she first worked for Ozark Guidance Center, that before there were psychiatric examiners in schools, tested over here in your neighboring towns. She testified she has also been a therapist, worked in several school districts doing Special Ed assessments, and for the last 15 or 20 years has been in private practice in therapy and psych assessments. She was paid for work by the Omaha School District.<sup>111</sup>

The witness testified she saw the Student November 16, 2018, and on that day the Student had two different evaluations, one by the witness and the other by Jennifer Moffitt, who is a licensed level

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<sup>105</sup> Vol. I, P. 158, line 23, through P. 159, line 15

<sup>106</sup> Vol. I, P. 161, line 14-25

<sup>107</sup> Vol. I, P. 162, lines 15, through P. 163, line 12

<sup>108</sup> Vol. I, P. 164, line 21, through P. 166, line 16

<sup>109</sup> Vol. I, P. 172, line 9-22

<sup>110</sup> Vol. I, P. 176, line 9, through P. 179, line 7

<sup>111</sup> Vol. I, P. 181, line 8, through P. 182, line 14

psychological examiner whose specialty is in learning disorders.<sup>112</sup> As far as the process, the witness testified there is a lot of data collection as to previous psych evaluations, previous diagnoses, and then there is current assessment instruments. The witness testified with consent of the Student's mother, the witness talked first to Missy Criner in the Omaha District, and they discussed that a comprehensive evaluation was needed, but the witness did not make many notes on that. The witness testified there was an agreement some personnel in the District, teachers, would fill out some Behavior Rating Scales that are standardized and that was also done and those were returned to Ms. Moffitt for scoring. The witness testified on November 26, 2018, the Student, his sister and their parents came to Fayetteville, and Ms. Moffitt began her testing of the Student at her office, which is about three blocks from the witness' office. The witness testified the parents and she had a diagnostic interview with lots of background and anecdotal information, as well as going over some diagnostic scales, which the witness testified is recorded in the first two or three pages of her report, the previous test results and the background history the parents provided. There was a break for the Student and his family to go to lunch, understanding they would come back for the witness to do testing, and she did an IQ test. The witness testified the parents were not present for the test, but she thought the Student's sister came in to kind of finish up, as the Student was agitated and upset by the whole process, which was a very long day for him, with lots of questions and answers. The witness testified when she tested the Student in the afternoon, she went to Ms. Moffitt's office because the Student was already familiar with that. Looking at her behavior observations, the witness testified on page four under the Behavioral Observation section in the end of the third paragraph, that she did invite the Student's sister because the Student was very nervous, being asked questions he could not answer.<sup>113</sup>

The witness testified she did not interview Missy Criner, and confirmed there were Behavior Rating Scales she got from the School. The witness testified at the bottom of page five where it discusses the BASC in the last paragraph, forms were completed independently by the Student's former and current Homebound teachers, so Ms. Robinson and Ms. Jaro each filled one out. The witness testified a VABS-II is the Vineland Adaptive Behavior Scale, that it is a normed, age-normed diagnostic instrument used to assess functional communication skills, self-help skills, and social skills. The witness testified Ms. Robinson did not do the BASC, as that was done by school personnel. The witness testified she did the Vineland, the VABS, VABS-II, with the parents during the interview. The witness testified Ms. Robinson was called Rater 1 and Ms. Jaro was called Rater 2 on the next page. The witness testified page six shows all the different scales, and their rating were computer-analyzed and scores derived from that. She used check marks rather than numbers, as numbers sometimes don't make sense. One check mark means the rating score of the person created a score that fell within the at-risk range, which is not quite the statistically significant range as far as being discrepant from the general population that the test was normed on, but at risk to develop further, more extensive problems. Two check marks means they met the statistical criteria as being highly atypical compared to the general population of students. The witness testified on page six under Externalizing Problems, neither Ms. Robinson nor Ms. Jaro testified the Student suffered from hyperactivity, aggression, or conduct problems, but setting in which they observed the Student must be considered, and they taught Homebound, one-on-one, so they did not observe those behaviors to

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<sup>112</sup> Vol. I, P. 182, lines 15-22

<sup>113</sup> Vol. I, P. 183, line 3, through P. 185, Line 19

the extent their ratings resulted in a statistically high score, and that the BASC has things like can't sit still, out of the seat a lot, talking without permission, those would be some hyper or impulsive behaviors, as well as inattentive, can't follow two-step directions, doesn't seem to be listening, and the score the Student got from both teachers was not high enough to meet the statistical cutoff to be called either at-risk or statistically significant.<sup>114</sup>

The witness testified she had reports from two or three other psychologists as to the Student, and she also had a psycho-educational evaluations by Dr. Charles Nichols dated October of 2011 and 2012. She also had a 2017 psychologist Philip Mothered in Springfield, as well as records of the psychologist Dr. Anne Colvin, another psychological evaluation from Dr. Nichols in 2017, further records of Dr. Colvin and records of counselor Jennifer Savage. The witness testified she also incorporated into her report some notes by the Homebound teacher Ms. Jaro, and that the others were provided to her by the District. The witness testified there were differences in the IQ scores on some of the previous testing, but that her interview with the parents was current. When asked about inconsistencies, the witness testified it was not discrepant with the history she was afforded started in 2011. The witness testified the Student was diagnosed with autism in early childhood, which was what was conveyed to her and was in the reports as well, that the Student was behind for his age and grade level.<sup>115</sup>

As to her behavioral observations of the Student, the witness testified the Student was very nervous, very insecure, very unsure, and required a lot of reassurances from his parents. The witness testified when they came back for the afternoon, Ms. Moffitt went out to the car to encourage the Student to come in, and he started to withdraw and be very nervous, which he had been throughout with her. The witness testified there was no evidence of withholding, inhibition, irrationality or malingering, which she always looks for because it goes to the validity or reliability of test scores.<sup>116</sup>

The witness testified her report was independent of what others have found, that it was consistent, but that it was independent. The witness testified the parents' information, which she summarized, was very important to her diagnosis, as they see the Student daily, and the witness just took a snapshot. As to her findings, the witness testified she gave the Student a standardized intelligence test, the Wechsler Intelligence Scale for Children, Fifth Edition, that the Student had previously been given that by Dr. Mothered in January of 2017. The witness testified their scores were very consistent, that the Student's Full Scale IQ score for her was 64, and it was 63 for Dr. Mothered. The witness testified that is about the second percentile rank as far as the general population, that most people score between 90 and 109, which is average. The witness testified Dr. Nichols' IQ opinion in 2011 was a bit different from hers, that she was not sure what test he gave as it was just in the history, but he did not give an IQ score, he only testified the Student's intelligence was in the low average range. But, on re-evaluation ten months later by Dr. Nichols, the Student got a verbal IQ score of 69, a nonverbal 75, and a full scale 71 from a different test. The witness testified it was the same one in an updated version that Dr. Nichols gave the Student in 2012, but at that time the Full Scale IQ score was 84, which is low average range. So, the witness testified with her testing on the Wechsler, she

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<sup>114</sup> Vol. I, P. 185, line 22, through P. 189, line 25

<sup>115</sup> Vol. I, P. 190, line 1, through P. 192, line 17

<sup>116</sup> Vol. I, P. 192, line 20, through P. 193, line 11

gave all the subtests because they load into the various indexes, but that not all the subtest scores go into the Full IQ score. When asked if the Student's IQ scores are consistent with someone diagnosed as being high functioning on the autism scale, the witness testified no, not high functioning. The witness testified as far as the Student's global intelligence, he is functioning in what would be called the intellectually disabled range.<sup>117</sup>

The witness testified the Student's Full Scale IQ is very low, not in the high functioning whatsoever, that what is familiar to him and what is predictable in his day and the words used in normal daily living, he has a good understanding those and can use those words to express himself, but in general his communication skills are very limited. The witness testified the Student was extremely slow on the Processing Speed Index, which are timed fine motor tasks, he had poor pencil control and fine motor coordination, which is one of the reasons OT is helpful for him and why he would need it.<sup>118</sup>

The witness testified on Adaptive Behavior the Student scored very low, that on the Behavior Scale Dr. Nichols diagnosed specific Learning Disability, as by his measure, his IQ measure, the Student had low average ability to learn, yet his achievement was highly discrepant from that, and that difference is called a learning disability, if it meets the DOE standard. The witness testified the Student's reading skills were low average and below. The witness testified her summaries were diagnoses of PTSD, Tourette's Disorder, ADHS, and Autism Spectrum Disorder.<sup>119</sup>

The witness testified she recommended the parents provide copies of her report to all the Student's treating physicians, which is standard practice, so that everyone knows the latest test scores and conclusions to use them to make goals and set treatment interventions, and inform physicians for their medication review. The witness testified she talked to the parents about nutrition and recommended speech/language therapy, as well as occupational therapy, and testified continue at the highest possible frequency. The witness testified there has to be room for improvement or the speech pathologist or therapist, if she was private and trying to bill insurance, insurance would not pay for therapy if there was no room for improvement, so she uses the standard phrase "at the highest frequency available" based on that professional finding and what the professional recommends the student needs. The witness also strongly recommended efforts to re-integrate the Student in Omaha School District be discontinued, saying that it is a persistent, significant source of stress on the family, and importantly, pressure on the Student exacerbates his social-emotional disorders and the prognosis for his success is very low. The witness agreed no more time should be wasted on marginal services and of school-based social opportunities. The witness agreed the next sentence saying Omaha School

District should have been Infinity School. The witness also testified it was essential the two school districts collaborate on an appropriate educational program that addresses the Student's special needs.

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<sup>117</sup> Vol. I, P. 193, line 19, through P. 197, line 2

<sup>118</sup> Vol. I, P. 198, lines 11-25

<sup>119</sup> Vol. I, P. 199, line 1, through P. 204, line 3



The witness testified in her 40 years of experience, that was best for Student.<sup>120</sup>

The witness testified the Student needs structure, and even the DOE recommends under their programming considerations that a promising treatment for autism involves intensive educational programming signed to meet the student's individual needs in the areas of language, social skills and self-control, so the components of that would be, on a practical basis, small classes, high teacher-to-student ration, low stress environment, and counseling built into the program. The witness testified she thought paraprofessional was discussed in past IEP's, and she thought the Student would need that, certainly at the beginning, if he was going all day, five days a week on campus, and perhaps should be slowly introduced to that, not just full weeks at the start; academic goals consistent with his skills, which are known to have been around the same grade level for several years, special educators with the training and resources would be a necessary component (and she did not know the District doesn't) as well as being in an environment where he can move about to expend energy.<sup>121</sup>

The witness testified she had seen the Student one time, on November 16, 2018, and had not seen him since. The witness confirmed she had not provided any course of treatment for the Student, that she did only an evaluation. The witness testified the time she did testing, with the breaks the Student needed, was an hour, she was not sure. The witness testified the Student was 14 when she saw him, and she did not interview him, as he already had a diagnosis of autism, which told her he already had delays, and she talked with the parents, as she did not consider it would be necessarily reliable information if the Student even understood what she was asking. The witness testified it would not be typical to interview a 14-year-old if he has autism and low communication abilities.<sup>122</sup>

The witness agreed the Student has a short attention span, but testified he was not resistant to testing in an intentionally withholding or non-cooperative way. The witness testified she did take into account for her report the impact of having the Student's sister present on test results by making sure the sister sat behind the Student, that she did not help him with anything, and that she seemed to have a calming influence. The witness testified the Student had already been diagnosed with autism several times so she relied on previous diagnosis, which is standard practice, nor did she diagnose the Student with PTSD, which was also a prior diagnosis on which she relied.<sup>123</sup>

The witness testified she did not rely on the parents' report as to the Student being bullied and ridiculed by students and that teachers and administrators did not effectively curtail that bad behavior in reaching the conclusion and recommendations on her report. The witness testified she did rely on the parents' report that the Student could not get near the Omaha School without having a meltdown in making her recommendation that attempts to re-integrate the Student into the public school be discontinued.<sup>124</sup>

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<sup>120</sup> Vo. I, P. 204, line 9, through P. 206, line 21

<sup>121</sup> Vol. I, P. 206, line 24, through P. 208, line 5

<sup>122</sup> Vol. I, P. 208, line 16, through P. 209, line 25

<sup>123</sup> Vol. I, P. 212, line 23, through P. 214, line 17

<sup>124</sup> Vol. I, P. 215, line 1, through P. 215, line 23

When asked if it would have been important to the witness to know that the allegations of bullying by students, teachers and administrators was not substantiated when tried at Due Process, and then on appeal, the witness testified it would have been an additional piece of information, but it would not have changed her diagnosis.<sup>125</sup> When asked if, had it been shared with her in the family history that the stepfather stayed on the property during the four days the Student was brought back, and that the stepfather peered in the window and circled around the whole time the Student was there, that would have been a matter to the witness' evaluation of whether the Student could transition back into the Omaha School District, the witness testified she would want to know a whole lot more about whether he was there for security reasons or for his son to be able to have contact and reassurance with him that he could stay at school, or what exactly that was about in order to answer that question.<sup>126</sup>

The witness testified in her report that teachers cooperated when attempts were made to bring the Student on the property after the other students were dismissed, and it was her understanding the school worked with the parents to try to help the Student re-integrate, and they told her there were other instances of not being able to work together and not being taken seriously. The witness testified the parents did tell her the school offered neutral meeting locations and after-hours meetings to help re-integrate. The witness admitted that when she states attempts to re-integrate had failed, the basis was what the parents told her, and testified her conclusion the attempts failed played into her recommendation that the Student not be re-integrated into public school. The witness also testified that if it was not true the Student had considerable debilitating anxiety regarding the school setting and property, then that may not have been a recommendation. The witness testified the Student had fairly significant anxiety coming to their office, consistent with autism.<sup>127</sup>

The witness agreed that, generally speaking, children with autism should be in a setting where they are with both disabled and non-disabled peers if they can tolerate it.<sup>128</sup> The witness did not know that Infinity Academy had only autistic kids, or that it was not an accredited school in Missouri. The witness stated in her report that it was essential the two school districts collaborate, but was not aware Infinity refused to sign on to any Arkansas-required IEP for the Student.<sup>129</sup> When asked if the witness was aware the Student has episodes of anxiety and his tics, all the things she describes in her report in response to doing homework or school work, also at home, she testified not exclusively, no. The witness testified she never suggested the Student would have more success at Infinity than at Omaha School District, that the Student's functioning is very low, he has not had any academic improvement over several years, that his issues are more social, emotional, neurological, developmental, and there are no guarantees.<sup>130</sup> When asked if she thought some of the Student's anxiety can be attributed to

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<sup>125</sup> Vol. I, P. 220, lines 7-20

<sup>126</sup> Vol. I, P. 221, line 24, through P. 222, line 21

<sup>127</sup> Vol. I, P. 224, line 12, through P. 225, line 23

<sup>128</sup> Vol. I, P. 226, lines 12-25

<sup>129</sup> Vol. I, P. 227, line 12, through P. 229, line 4

<sup>130</sup> Vol. I, P. 233, lines 2-20

his parents, the witness testified she would have to reassess that from that angle.<sup>131</sup> The witness testified she did not reach any conclusion whether or not the Student would benefit from ABA therapy.<sup>132</sup>

When asked if the witness would recommend any other programs, she testified certainly, anything that would be an appropriate education for the Student; she testified she did not research that, she doesn't make that kind of recommendation, that she knew he had some success at Infinity, but there are certainly others around, she just didn't know of those, so her recommendation was not just keyed specifically to Infinity.<sup>133</sup>

### **Witness: Anne Colvin**

The witness Anne Colvin testified she works for Mercy Hospital in Springfield, Missouri as a child psychologist.<sup>134</sup> By way of background, Dr. Colvin testified she majored in psychology and minored in sociology at Pittsburgh State University, obtained her Master's degree in 2004 at Forest Institute in Springfield, Missouri, completed an APA accredited internship at the Robert J. Murney Clinic, then graduated in 2006, did a short stint of career counseling, but really wanted to work with under-served populations as a general psychologist, and joined in a private practice for several years in 2009. The witness testified she had the opportunity to join in at the Mercy Hospital in 2016 and specialize in working with children ages 3-18. She testified she also works with some college-age people. She testified primary referrals are from psychiatry, pediatric, neurology, and pediatric gastroenterology, so a medical base setting working with the integration of how physical health affects mental health in children, and she has been doing that since 2016. She testified she was licensed by the State of Missouri somewhere around 2008.<sup>135</sup>

The witness testified referral for the Student went in approximately December of 2016, but they did not have an intake until February of 2017. Looking at her records beginning in May, the witness her progress note from May 5, 2017 showed she was with the Student, and that the Student's stepfather in for at least part of the session. She testified the diagnoses are Autism Disorder, Attention Deficit Hyperactivity Disorder, combined type, Tourette's Syndrome, Generalized Anxiety Disorder. The witness testified Generalized Anxiety Disorder means worry that it is difficult to manage in a wide range of situations. The witness testified "High Functioning Autism, by (parent) history," and that the parents had told her there was a prior evaluation, she thought, in elementary school. The witness testified they were going off that record, and the Student's mother had given the witness a description of some of the Student's early behaviors and difficulty with social engagement and communication, those kinds of things, and after working with the Student a bit longer, the witness had gone back and was looking

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<sup>131</sup> Vol. I, P. 234, lines 16-18

<sup>132</sup> Vol. I, P. 235, lines 11-13

<sup>133</sup> Vol. I, P. 237, line 23, through P. 238, line 23

<sup>134</sup> Vol. II, P. 6, lines 8-15

<sup>135</sup> Vol. II, P. 6, line 16, through P. 7, line 18

at records and saw Dr. Collins supported that diagnosis as well, which was the neurologist, and neurologists can diagnose autism.<sup>136</sup>

The witness testified when she tried to inquire about school with the Student, there was a lot of psychomotor agitation, just fidgety, avoidant, loss of eye contact, looking away, irritability, those type things would be present, and it became very difficult to get information from the Student about his experiences. The witness testified the report of the Student having distrust of some of the teachers that he encountered this school year reported feelings of being unsafe, unheard, judged, unprotected, came from the Student, not the parents. The witness testified the Student would perseverate, fixate on what he saw as sort of the key players or kind of culprits of his bullying, primarily the teachers involved, that he rarely cited specific student names, but had specific teachers' names he felt very criticized by.<sup>137</sup>

When questioned about her comments she wanted to see the Student gradually return to school with a traditional classroom environment, was that an appropriate goal, the witness testified yes, that was an appropriate goal, because the Student needs feel, so part of his preoccupation, too, was that this was his school, that is where his friends are, and he wanted to feel normal, which was a phrase he brought up often. So, in an effort to deal with these symptoms, you are trying to work with the person on understanding that it was specific instances, not the whole experience, that perhaps was a problem--the same way if you were bit by a dog, the problem is that dog, not all dogs. So, the witness testified trying to bridge the gap between feeling as though it was this blanketed, all-encompassing experience, to see the isolated instances that were the problem, and that the Student could be safe in that environment and that he could overcome his anxiety and sort of build a self-image or self-esteem around "I can conquer," "I can overcome," and build confidence back up, not to mention the fact that the Student needed an education.<sup>138</sup>

The witness agreed they explored options for this, and she created a letter summarizing her recommendations for the parents to present at the IEP. The witness agreed she testified her primary concern was the Student has done minimal school work at this year and tics are significantly exacerbated during homework time, and the witness agreed the Student was homebound but did not have an in-home teacher or even an online program he followed, but agreed that information was provided to the witness was from the parents. The witness agreed her notes the Student was sent home worksheets without instruction was also information from the parents.<sup>139</sup>

The witness had recommended starting the Student in his safe, home environment with an instructor sensitive with Autism Spectrum Disorder and ADHD, as she testified in large part they needed to be aware of the Student's focusing difficulties and how to redirect and get him on task, which was one of the witness' many hurdles, but she testified she would place that high on the list of priorities, that a person able to keep the Student engaged, keep him moving, work in small bits, recognize physical signs of distress when he is struggling to articulate, he needs a break. The witness testified that without

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<sup>136</sup> Vol. II, P. 7, line 19, through P. 8, line 10 and Vol. II, P. 9, line 1, through P. 10, line 24

<sup>137</sup> Vol. II, P. 12, line 25, through P. 13, line 22

<sup>138</sup> Vol. II, P. 13, line 23, through P. 15, line 4

<sup>139</sup> Vol. II, P. 15, lines 5-21

focus and attention, you are not going to be able to do anything else. The witness testified the Student needed a lot of concrete instruction, direct guidance and clear expectations at the beginning, and a lot of emphasis on what the Student needs to do rather than what he does not need to do, and that someone sensitive in working with those diagnoses would understand all those things. When asked if that required training, her experience, the witness testified that from what she has seen, special ed teachers have long worked with these diagnoses and if they worked in that setting, they typically are quite prepared to work with those presenting problems. The witness testified the Student obviously had some things that are more unique with the degree of the intensity of his anxiety around school and his Tourette's, but those still could have been worked with someone behaviorally focused in recognizing when he needed a break, helping to redirect him when he perseverates, offering empathy then redirecting. The witness testified "perseverates" is a less extreme form of obsessing, it is just getting stuck or fixated on something, on a particular idea, and it could be anything. The witness testified they explored with Student safe classes/teachers and he enjoys his OT, and he had told the witness he liked the teacher, which is usually the Student's MO—he likes a teacher that's really nice.<sup>140</sup>

The witness agreed they discussed the possibility of doing in-home academics, and perhaps OT at school each week to get him on campus for a short amount of time (an hour a week) with an adult he has good rapport with, which was the witness' desire. The witness testified the Student's stepfather would fill that role.<sup>141</sup> The witness testified most of her interaction as between the two parents with the Student, that the mother would come to some sessions and they would talk on the phone, and the stepfather would often bring the Student to appointments, sometimes sitting in those sessions. The witness testified she found the stepfather attentive to the Student's needs, and testified anything she asked the parents to do, they were on it.<sup>142</sup>

As to the witness' objectives, she had number one was complete thorough assessment of the Student's Tourette's Disorder, number two, complete a tic hierarchy. Objectives six and seven, that parents and the Student would demonstrate increased knowledge about ADHD and its treatment, specifically parent training to promote improved behaviors at home, such as visual aids, use of clear instruction, time-out, and expectations rewards/consequences clearly outlined, then number seven to impose some responsibilities on the parents, an organized system to keep track of assignments, chores and personal responsibilities, the witness had noted they were ready, willing and able. She testified they identified ways of creating more award systems and chores and charting, learning daily living skills, those kinds of things, and they were able to put those into practice for the Student and he was able to come back and let the witness know what he was doing. When asked if the Student was enthusiastic about it, the witness testified sometimes not, especially about school stuff, and he would really drag his feet when she asked him to read more or work an extra 30 minutes on school work.<sup>143</sup>

The witness testified the Student is aware of his condition, and they had talked about situations that might exacerbate tics and looking for circumstances and situations where those would be better,

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<sup>140</sup> Vol. II, P. 15, line 22, through P. 18, line 18

<sup>141</sup> Vo. II, P. 18, line 22, through P. 19, line 11

<sup>142</sup> Vol. II, P. 19, line 20, through P. 20, line 8

<sup>143</sup> Vol. II, P. 20, line 15, through P. 22, line 12

and she talked to him about it being a part of the brain not in his control, and he had a very difficult time understanding that it was not his fault, as he felt judged or criticized as to tic behaviors, even noticing if there were new tics, that he had a lot of negative self-talk.<sup>144</sup>

Looking at her notes from a visit July 27, 2017, where she had reviewed the recent school meeting and the family had provided a copy of the Student's latest psychological evaluation for the new school, the witness testified that was by Dr. Charles Nichols so the school had their Resource do the evaluation. The witness testified in her notes that there was no start date for school, that they were looking to do four days weekly and hour a day in home, and that she was in agreement with a slow process. The witness testified this was because the Student needed to build small but steady gains so that he would not be thrust into school and expect his anxiety to be managed. Rather, he would be in a small situation, then taught to build up from there.<sup>145</sup>

Discussing her communications in a general way with the people at the school at Omaha, the witness testified in the February of 2017 range when she began therapy with the Student, earlier in that process she had called the school, she was trying to find out from the Student's parents who would be a good contact, she called to talk with the Special Ed director at that time, the witness could not remember the lady's name, but it was not Ms. Criner, the liaison, and she left a message. She testified she was trying to get a feel of a general scope of their plan. She wanted something other than the parents' report, the other side of the story, to get a feel for how it was that the Student reported concerns of bullying, how they are responding, kind of bullying policy or what their structure was around that. The witness testified that if she was going to work with the Student as to anxiety around other students, she needed to let the Student know what procedures could be gone through. The witness testified she did not hear back.<sup>146</sup>

The witness agreed her notes indicate that she spoke with the Student about his fears of being bullied and people being mean, his words, and he spoke of his fears as to the principal, and that she noted the Student's tics had a notable increase in session, he became angry and hid under a pillow, he was avoiding, trying to get away from his discomfort, not wanting to talk. She also noted she discussed with the Student they would find safe adults for him to communicate with, access to call parents if needed, by phone.<sup>147</sup>

The witness agreed her notes testified the Student was starting that week with going to the campus to slowly transition and assess how he did. When asked if she was instrumental in putting together a re-integration plan, the witness testified she was trying to think of ways to do that, basic things like driving by the school, maybe getting out and shooting some baskets, and there were some other things they were thinking about, like going up and helping his special ed teacher, like clean up

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<sup>144</sup> Vol. II, P. 22, line 24, through P. 24, line 5

<sup>145</sup> Vol. II, P. 24, line 6, through P. 25, line 23

<sup>146</sup> Vol. II, P. 26, line 2, through P. 27, line 13

<sup>147</sup> Vol. II, P. 27, line 24, through P. 28, line 16

her classroom, just trying to get the Student where he was not panicking, she and the parents.<sup>148</sup>

The witness confirmed school had started in August 2017. Her notes testified she attempted to reach the Special Ed teacher, Ms. Jennifer Robinson, by phone to review two issues of concern, staying calm when the Student becomes upset, and responding to tics and focusing on school work and self-monitoring. The witness' notes testified she left a phone message for a return call, but she did not recall having communication with Ms. Robinson at that time.<sup>149</sup>

As to the Student's meds in the Fall of 2017, this witness testified she did not do meds, as she is not a psychiatrist, but she could say what they are and what he is doing, that he has Zoloft, that it is an antidepressant but it is used for anxiety, it is a nice one for specifically kind of obsessional kinds of anxiety, which is sort of the feel you have around the Student's anxiety and things about school. Strattera would be for ADHD, the witness thought the Student was on Respiradol for the tics, for the movements, and she thought he was on Melatonin for sleep, and then Benadryl which she assumed was related to allergies.<sup>150</sup>

As to a visit about three months later, November of 2017, the witness confirmed her notes testified she met with the Student's father for planning to get the Student back to school, and consulted with Jennifer Savage about transition. The witness testified Ms. Savage was a colleague of the witness with whom she had worked when in private practice, who was a child therapist who did EMDR, a form of treatment discussed in around July of 2017, which is called Eye Movement Desensitization and Reprocessing, a therapeutic process used with responding to trauma, which builds inner resourcing and calm and resiliency. The witness testified there was another lady who worked in her office, Dr. Angela Gill, who also does EMDR, but the witness had less knowledge as to her abilities other than she was told Dr. Gill was certified to do that approach. So, the witness testified they put in two referrals, and the Student was able to get in with Jennifer Savage earlier, that the Student had a handful of sessions with her in the Fall of 2017, and that they had communication about considerations as to the Student's transition. The witness testified Jennifer Savage's concern was that you can re-traumatize, and the witness was pushing to get the Student back in school from an anxiety perspective, that you are typically trying to get the kid back as quickly as possible, as the longer they are out, the harder it is to get them to return. The witness testified Jennifer Savage's concern was the Student would be vulnerable to re-traumatization, so she wanted to ensure staff was ready for him and that there was a plan in place on how to handle the kind of situations that might come up in middle school after his experiences in the sixth grade, that she wanted to be sure he had some positive self-image as to his ability at school, because he felt like he was stupid and a burden. The witness testified Jennifer Savage needed the Student to see isolated instances of really positive experiences at school and have a calm, structured, predictable, safe environment, people he could turn to if needed, those were the sort of things the witness testified she and Jennifer Savage discussed.<sup>151</sup>

Discussing what would be easy for the Student, the witness testified you work easy to harder,

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<sup>148</sup> Vol. II, P. 28, line 23, through P. 29, line 17

<sup>149</sup> Vol. II, P. 29, line 23, through P. 30, line 12

<sup>150</sup> Vol. II, P. 30, line 18, through P. 31, line 17

<sup>151</sup> Vol. II, P. 31, line 18, through P. 35, line 4

easy items would be doing some more school work and homework at home, 30 minutes a day, perhaps helping Jennifer Robinson organize her office, moving, being active to bring his anxiety down and he could be in the setting and they wanted to pair up being calm in the school setting. The witness testified she had been talking about doing OT and speech at school because the Student had some positive experiences with that, they seemed to be moving with him quickly, and they were very behaviorally focused. The witness thought this would be easy for the Student at the school. Reading, finding books and things for the Student to read, doing worksheets, anything that looked like school, they were trying to think of, and that building his math skills and doing little times tables at home, those were easy items.<sup>152</sup> As to medium items and what those included, the witness testified increasing the amount of time the Student worked on school work, an hour daily, talking about science, which even the word could sometimes set the Student off and the pop-up on the school-provided laptop would get him agitated and he would want to run from it.<sup>153</sup>

The witness confirmed she called the Special Ed teacher, Jennifer Robinson, because she wanted to review plans to start working more in school work, but could not leave a message because the mailbox was full. The witness testified by this point she did have a conversation with Ms. Robinson, who called the witness' cell phone when she was off site. The witness testified they talked through Ms. Robinson's background and experiences, and then the witness' take on wanting to kind of integrate the Student back to school, and Ms. Robinson had referenced how anxious the Student seems around his school work and things like that. The witness testified there was a conversation somewhere in there about that she thought she did not record.<sup>154</sup>

Looking at notes on the November 27 session, two weeks after the previous one, the witness testified under "content" she addressed family plans to re-integrate the Student in school, addressing the easy items, going to the school, help out his specialist teacher with her classroom. The witness testified her notes reflect the Student's stepfather planned to meet with the principal the next day, and they went on to discuss the stepfather's efforts to encourage the home school teachers to reinforce the themes and new narrative the Student is trying to make around school. The witness and the parents again reviewed accommodation factors for the Student and ways to work with his fidgetiness, boredom and stress when work is hard. The stepfather noted the Student's speech teacher does well to encourage the Student's deep breathing, but also after a short break continues on in the work, and the Student was then being given homework. As to the dates for sessions, the witness testified she had a really tight schedule.<sup>155</sup>

When asked if the stepfather reported back to the witness about cooperation from the school with the re-integration effort, the witness testified the stepfather and the Student were very close and the stepfather was working on getting the Student to let things go, but the sense the witness got from the stepfather is that perhaps the Homebound teacher, the people involved in that may not have understood what he was trying to do, so she did not feel the stepfather felt he was getting good

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<sup>152</sup> Vol. II, P. 35, line 5, through P. 36, line 16

<sup>153</sup> Vol. II, P. 36, lines 17-25

<sup>154</sup> Vol. II, P. 37, lines 5-25

<sup>155</sup> Vol. II, P. 38, line 11, through P. 40, line 2



feedback.<sup>156</sup>

The witness agreed objection number one is done, the scales and stuff, just looking through the Student's past and present tics in term of what is your awareness of the urge to tic, and the parents had done the questionnaires for the witness around that. The witness testified objective number two was done, that was where she was working on the functional assessment with them, that with Tourette's, you are looking at times when the tics are more severe or absent, so they learned over the summer that when the Student is swimming he has no tics, when he is agitated, at school or playing video games, he can have more. The witness testified that objective number three, the parental responsibility, was done, as was objective number four, teaching the patient to recognize the urge prior to the tic and how to cope with it. The witness testified objective number five was done, provide habit reversal training, which is coming up with an incompatible behavior the Student can do when he is about to tic, doing an alternative thing that they can do that does not cause a lot of attention. The witness testified this can be tricky for the Student, as it requires a lot of creativity and flexible thinking, which is not something you find in autism. The witness testified objective number six is progressing, which was for the parents and the Student to demonstrate increased knowledge about ADHD and its treatment, getting the Student to make eye contact, getting him to pause, think, listen, making a request and getting him to follow through on that, trying to work toward getting him more focused. The witness testified by January of 2018 she got the Student in with psychiatry to look at the Student's meds and if they could better manage the Student's ADHD symptoms. The witness testified, as to objective number seven, her records say there was no progress, concerning the parents developing and utilizing an organized system to keep track of the Student's school assignments, chores and personal responsibilities using positive reinforcements, but probably a better term she could have used would have been just maintaining; in other words, not worse, not better, just the same. As to her records on objective number eight, to identify stressors or painful emotions that can trigger an increase in hyperactivity and impulsivity to improve social skills, anger, management, etc., the witness testified from day one they were having conversations around recognizing from the adult perspective what seems to be triggers, and then getting the Student to see when he needs to ask for help or take a break. The witness testified the Student is not necessarily going to say a person did something and that triggered him, so the adults have to watch for moments when these things happen to make sense of what he is responding to, as he does not have that kind of insight.<sup>157</sup>

Looking at her records for April of 2018, toward the end of the 2017-2018 school year, when she met with the Student's stepfather and she was concerned about the Student not progressing toward being in school, the stepfather reported, and had text messages as to variable attendance by the Homebound teacher. The witness testified it is important for the Student to have structure, to know what is happening, when it was happening, to be able to predict, that kids on the Autism Spectrum, even those with ADHD, struggle with flexibility. The witness' notes also set out the stepfather reported the Student was being given too advanced work that he is not prepared to do. The witness testified it is important that the Student be doing or attempting to do work that gives him a chance to succeed, that the feeling of being defeated should not be reinforced, so if he is testing on a third grade level and he is getting fifth, sixth grade work, that is inappropriate for two reasons, first because it is

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<sup>156</sup> Vol. II, P. 40, line 3, through P. 41, line 24

<sup>157</sup> Vol. II, P. 15, through P. 48, line 9

inappropriate and he has an IEP that should be specific to him, not sixth, seventh graders, and second because his experiences were such in the Fall of 2016 that he internalized the notion he is not good and wanted and capable. The witness had noted the stepfather also reported the Student having some stomach upset after being at the school and refusal to eat.<sup>158</sup>

The witness confirmed her documents show she met with the Student and his stepfather April 25, 2018, to review school progress. The notes show they shared the Student's preoccupation with the child in the witness' office lobby who "appeared to be grown up" but had the "mind of a child," but the witness testified she should probably have put "gown up" in quotes, and the Student was bothered, he would get preoccupied with whether the witness had other kids like him or who are the people that come to see her. The witness confirmed the Student met with two familiar faces at the school, a teacher who helped him through his anxiety when in school and his Homebound teacher, and while the witness did not put the name in, but maybe it was Martha Hicks. The witness testified there was a lady in the Fall of 2016 who would pull the Student into a dark, quiet room and help him do deep breathing and those kinds of things. As to the Student's aversion to the word science, the witness testified he was getting ready to do testing, end-of-year suff, and he was anxious he would have a section on science, and responded to the witness in session clearly something she was about to do, and he started grabbing his chest. The witness' notes also reflected she discussed with the Student's stepfather the absolute need for structure and routine, particularly school and peers, as well as a hotline for school, but the stepfather reported testing had started. Her notes also reflected if the Homebound teacher continued to be inconsistent and inappropriately providing work above the Student's level, she would hotline. The witness testified she was not a school psychologist, but felt the Student's education was being neglected, and she told the stepfather she could call the hotline for resources. The witness testified the Student was spending a lot of his day with adults, and adults are different than kids, as kids don't know how to accommodate and won't, so the Student missed out on those opportunities, and just a sense of belonging where he could thrive. As to recovery from educational loss, the witness testified kids are very resilient and we need to give them opportunities and they can show us some amazing things they can do. The witness testified it is her hope still that the Student can recover this time or make some gains.<sup>159</sup>

Discussing her next report in April 2018, five days from the prior one, the witness met with the Student and his stepfather again to review recent progress, and she addressed the Student's desire to return to school and began formulating a clear plan for that and reviewed the Student's IEP. As to the IEP, the witness testified there was not good kind of baseline data from what the comments were being made from, that there would be percents, but she did not know what those meant, so if it testified increase spelling by 70%, it had little meaning to her, that there were places where there would be things like "four out of ten times," where you had a better sense of kind of what the baseline was that they were working from. The witness testified they were not as specific as she is used to seeing, and sometimes they covered areas that did not seem relevant to the Student at all or did not seem to characterize his strengths or limitations adequately, and she did not see anything as to how they were

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<sup>158</sup> Vol. II, P. 48, line 10, through Page 50, line 22

<sup>159</sup> Vol. II, P. 52, line 1, through P. 56, line 22

going to start working on integrating the Student back to school.<sup>160</sup>

The witness contacted Jennifer Robinson about the need to meet at school, and she was going to find time when she was available to have the Student there, because at this point, the Student has a lot of rapport with Ms. Robinson, and he was adamant he is going back to school, that is his school, it has always been and is going to keep being his school.<sup>161</sup>

The witness' report two or three weeks later, May 23, 2018 reflects the Student was prompted to speak about attending school last week, but he was resistant and spoke of efforts to avoid. The witness testified the Student's characterization of it was he saw some people there he knew, he talked to them, he was there with Ms. Robinson, there was some kind of animal in the room. The witness testified one thing about autism is they struggle with cross context social communication, getting a lot of detail is next to impossible. The witness testified Jennifer Robinson told the witness the Student did good, he did a little bit for her, and sat and talked, which was not the way the Student characterized it. The witness testified the Student has a hard time reading facial expressions, and the Student will occasionally look out of the corner of his eye or look to his stepfather and make a comment "I'm sorry, Father," "Are you mad, Father," those kinds of things, and now he does the same thing with the witness. The witness testified misunderstanding cues is a part of that population's disorder. The witness testified as far as parent anxiety in general goes, she thinks there have been conversations in private around making sure, and she testified this to Ms. Robinson, as well, making sure that we are staying calm and are giving the Student every bit of our confidence. The witness testified she had done a lot of side coaching around both parents to make sure they are aware of how they are presenting themselves in front of the Student so they would be really honest and authentic in a way promoting being calm and confident. The witness confirmed she stated she discussed with the parents how focusing at school would be difficult for the Student without clear expectations, safe, calm, structured environment. She testified chaos is not acceptable for the Student. A lot of movement, a lot of activity disruptions, things like that would be distracting.<sup>162</sup>

In the next paragraph of the witness' report, she stated that the parents had an IEP meeting the day before and the Student's updated academic evaluation was not yet complete or written up. The school has offered a para for bus throughout the school day and plan to place the Student mainstream, which meant being back in school. The witness testified she did not think that sounded appropriate, because hadn't done much else to prepare him for that, that she wanted some basic things, like using it as Homebound services, some kind of visual cue system that it is time for a break, finding some things to use in terms of that setting to show the Student could use those tools. The witness' notes testified they initially indicated they could not offer Homebound and a para (to gradually transition the Student back to school), but called back to state this was a possibility if the committee approved it. The report further set out that Special Ed teachers are changing next year, and she was told by the parents likely no Homebound services over the summer due to staff changes.<sup>163</sup> The witness testified the Student is

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<sup>160</sup> Vol. II, P. 56, line 23, through P. 58, line 8

<sup>161</sup> Vol. II, P. 58, lines 9-24

<sup>162</sup> Vol. II, P. 63, line 25, through P. 64, line 14

<sup>163</sup> Vol. II, P. 64, line 15, P. 66, line 3

tic-free when he is swimming, that is a big one for him.<sup>164</sup>

Discussing the report noting the parents are still considering options for school next fall, which would be the Fall of 2018, she was calling anyone she could talk to try to find out resources and the parents were calling around trying to find alternatives and options for the Student. Talking about what she knew of Infinity Academy, the witness testified historically there was a school called Rivendell that was very similar to Infinity, and she had done some internship time at Rivendell, so was familiar with that school and would refer that school out. Then she discovered it had transitioned and changed hands and that Rivendell was now under Arc Services in Springfield and that Infinity was brought forward or developed out of that after that time. The witness testified she had heard very positive reports, particularly, specifically in kids with school anxiety and bullying, specifically, but it just so happened that those diagnoses were ADHD, Autism Spectrum kinds of kids, so she thought it worth a look to see if that would be an appropriate fit for the Student. The witness testified Arc Services is the Springfield Area Disability, for people with developmental disabilities, it is an umbrella organization that has a lot of sub-organizations within it that offer services from pre-school to adulthood, a consortium of developmental disability programs. The witness testified Rivendell still exists, but it is whole different thing, it is somehow tied to the Springfield Public Schools, that she did not know a lot about it and it is not a place she can send people to, that she would have that resource. When asked if Infinity grew out of Rivendell after Rivendell changed its mission, the witness testified not necessarily, that what she was saying is that it has similar philosophy of a private school offering small class sizes for children with special needs. When asked how familiar with Rivendell she was, the witness testified she was never a student there, that she had visited, talked to the folks there and had kids that have gone there. When asked if she had seen good results, the witness testified yes, that it has small classes of 5-6 students per teacher, that it is very individualized but they have a very set routine. She testified they have a meeting group time, they talk about what they are going to do, they do it, and then they meet again at the end of the day in a living room and go over what they accomplished for the day. The witness testified they teach daily living skills, they have chores, they help clean up and take care of the school, they cook on Friday and they have field trips, it is very hands-on. If they want to learn about outer space, they go talk to an astronaut kind of thing. The witness testified the teachers have some kind of a special ed background, Masters degree. Dr. Brenda Bradshaw, the Principal, the Director, her background is in special ed services around reading, reading services, and then later did administrative degrees. The witness testified she knows Infinity is accredited and they are out of Kansas City, the accreditation is from the west coast; the witness testified she was looking at the website, so could not speak to Missouri's accreditation rules. The witness testified she would not want the Student to be where they talk a good talk but actually isn't delivering anything. She testified the assumption is that when a place is accredited it is following some kind of criteria, some baseline criteria, so it looks good, sounds good, but she could not speak to Missouri's rules.<sup>165</sup>

Looking at her report nearly a year ago, in June of 2018, beginning last summer, the witness noted she met with the Student on day three of the Dragon Camp that week through Infinity School, and that their mascot is the dragons, and Dr. Bradshaw is the mother of dragons. The report noted the Student enjoyed the experience, making friends and trusting teachers, he was tasked to go get his new

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<sup>164</sup> Vol. II, P. 66, lines 9-21

<sup>165</sup> Vol. II, P. 66, line 22, through P. 74, line 3

friend's name and age today and did so. Per the school, no ties and he has fit right in. The witness testified every summer, each week in June, they have camps they offer, that open up to other students. The witness testified she is always looking for things between the end of school and the start of school again for over the summer to keep them bridged so they do not lose over the summer. It was 3 p.m., the end of the day, and the Student was exhausted, drained, but per the parents the Student was able to engage and socialize and kept saying they were all nice.<sup>166</sup>

Discussing her report from August of 2018, the witness, under Content, noted that school had started in Omaha and the Student was aware he is still not in school, and he reported recent thoughts of his old teacher Ms. Dillon and feeling distress and anxiety, that he did not know the trigger, the start of school, but the stepfather noted this. The witness testified they addressed moving those memories, focusing on the present and validation/support around those thoughts/feelings, but the Student did not want to talk in detail, although he was distressed last week when they stopped into Dr. Tan's office. Dr. Tan is in child psychology, so Dr. Tan is a psychiatrist, and the week before Dr. Tan had been seen for a med check, and he apparently the Student made the comment he wanted to see the witness. The witness testified the Student had never done that before or since, led the witness to believe the Student was feeling some emotional distress and that his ties were probably bigger than his new video game. The witness testified in this report that the Student tested under range in all year end testing and need of support, that he had only 50 hours of face-to-face education time, that the family was questioning ways to meet academic needs and had reached out to Perspectives Preparatory Academy (200 student wait list), Infinity was full, the Student would get 10 hours a week with last year's teacher, Ms. Jennifer, family requested 20 hours, and that they discussed returning the Student to the classroom. The witness testified the family was hesitant, and given the end of year response from the Student, she assumed he would be as well, though he had not been asked. The witness testified when the stepfather was talking about roughly 50 hours of face-to-face education time, he was talking about the 2017-2018 school year, his Homebound services, and that was a private conversation between the two of them.<sup>167</sup>

As to her report in September of 2018, under Content, the witness was asked to explain in greater detail what she was discussing in terms of the Student having a bad week and Grandma mentioning bullying in school, the witness testified her understanding of events was that some kids from up the road had gotten off the bus and had mentioned that there was some instance of bullying at the school, and the Student was preoccupied about whether it was still going on and if anything was being done about it. The witness testified the Student asked her if he was going to have a seizure or something, and she thought he was feeling anxious, her sense that the progression was that he must have had a lot of big, internal sensations and cues and recognized those as familiar and tied that to more wishful thinking he hoped he did not have a seizure. The report also testified the school had yet to get a certified Special Ed teacher and are unwilling to do services during the day when stress, calm, and focus are best for the Student, which was from reports by the Student's stepfather. The final paragraph testified the school was requesting contact with the witness to coordinate a plan, release to communicate is up to date. A release had to be signed for this witness to testify today also. The report went on to say the witness returned a call to Missy Criner, the new Special Ed director at Omaha, there was no answer and the witness was unable to leave a message. As to the witness' January 7, 2019

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<sup>166</sup> Vol. II, P. 74, line 6, through P. 75, line 12

<sup>167</sup> Vol. II, P. 75, line 16, through P. 78, line 5

report, it says the Student's stepfather reported to the witness there was no grade card and little progress as the Homebound teacher wasn't sure of the Student's grade level, has no books or resources to educate him at home, which was the stepfather's report of the teacher's report. The witness testified she had not talked to JoAnna Jaro, they had exchanged notes, that Ms. Jaro wanted to get tips and advice on what to do and how to work with the Student, so trying to get her to recognize when the Student is having tics, but you continue working, that he needed some kind of visual system to be able to grade himself and promote self-monitoring on how the day had gone. The witness testified Ms. Jaro devised a sheet where it had different pictures, maybe to give the Student a ranking or rating of his day. It might be getting him to notice if he was having breathing trouble or needed to take a break, those kind of things, like a daily log. The witness testified she had seen some stuff presumably written by Ms. Jaro where she referenced not having a baseline, a starting point for what seems to be the Student's level and what work needed to be done and work with him on that so they could be providing resources that were developmentally appropriate. The witness also testified in her report she expressed her willingness to communicate with them to coordinate care if this should materialize. The stepfather noted the Student's Homebound status, lack of IEP meeting, and transportation were confounding factors still at that time, and the witness clarified that when she testified "they," she meant the speech, TheraPlay, though the witness testified she had no conversations with TheraPlay.<sup>168</sup>

The witness testified, looking at the report of March 5, 2019, it contained a letter from herself to Missy Criner dated February 18, 2019, telling Missy Criner that the witness had received a request through the law firm of Eldredge and Clark requesting the witness complete a Physician's Report for Autism on the Student. The witness testified she suggested that Omaha school work with an autism specialist and applied behavioral analyst as to school situations, behaviors, and effective strategies for children with autism, that she and Ms. Criner had a phone call, that the two had ended up touching base back in September of 2018. The witness testified she sent the letter because the law firm had faxed her a document they wanted filled out, she presumed before the IEP meeting, which was why she was trying to reference that in the letter, and the document was illegible. The witness testified when she went to fill the document out, she realized she was not sure she could say some of the things it was asking her to say, so she did not feel comfortable filling it out. Instead, she took the essential information from the document and tried to answer the questions as best she could in a way she was comfortable with. The witness testified it referenced meds and side effects and physical exam things that are not things she does, so she wanted to make it clear these were her words and things she could say and sign that. She did not want to sign the other document as she was not clear about it.<sup>169</sup>

Looking at the letter written by the witness to the Omaha School District May 3, 2018, the witness testified she wrote the letter because she had it in her head she wanted the Student in school before the end of the school year. He had finished the EMDR therapy with Jennifer Savage, and it was appropriate and necessary for the next stage of the Student's treatment for him to be back in school, and she was asking what is something that can be done to make this happen. The witness testified she had talked to Ms. Robinson on the phone during that therapy session and they went through a list of accommodations she thought appropriate, that the witness thought appropriate, so this was the witness putting in writing as a result of that conversation. The witness did not recall how it was transmitted,

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<sup>168</sup> Vol. II, P. 78, line 9, through P. 84, line 6

<sup>169</sup> Vol. II, P. 84, line 7, through P. 86, line 13

as there was no address on it, she believed she might have given it to the Student's stepfather, but did not recall for sure. That would be applicable to the 2018-2019 school year, and the witness testified the feel she got from Ms. Robinson was that there was a way they could get the Student up there a few days before the school year was going to be over, as they do not do summer school, so the witness wanted to at least get the Student on campus for a bit of the day and see if they could put some things in place and in time he might be able to do that. Looking at her letter, the witness had testified it would be important to educate staff and administrators who would be in with the Student as to strategies for managing his symptoms since he would struggle at times to use appropriate strategies. The witness did not know whether that ever occurred. The witness had also written that the goal was not to ostracize the Student, and it might be a helpful accommodation to have him leave the room or step outside briefly, but that should not turn into perceived punishment. The witness confirmed this was her last attempt in the 2017-2018 school year to get the Student started in being re-integrated into the Omaha School District. She wanted to get him in a few days in May before that year was over, but also kind of looking forward, the things that needed to be in place, and the thought process was even a couple of half-days, because he had rapport with her, the visual schedule, the card system, small classroom, she had a para, those kind of things. The witness testified she then gave a list of accommodations advised, and testified based on her experience with Infinity Academy those things are available at Infinity, with the caveat being para support, they have a small ratio of students to teacher, so the witness testified she did not think that significant.<sup>170</sup>

Looking at the document dated April 26, 2018, the witness agreed it was intended to be hand carried to the Omaha School District, and testified it was the month prior where she was again trying to clarify what she was requesting or what she thought was needed or necessary to get the Student ready to be back in school, so she does want to continue to work to re-enter him into a standard day. She testified she was asking for Homebound service for the summer of 2018, and agreed she now knows those were not provided. The witness testified she thought it necessary because that was the year the Student had some 55 hours of Homebound services, total, for the whole year, and it was obvious to her he needed to continue to have services, and added that the OT is important for the Student's fidgeting, tics, those kinds of things.<sup>171</sup> As to the witness' note the Student's tics increased with computer usage concerning the laptop, the witness testified that was happening in the home setting because it had science and that stuff pulling up.<sup>172</sup> The witness testified that she had no information on who paid for the couple of patients she had treated who went to Infinity Academy, and certainly not that any public school district paid that tuition.<sup>173</sup>

The witness testified she had read Dr. Charles Nichols' report, which seemed to be a thorough report. The witness testified she began treating the Student in February of 2017, and knew Dr. Nichols started his evaluation of the Student in July 2017. The witness could not recall which of the parents told her, and she testified she was not clear on why the Student needed an evaluation, what the goal

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<sup>170</sup> Vol. II, P. 87, line 7, through 91, line 3

<sup>171</sup> Vol. II, P. 91, line 4, through Page 8, line 8

<sup>172</sup> Vol. II, P. 115, lines 8-19

<sup>173</sup> Vol. II, P. 93, lines 3-22

or purpose was. She testified she did not want the Student to have re-test, that you could invalidate the test by doing a re-test too soon, and the Student had a prior evaluation and she was not clear on if this would be too soon to be doing another one, and they are costly. The witness testified the Student had an evaluation with the neuro-psychologist, Dr. Mothersead, in 2016 or early— that it was before her but she did not know exactly when. The witness testified she also had concerns about the Student's anxiety being high, which could perhaps not be a good representation of what was going on with him. The witness testified, when asked if she asked the parents to withhold consent to Dr. Nichols performing an Emotional Disturbance evaluation, she said she was not going to give a "yes" or "no" answer, as she could not recall exactly what she said, but she could recall conversations with the parents about that, in which she may have expressed some concerns.<sup>174</sup>

The witness confirmed she is still treating the Student today, is aware the School District is paying for it, and said it sounded familiar that the District pays the mileage for the family to bring the Student to her. The witness did not recall when she added the diagnosis of PTSD, but when asked how in one report it was there but with nothing to explain why it suddenly pops up there, the witness testified she was referencing the anxiety for a long time, which PTSD is a form of anxiety, and it was probably around the time she decided to do the EMDR referral, that he had very little school work that 2016-2017 year, so she had not witnessed a lot of that anxiety. The witness testified that a characteristic of PTSD is to avoid, and then when the Student became more exposed to school, it shifted from the parent reporting to her to her observing more and more of these symptoms in session. The witness testified the Student was reporting a lot of that same anxiety relating to doing homework in the home setting, but she said that was because the work was not developmentally appropriate. However, the witness testified she was not able to personally conclude the work level was not developmentally appropriate, that was reported by the parents. The witness testified she was able to confirm that the Student's reaction to school work, even in the home setting, triggered anxiety, withdrawal and avoidance, which she said is how PTSD works, it can be triggered in any setting. The witness testified a big trigger is something that looks like or feels like a classroom to him will trigger his anxiety, so it shifts and changes in relation to how he has it worked out in his mind. The witness said she did not know that in a Due Process hearing and then later in federal court, the fact that the issue of bullying was tried and found to be not substantiated. The witness confirmed that the words saying the Student reported feelings of being unsafe, unheard, judged and unprotected were her words, not the Student's words, that was her interpretation of what the Student was saying. The witness testified that when she began treating the Student, the reports of minimal school and grade inappropriate schoolwork and tics being significantly exacerbated during homework time was from the Student's mother. The witness confirmed she never saw an IEP that said the Mother was printing out things on the internet. The witness testified that the Student being on campus with an adult he has good rapport with meant pairing the Student with a school employee, and she asked the stepfather and/or mother to take him to school, go in with him.<sup>175</sup>

The witness testified that in May of 2017 she wanted the Student to do Homebound, but she thought in that environment they could begin putting some things in place the Student could use at school, and that she reported the Student was struggling with focus and increase in intensity of tics

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<sup>174</sup> Vol. II, P. 93, line 23, through P. 99, line 17

<sup>175</sup> Vol. II, P. 99, line 18, through P. 113, line 3



when attempting to do the work then, even at home.<sup>176</sup> The witness testified she had been with the Student about five months when she wrote her July 24, 2017 letter, still saying she would like to see the Student ultimately transition to full-time classes on campus, with supports, and that the impressions from his previous impressions be slowly dispelled with positive teacher support, and she believed the Student's narrative impressions could be dispelled.<sup>177</sup>

Looking at tab 74 which said "No start date for school. They are looking to do four days a week, one hour a day in home," the witness testified she could not recall if "they" referenced the parents or the school district, and then where she said "He spoke of his fears regarding the principal. His tics have increased," the witness testified the first sentence was historical and the second visual, what she was seeing.<sup>178</sup> As to the witness' interactions with Jennifer Robinson or anyone else in the

district in 2017, the witness testified there was another person she tried to contact, a special ed coordinator, and then Jennifer Robinson, and she thought that was all for 2017.<sup>179</sup>

The witness said in November of 2017 it was still her recommendation for Homebound, but start to transition to school. The witness testified the evaluation with Dr. Nichols had been done over the summer, so she assumed that school year things were going to be moving in reference to the recommendations and things in that evaluation. The witness testified the easy list were from the Student and herself, and at that point she said to increase school work to 30 minutes a day, and the parents told her the Student had no homework. The witness testified the Student was receptive to going and helping Ms. Jennifer, but he gets fidgety and twitchy when you start talk about going to the school building, that he was distressed, that Ms. Robinson wanted him to and he would be willing to go if the witness asked him to, but he had reservations. The witness testified the Student had reservations, which has to do with the cognitive flexibility, and there is reservation because of his anxiety, so he can in the same breath say it is his school, he is going back, and those are his friends, while you sense his reservation in actually doing so. The witness said the hard tasks she listed, computer use, computer-based homework, doing science on a computer, those were all things the Student was doing, but that would have been tough for the Student in any environment.<sup>180</sup>

The witness testified that in her Content, November 13, it said she met with the Father for planning on getting the Student back to school, that she consulted with Jennifer Savage about the transition. The witness testified she had recommended slowing down the pace to re-integrate the Student into a traditional school environment, which was based on behaviors from the Student following visits, that she was referencing breaking down the steps to delineate what needed to come first, decrease anxiety to achieve calm, then move to the next thing and on. She testified that she was

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<sup>176</sup> Vol. II, P. 113, line 6, through P. 114, line 12

<sup>177</sup> Vol. II, P. 114, line 13, through P. 115, line 7

<sup>178</sup> Vol. II, P. 116, line 18, through P. 117, line 24

<sup>179</sup> Vol. II, P. 117, line 25, through P. 118, line 13

<sup>180</sup> Vol. II, P. 118, line 14, through P. 122, line 14

referencing the idea of setting smaller goals and working toward those, so there would be some things to achieve during Homebound in order for that to occur to move the Student to the classroom. When asked how things could go any slower, when she had been talking transition back in February and now it was November, and there is still a recommendation of Homebound, the witness testified the more she interacted with the Student the more behaviors she saw emerge, and problems she could foresee coming out of those if the Student were back at school. The witness testified that by November the Student was in EMDR treatment (which is short term typically, and fosters inner calm called resourcing, which is resiliency based, strength-based) for the trauma piece, so she kept thinking she was expecting certain skills developed for him in the Homebound environment so that when he went to school, the Student was ready to use them, being able to self-monitor, etc. The witness testified she thought the Student became aware that school was ending, and then that it was starting and she was able to see his reaction at not being a student at school.<sup>181</sup>

Referencing the letter the witness wrote December 22, 2017, the witness testified she had recommended extension of Homebound for another six months, but that was a typo, that she meant through June of 2018, and she again made the same recommendation about begin to re-enter the

Student into the school environment, so essentially she remained consistent from February through December, which is Homebound, but start to re-integrate.<sup>182</sup>

The witness testified in Content when she said she was concerned about the Student not progressing towards being in school, that she was referencing what the father had told her in terms of the Homebound teacher's meetings, and he had the text messages from his cell phone, and the "too advanced work" came from the father. The witness testified when she said the Student had variable attendance from his Homebound teacher, that dad had text messages, she did not think it strange he was showing her text messages, but she did not click through them, that she could recall some instances, but did not document them. The witness testified she did not know about instances where the parents canceled the Homebound instructor going to the home. The witness testified she had a report from the stepfather the Student had stomach upset at the school and refused to eat, but she did not have specific where he was in the school building, just that he was at the school, and the witness confirmed what she listed in Content was essentially from the stepfather. The witness testified she was drawing a conclusion based on the narrative from the stepfather.<sup>183</sup>

The witness testified where her Content on April 30, 2018, said they had addressed the Student's desire to return to school and begin forming a clear plan for that, but that her recommendation at that time was still Homebound she thought. The witness also testified as to her narrative where she said she did not have the family take the letter yet for Homebound services as they needed to find more out about what the Student could do for educational services onsite at school

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<sup>181</sup> Vol. II, P. 122, line 17, through P. 127, line 2

<sup>182</sup> Vol. II, P. 127, lines 3-19

<sup>183</sup> Vol. II, P. 127, line 20, through P. 129, line 12, and P. 131, line 17, through 133, line 16

before she agreed to another few months of Homebound.<sup>184</sup> Referencing a letter the witness wrote several days later, on May 3<sup>rd</sup>, the witness testified that she had talked to Ms. Robinson and has a comfort level with trying to transition the Student back to school, and that the witness' expectation at that point was they were going to try some partial days and get the Student back in the school building, that there was not much time to work with and she did not have summer school, but she was not sure of particulars as to any lack of summer school. The witness testified her recommendations were para support and a shortened day.<sup>185</sup>

As to her report on May 23, 2018, after the Student had attended partial days, the witness testified most of the linear narrative, the characterization of what happened, came from the stepfather, as the Student only gave her fragments, bits and pieces. The witness testified the stepfather was able to fill in the blanks because he was at the school. When asked about her expectation, that the stepfather would be in the building the entire time the Student was there, or on the school grounds the entire time the Student was in class, the witness testified she did not ask that of the stepfather directly in that way, that they had talked about the Student having a way to access the stepfather, to call or contact or communicate with him. When asked about the Student rating his experience of four partial days in school after being out forever a "C," the witness testified initiating was what she was looking for, and she would not expect an "A." When asked if the parents' management of what would be a big part of giving the Student the confidence to go to school, the witness testified yes, absolutely. Referencing her earlier testimony as to the Student not being able to read visual cues, faces, etc., the witness testified, as to the question that if the Student was in the classroom and the entire time he is looking through the window seeing his stepfather pace back and forth, then walk to the window and look in, tearfully, how would she expect that to impact the Student, she testified that it would create confusion and he would struggle to interpret or understand it, and his typical MO was to interpret it in the most negative sense. The witness testified she knew the school provided a para support she recommended in May of 2018 for the Student, then said she did not recall that. When asked if the school failed to do in May 2018 to make re-integration successful, the witness testified just those things she said earlier, her concern was just around the physical environment and not really knowing how to make that work since she was not there on campus and could not physically see that. The witness testified she did not know whether or not the parents have ever been willing to take the Student back to the Omaha School District since May of 2018. As to Infinity Academy, the witness testified she knew there were no academic offerings when the Student was there for camp, nor are there any academics on Fridays.<sup>186</sup>

Looking at tab122 and the witness' Content therein, the witness testified that after noting the Student had been making significant improvement in OT and speech, she had stated that he had only 50 hours of face-to-face education time, and testified that she had obtained that number from the stepfather. The witness testified she was never told Jennifer Robinson had provided 268 hours of Homebound instruction. The witness testified she was not aware there was another 90 hours of Compensatory Education. The witness testified that was three months later, at the beginning of the next school year, and the parents were telling her they were hesitant to take the Student back to the

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<sup>184</sup> Vol. II, P. 133, line 17, through P. 134, line 19

<sup>185</sup> Vol. II, P. 134, line 20, through P. 137, line 11

<sup>186</sup> Vol. II, P. 137, line 14, through P. 143, line 12

classroom, given his response. The witness testified she had said she would assume he would be as well, though he had not been asked. She testified she did not ask the Student because she had been talking to the stepfather, it was at the end of the session, and she did not have a chance to loop back around and talk to the Student about it. The witness was asked if she had confidence in Jennifer Savage, the witness testified Ms. Savage was an appropriate fit. Looking at Ms. Savage's report and her assessment that the Student demonstrated progress toward desensitizing emotionally-charged events from the past associated with school, the witness testified that she believed there were improvements during the EMDR therapy, that she saw progress regarding that, especially when the Student was doing it.<sup>187</sup>

The witness testified that as of January 2018 she was still recommending Homebound, status quo. The witness testified she also noted the Student had flashbacks into his past educational experiences where an academic setting, textbooks, technology, laptops, and science trigger his anxiety, and she agreed that at some point he is going to have to deal with those, whatever the setting, whether at home or in the school setting. When asked about her recommendation of ABA therapy and whether she was a big proponent of that, the witness testified she thought it is appropriate and has its time and places, and what she thought she was specifically saying to Missy in their conversation was that they were talking about the witness did not feel equipped to give full guidance and recommendations about how to write those IEP's or set those goals or create that map for the Student to return to school. The witness testified she can offer commentary and suggestions, but felt someone, a behaviorist typically working in school settings would be an appropriate person to consult with to ensure the plans and strategies in place at school are going to be an appropriate fit to bridge the Student across. Explaining this, the witness said she is not an education person, she can tell you about the diagnoses and things she would expect to see and happen around those diagnoses, but in terms of what it actually looks like on an educator's end in terms of how they actually deliver that service or how it would be configured to work, those are things she can't speak to.<sup>188</sup>

Gong back to where the witness had said it was not in the Student's best interest to continue to remain on Homebound indefinitely and she only recommended he receive services over the summer as he was likely quite behind, the witness testified the part about the Student being behind was based on parent report. The witness testified she understood being quite behind is not a basis for extended year service, but testified she could not recall that comp ed was furnished for the Student in the summer of 2018. When asked to explain her progress note as to having continued discussion with school about an alternative educational environment, and she had in parentheses "Truth Academy," that would be a blended classroom and home school, but no further progress, the witness testified there was a bit of a back story. The witness testified that at that time the stepfather made reference to Ms. Robinson and him having talked about how the school might be willing to do some kind of alternative school learning environment, and the witness told the parents from intake that the Student needs more meat, educational meat, more time spent on academics, and so they had located a family advocate through Arc, that she was talking about earlier, who specialized around family services, children's services, and the witness had asked around for resources, looking for, University of Arkansas had an advocate, they had found this lady in Missouri. So, the witness testified, resources are limited in this area, so the

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<sup>187</sup> Vol. II, P. 143, line 13, through P. 147, line 8

<sup>188</sup> Vol. II, P. 147, line 20, through Page 149, line 18

witness ended up pulling more from Springfield because that is where the witness was, and Truth Academy was a school she was familiar with, this woman. The witness said she could not recall the lady's name, but she was a family advocate there and she was familiar with the school, and the parents had spoke to that school at one point during their calling around and just asking questions. The witness testified that was her making a notation of that, as she had other students go to that school, so it was a place she knew something about, and they were thinking in terms of what resources do they offer, how does that look and how does that play out. The witness testified she thought it was religious based, thought it was located in Springfield, but she not know if it was accredited.<sup>189</sup>

**Witness: Charles Nichols**

The witness Charles Nichols testified he is a clinical psychologist, licensed in Arkansas, practicing in Harrison. The witness testified he holds an undergrad degree in pre-seminary from Central Bible College in Springfield, Missouri, a Master's degree in counseling from the Assemblies of God Theological Seminary in Springfield, Missouri, and a doctorate in psychology from Forest Institute of Professional Psychology in Springfield, Missouri.<sup>190</sup>

The witness testified he had evaluated the Student, that he supervised an evaluation conducted initially in 2011, he conducted directly an evaluation in 2012, and in 2017 he evaluated the Student again, which was the witness' last contact with the Student. The witness testified he had never provided treatment to the Student. When asked if it was ever contemplated or recommended that he provide treatment for the Student, the witness said yes, and that after discussion of the test results with the parent, the witness discussed the option and his recommendation of treatment, but at the time he believed their concern was payment and his office was never contacted again, so the witness discharged the Student. The witness testified that would have been around the time of his 2017 evaluation, he believed.<sup>191</sup>

Looking at his report from July 2017, which shows testing dates July 11 to July 20, the witness testified he did the evaluation of the Student because of the Omaha School District referral to him. When asked about collateral sources considered in conducting that evaluation, the witness testified that in any Psycho educational Evaluation – that he conducts school evaluations in five or six different counties in this area, this part of Arkansas – that there kind of a typical battery of collateral information, a lot which is mandated by the Department of Education, but those include things like prior reports, prior evaluations, which includes some notes from current treating professionals at least at the time, an IEP and previous evaluations they conducted, meaning both himself and a practicum student he supervised in '11. The witness testified they go through forms like the curriculum-based assessment, the classroom checklist based on the observations of the teachers that were working with the Student, functional skills assessment, autism observation forms, two autism-related observations conducted by two different teachers, classroom observations, in his case would be in the home. The witness testified then some subject area testing conducted by school staff related to reading, math, and written

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<sup>189</sup> Vol. II, P. 149, page 19, through Page 154, line 23

<sup>190</sup> Vol. II, P. 156, line 5, through Page 157, line 24

<sup>191</sup> Vol. II, P. 156, line 25, through P. 158, line 9

expression, and then the testing the witness conducted. The witness testified many of those evaluations were done recently, around the May of 2017 time period. The witness testified as part of his evaluation he interviewed the Student, both in a family context and then when the witness worked one-on-one with the Student. The witness estimated the time he spent with the Student, individually and combined, to be four hours over two different days. The witness said he was not given a consent to evaluate the Student for an Emotional Disturbance, which is a category under the Department of Education, basically encompassing things like emotional disorders, depression, anxiety, even trauma-related disorders. The witness testified it was made clear to him by the staff at school that was an area the witness was not allowed to go into as the parents had not consented. The witness was not asked to go through each thing in his 19-page report, but was asked to explain what his evaluation of the Student consisted of. The witness testified that normal components in Psycho educational Evaluations would be a comprehensive, one-to-one measure of standardized intelligence, that he chose for his assessment on that date the Stanford-Binet-5 for IQ because the Student had previously been evaluated not too long before, by a psychologist in Springfield, who had given the Student the WISC, and the witness testified he gave the Student the Woodcock-Johnson, which is a standardized comprehensive assessment of academic achievement, the Fourth Edition was the current edition. The witness testified he also gave the Student the Oral Language Woodcock-Johnson-IV, which they use as a screening measure to try to identify kids who may be at risk danger for language deficits or developmental deficits in language. The witness testified he also administered the Bender-Gestalt, a visual motor assessment, brief assessment. The TAPS-3 subtest to measure auditory word discrimination and oral processing. He also administered the BASC-3, the Behavior Assessment System for Children, Third Edition. The witness said one is normed on teacher responses, another is normed on parent responses, and the final is normed on the student or child or adolescent responses. So, it gives a way to globally assess the child from three perspectives, including the child's perspective. The witness said since it is normed-referenced, it compares that child's symptoms against other children in the same age range. The witness said he also administered the BRIEF-2, the measure designed to assess executive functioning, Second Edition, which was completed by the Student's stepfather. The witness testified he administered the Autism Spectrum Rating Scale, a normed-referenced measure of autism spectrum symptoms to both the parent and the teacher, so the witness testified he had perspectives on the same instrument from two different people that are seeing the Student. Finally, the witness testified he gave the Vineland-II, which at that time was the current edition, which is a measure of adaptive behavior, how well a child is functioning independently, day-to-day, compared to their age peers. The witness said that was also standardized and norm-referenced, and was completed by Ms. Hicks, a teacher who was working with the Student, and the Student's mother. The witness testified he administered all these instruments, as well as an interview with them.<sup>192</sup>

The witness testified his diagnostic conclusions were the Student showed a severe gap between his intelligence scores, which are used to predict learning ability, capacity, versus his academic achievement scores which measure his current academic skills, his current level of functioning in math, reading and writing, and that because of the unusually large discrepancy in all three areas, the Student's test results were consistent with Spectrum Learning Disabilities in reading, math and written expression. The witness testified he considered, another finding was due to the Oral Language Woodcock-Johnson-

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<sup>192</sup> Vol. II, P. 158, line 10, through P. 164, line 15

IV, the Student's scores were very low. The witness testified he recommended reassessment of the Student's speech and language abilities by a specialist in that field, considered the question of intellectual disability, formerly known as mental retardation. The witness testified the Student's current scores at the time in 2017 were much higher than a child with mental retardation or intellectual disability. The witness testified the parents' Vineland indicated the Student's adaptive functioning was kind of in the range typically seen from a child with ID, but his IQ scores were significantly higher, so that was ruled out.<sup>193</sup>

As to Autism Spectrum Disorder, the witness testified he had previously diagnosed the Student in 2012 with Pervasive Developmental Disorder NOS, a diagnosis that indicated a child who has chronic developmental difficulties in the areas of communication and socialization, but they may not quite meet the criteria at that time for Autism Disorder or Asperger's Disorder, and the DSM-V which the witness evaluated the Student, the current edition at this time, so it had been updated. The witness testified he diagnosed the Student with Autism Spectrum Disorder based on the witness' observations of the Student, which were consistent with autism, as well as the test data, the history over three different evaluations that they had conducted. The witness said he also confirmed again the diagnosis of ADHD, Combined Type, meaning the Student was showing both kind of attention, concentration, disorganization, and hyperactivity and impulsivity, and that, again, was a continuation of a prior diagnosis. The witness testified he also diagnosed the Student with Provisional Tic Disorder, based off the symptoms the witness observed and were reported by the parents. The witness testified that at the time the Student was showing multiple motor tics and vocal tics, but based on what the parents told the witness, the time-line was less than a year at the time the witness evaluated him, so instead of

diagnosing the Student with Tourette's, which requires chronicity of at least a year, he was under that year, so the appropriate diagnosis was Provisional Tic Disorder.<sup>194</sup>

The witness testified he also referenced ongoing problems with anxiety per records and report of the parents, the possibility of a trauma-related disorder per the parents, but also per the parents the witness did not have enough information or permission to evaluate the Student for Emotional Disturbance. The witness testified he recommended occupational therapy evaluation because of the Student's fine motor skills on the Bender, which were way below aged norms.<sup>195</sup>

The witness testified that when he evaluated the Student in July of 2017, the witness believed the intention for the Student to return to a school setting was stated as kind of like the best case scenario, so the witness' recommendations were made with a school setting in mind predominantly, though a lot of them can cross over to a Homebound setting. The witness testified that when he recommend things like this, such as he recommended for the Student, the witness understood that there are people in that environment who have one-on-one daily contact with the Student, whereas the witness doing an evaluation does not have as much day-to-day experience, so the witness provides what

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<sup>193</sup> Vol. II, P. 164, line 16, through P. 165, line 16

<sup>194</sup> Vol. II, P. 165, line 17, through P. 166, line 21

<sup>195</sup> Vol. II, P. 166, line 22, through P. 167, line 6

are evidence-based kinds of accommodations that have been found to be successful. The witness testified that then it is his preference for the committee to look at his report to select the accommodations they believe would be most effective for that particular student. When asked if it was accurate to say the recommendations were made with the classroom setting in mind, but some of them could be tailored to a Homebound setting, the witness testified yes, a lot of them could be.<sup>196</sup>

As to the witness' recommendations for Autism Spectrum Disorder, and the witness saying those recommendations may help reduce the impact of Autism Spectrum Disorder in the classroom, the witness testified these were predominantly classroom-focused, but a lot could be applied in the Homebound setting also. When asked about it talking about a repetitive or routine class schedule, and was that something more classroom-focused, the witness testified yes, that predictability is important for kids who have Autism Spectrum Disorder.<sup>197</sup>

The witness testified he did participate in an IEP meeting for the Student July 26, 2017. When asked about his participation in that meeting, the witness testified he was primarily asked to review the findings of his evaluation, similar to what he just did in this hearing, except may be a little bit more explaining the diagnostic findings and recommendations. The witness said he knew at least one of the parents were present, but did not know about the other. The witness testified he did not know if his recommendations were implemented in the Student's IEP, as he did not follow up with the case and that was the end of his involvement.<sup>198</sup>

The witness testified he had a chance to review Dr. Van Kirk's report, and in the witness' professional opinion there were procedural flaws in her methodology. The witness testified that one thing that stood out in the evaluation was that she did not state she ever interviewed the Student directly, which she confirmed in her testimony in this case that she spent about an hour total with the Student, conducting the IQ assessment. The witness testified in his opinion a standard practice for a person 14 years old would be an in-person interview with them, to gauge if they were a good source or had good insight by asking them about their symptoms. When asked if he agreed with Dr. Van Kirk's assessment she did not interview the Student because an interview with him would not have been reliable because of his autism, the witness testified that if that was Dr. Van Kirk's suspicion, the interview with the Student would have confirmed or disconfirmed her hypothesis, that she did not test it, and either way, it should have been reported in the report. The witness testified, as to Dr. Van Kirk not reviewing any self-reports from the Student as she said he would not have been able to complete any self-reports because of his cognitive ability, that was not standard practice, that in this case there is variability in the test data, which she cited, and the witness cited in his reports, as well, that the Student's IQ scores are up and down, they cluster in sort of two groups. The witness also said a lot of the self-report measures, like the BASC-3 report which he administered, and Dr. Van Kirk administered a version of to two different teachers, they have validity scales imbedded, like the consistency index, designed specifically to flag students who either haphazardly go through and just mark, or those who don't have adequate reading ability or comprehension. The witness said no validity scale is 100% accurate, but they are very effective. The witness said another way to assess that is

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<sup>196</sup> Vol. II, P. 167, line 7, through P. 168, line 8

<sup>197</sup> Vol. II, P. 168, lines 9-21

<sup>198</sup> Vol. II, P. 168, line 25, through P. 170, line 20



looking at either the convergence or the divergence with your other data points, and so if he is presenting a picture that is very different than all the other data from all the other sources, then that would be a reason to doubt its accuracy. When asked about Dr. Van Kirk having Dr. Mollitt perform an evaluation in the morning and Dr. Van Kirk one in the afternoon being standard practice, the witness testified he could not say there is a standard practice in this situation, but said given the Student's autism diagnosis, he has difficulty with transition, difficulty maintaining effort, that he had a lot of difficulties in that first session which are detailed to the extent the Student's sibling went into the room while he was being tested, so being presented with another professional would be an adjustment, which takes time, and it can potentially affect test results. The witness testified that rapport, difficulties with transition, emotional distress, all can affect test performance. When asked if he thought that report adequately accounts for the change in evaluators, the witness testified he saw no where it even brings it up. When asked if he thought there was adequate time for those two tests, the witness said the KTEA is around 60 minutes, plus or minus, and the CTOPP is around 40 minutes. The witness said he does not administer either of those two tests, but they are things he looked up. He said he administered two tests that are very similar to the KTEA, and its about the same amount of time. The witness agreed that if there is an average of 100 minutes, that allows for no time to develop rapport with the student, just right into testing. The witness testified it would have been pretty difficult for the Student to sustain effort over 100 minutes, especially with a kid with autism and has the emotional distress he had going into this that was documented and provided to her, the witness assumed ahead of time. When asked about concern with the IQ test being given in the afternoon, after the achievement test, the witness testified yes, that when he evaluates children and gives an achievement and IQ, the bedrock of the assessment is the IQ, that everything hinges on IQ, because IQ is stable, it measures a stable ability, a construct, that aside from a few exceptions, things like neurological injury or significant Emotional Disturbance stays relatively constant after the school-age period and beyond. The witness testified it is known as lot of things can affect IQ scores, and one of the main things is test effort, and concentration, and attention, that multiple studies show between 47 to 50 percent of variance in neuropsychological testing is explained by test effort, so for that reason the witness always start with the IQ, then goes to achievement second. If he gets a lower achievement score because of flagging effort, the witness testified he makes that notation in his results, saying due to signs of diminishing effort, the scores would likely be suppressed. The witness testified that when looking for things like Specific Learning Disability, the way districts and he work with determine that is by ability/achievement discrepancy, typically children with higher IQ scores but severely lower achievement scores. The witness testified that if IQ is given second and it is suppressed, it could suppress the finding of a specific learning disability in a child who actually has one. The witness testified that if you give it in the order that Dr. Van Kirk gave it, you may have a suppressed IQ score, and if suppression is not detected or no performance validity test is given, which was not given, then you could mis-diagnose a child with n intellectual disability when they do not have one, and those are far-reaching kinds of mistakes. The witness testified that an hour long lunch between the tests was fine. The witness testified that having another person in the room during testing is a departure from standardization, that testing should be one-on-one interaction, and deviation means an ethical obligation to bring that up in a report, which includes discussion of what effect potentially that might have on the scores, and the witness said he did

not see anything where the report addresses the potential effect on the scores in this case.<sup>199</sup>

As to the Student's IQ score, the witness testified that it was lower than some of the previous ones, and there were numerous scoring errors in Dr. Van Kirk's IQ scores. Based on the ten subtest scores Dr. Van Kirk reported, the witness testified four of the six index scores are incorrect, and those are more important scores because they measure broader areas of ability. The witness testified that using Dr. Van Kirk's subtest scores, the Student's Full Scale IQ was actually 69, not 64, that his Verbal Comprehension Index was correctly calculated at 70, his Fluid Reasoning was actually 85 instead of 70, the Working Memory Index was actually 76, not 72, the Perceptual Reasoning Index, which actually does not even exist in this test, as an 86, should be the Visual Spatial Index, which is actually 69, a 17-point difference which is more than standard deviation and a significant difference, and she reported a Perceptual Reasoning Index, then the Processing Speed Index is a 53. When asked how the witness got to his numbers, the witness testified there are two ways to score the WISC, one is hand-scoring and one is using a service called Q-Global through Pearson, the company that produces the test. The witness said he hand-scored the subtest scores she gave him, he did that on two different occasions, so you look in the back of the manual, add up the sub-scale scores, and you get a total scaled score, then you look at each index page and you transform that total scaled score to the index score. The witness testified that the Full Scale IQ score of 64 lines up with that percentile that is next to it of one, basically, that if the Student's Full Scale were actually 64, which it was not, the first percentile would be the correct percentile, but it is actually the second percentile at 69. The witness testified that an IQ score of 64 means using a Full Scale IQ, that across all five factors of intelligence, globally, that child scored lower than about 99 out of 100 kids. The witness said that IQ predicts a lot of things pretty effectively, one of which is academic achievement, achievement in life in general, not as soon as that. However, the witness testified that a child with an IQ of 64 would have really substantial adaptive functioning deficits, usually across multiple areas, like self-care, communication, social skills as a general rule of thumb, and that the Student here has been described often as a child with high functioning autism, so an IQ score of 64 would not be consistent with that. The witness testified that the research he did earlier shows that test effort is currently a hot area of research. The witness testified that the Student's IQ scores before the one by Dr. Van Kirk were higher, and that one of the things that you have to do as an evaluator is build rapport with the student, you cannot just jump into the test, and if that is not done, the test results are going to be invalid. The witness testified that when he evaluated the Student in 2017, the Student took three different breaks, talking to his dad each time, and his dad was helpful in encouraging him, and the Student came back each time re-invigorated and motivated, so he obtained a score 10-15 points higher, which is the standard deviation, and which is significant when talking about IQ. The witness testified that he firmly believed the higher score is the more accurate score, there were scores in the 80's two different times, so 2017 was not the only time. The witness testified that if you have two divergent sets of IQ scores, the rule of thumb is you accept the higher range of scores, while an IQ of 64 or 69 is not going to be able to score significantly higher than they are capable of. The witness testified the Vineland test that was verbally administered to both parents violates standardization rules as well, as the standardized practice is to interview one parent, that the parents cannot pool their resources. When asked did Dr. Van Kirk's report adequately explain the effect of having another parent in the room on the results, the witness testified he found no

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<sup>199</sup> Vol. II, P. 170, line 21, through P. 181, line 24

treatment of that at all. The witness testified that in his opinion it would have been helpful, or even important, to have an opinion from a school administrator, and that instrument, even though it might not be able to be scored, and in that occasion you would say in your report that because of the homebound setting the Vineland could not be scored, and a look or analysis of the individual items and then go into what relevant points you can draw from that. When the Student scored below the first percentile, that's the Adaptive Behavior Composite of 47, the witness said that is not consistent with the Student's Vineland scores two years ago. The witness testified there was a big decline, almost two standard deviations in Communication, which you would not normally see, so it raises the question of why the scores are so different, and there was no real discussion of that. The witness testified lacking from Dr. Van Kirk's report was the main diagnostic consideration as to intellectual disability. The witness testified there might be reasons you would not diagnose intellectual disability, but if you believed those scores by Dr. Van Kirk are valid, you would definitely have to make a case for why it was not diagnosed, and there is no discussion in her report on that. The witness testified the scores Dr. Van Kirk found in her report were not consistent with the child he evaluated in 2017. The witness testified he believed the Adaptive Behavior scores obtained in 2017 were much more consistent with the child he observed, and also much more consistent with his IQ scores this witness obtained.<sup>200</sup>

The witness testified, when asked if it was clear that Dr. Van Kirk's report was based on previous diagnoses as opposed to her independent evaluation, that he thought she touches on and described symptoms of all four disorders she has diagnosed, but he did not believe her report establishes a real clear description of all the necessary symptoms, especially of PTSD, although he was not offering an opinion as to whether the Student has PTSD, he was just saying the foundation for that diagnosis is a little incomplete in Dr. Van Kirk's report. When asked about Dr. Van Kirk's statement that rapport was adequately established with the Student and his parents, and evaluation results are considered valid, the witness testified that, given the observations that come before that statement, where she said the Student has struggled with some of the testing and exhibited emotional distress, he believes that is definitely internally inconsistent when you describe the degree of distress the Student suffered during this testing session, both of them, especially the first one, based on what is written, to the point you had to deviate from standardization and allow a family member in the room to provide comfort, that is a substantial deviation, and should be in extreme cases. The witness testified that in that kind of situation, scores should be interpreted cautiously in context with all the resistance and emotional distress exhibited. The witness further point out that on page five of Dr. Van Kirk's report she stated the Student was unconcerned about being timed, and both the subtests she referenced, Coding and Symbol-Search, the Student scores and one and a three, and one is the lowest score possible, there is no zero, and it is one of the seven subtests composing the Full Scale IQ. The witness said a person not motivated, doesn't really care about timing, is going to score lower, and that in itself, just on that one subtest, would tell us we at least have a reasonable suspicion the coding score is not valid, and it is a seventh of the Student's Full Scale IQ.<sup>201</sup>

When asked what the test for Emotional Disturbance consists of, what would have been done, the witness testified he would direct his questions in areas that he could not direct them in, he would ask the Student about symptoms that he could not ask him about otherwise. The witness testified he

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<sup>200</sup> Vol. II, P. 181, line 25, through P. 196, line 16

<sup>201</sup> Vol. II, P. 196, line 17, through P. 199, line 12

did not talk with Dr. Colvin, the Student's therapist. The witness testified that his Full Scale IQ was about 15 points higher than that by Dr. Van Kirk, and that there was a huge gap between the IQ level he determined, which predicts learning capacity, and the Student's academic skills. The witness agreed the Omaha School District was in charge of developing the Student's academic skills since first grade.<sup>202</sup>

**Witness: Gwen Benton**

The witness Gwen Benton testified she is the Special Ed Supervisor for K-5 at Mountain Home School District. The witness testified that before that she worked at the OUR Co-op, and in that position provided Special Ed services for the Omaha School District. The witness testified she worked 7 years for the Omaha School District, from 2011 to 2018, where she managed the budget for the Special Ed Department, oversaw the Due Process, handled monitoring, training staff and handling Due Process hearings.<sup>203</sup>

The witness testified she was familiar with the Student in her time working for the Omaha School District, and agreed that during the Spring of 2017 homework was being sent home for the Student by Ms. Robinson and Ms. Hicks, but she did not know how often. The witness testified that this was something that would have been done for any child who was home sick, and the work being sent home was the same work the Student would have been doing if he was at school. The witness did not know if the homework was being returned, nor did she know of any particular complaints from the parents about the homework. When asked what the Student's placement in Spring of 2017, the witness testified the committee had met before the last Due Process and moved the Student into Special Ed classes mostly full-time, so that was his last placement, and until after the Due Process and they met that would have been his placement. The witness agreed that during the time the school was sending homework home for the Student, the school stood ready to provide Special Ed classes for the Student, so if the parents had brought the Student to school, the school would have provided services in the Student's IEP.<sup>204</sup> Focusing on March 2017 forward, when asked if there were any attempts to offer

neutral meeting locations for the Student to receive classes while she was there, the witness testified she did not think they had any Special Ed meetings, but did she not remember.<sup>205</sup>

Looking at the Notice of Action dated May 9, 2017, the witness said they held that conference as part of the Hearing Officer's ruling, who requested they conduct an Existing Data Review and do new evaluations, so the team conducted the conference, they determined they would do a full battery of evaluations, as well as an OT and speech evaluation and dyslexia screener. The witness testified the

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<sup>202</sup> Vol. II, P. 1999, line 18, through P. 201, line 22

<sup>203</sup> Vol. II, P. 203, line 19, through P. 204, line 20

<sup>204</sup> Vol. II, P. 204, line 21, through P. 206, line 24

<sup>205</sup> Vol. II, P. 207, lines 9-18

parents had input as to evaluations that were done, and they discussed in the options what they rejected, and discussed what disability categories they would be looking at, it would be certain requirements that they would need to gather, but at the parents' request they did not gather information related to Emotional Disturbance, so basically they had everything except observations, which would have been the only other component. Looking at the Other Factors Relevant to the Action, the witness testified that compensatory education was discussed during this meeting, that Dr. Sherwood and the witness felt the Student had been out of school for a great deal of time and that in his best interest, given that summer was coming, to offer some Compensatory Ed. The witness testified that was not part of the earlier Hearing Office ruling, it was just something Dr. Sherwood and the witness felt was in the Student's best interest, and that they offered some Compensatory Ed as well as occupational therapy in the form of Compensatory Ed also, and the witness said she did not document it, but thought it was their understanding it would be provided in the home. The witness testified it was to begin that summer, May 30 of 2017. The witness testified she did not remember how she calculate the 90 hours, but said she suspected it would have been based on number of weeks out of school and then 3-4 hours, at least, a week to try to close that gap, 90 hours of Compensatory Ed, 20 hours of OT Compensatory Ed.<sup>206</sup>

When asked if anything was discussed about cognitive behavior therapy, the witness testified yes, that Dr. Sherwood and she both felt the parents had mentioned a desire for that to continue, that they were taking the Student for that service, and Dr. Sherwood and the witness felt if that was beneficial for the Student, support would be provided for that, and compensation was provided for an hour per week for that therapy, as well as travel reimbursement for the family. The witness reiterated that was not part of the earlier Hearing Officer's ruling, but that it was a reasonable request and they were willing to provide it. When asked if the District provided other things not required by the earlier Hearing Officer, the witness testified no certain number of hours were required for Homebound Instruction, but they offered more than the minimum required of Homebound instruction. The witness also testified they paid for the Student's internet, that might be documented on the IEP, and she believed a laptop was provided for the Student. As to the summer Comp Ed beginning May 30, 2017, the witness testified Jennifer Robinson provided the Educational Comp Ed, and the witness thought the team determined OT would pick up the Comp Ed once school began because they wanted to stay with Shining Stars that was providing the OT since the Student had already developed a relationship with them.<sup>207</sup>

The witness testified she did not know when Ms. Robinson went to the home in the summer of 2017, but that Ms. Robinson did time sheets. The witness testified she knew Ms. Robinson worked with the parents to find a time that would work for everyone involved, as there were conversations had at multiple conferences along the way, where they discussed being flexible in schedules to what would be best for the Student. The witness testified the parents absolutely loved Ms. Robinson, and were willing to work with her schedule to keep her as instructor. The witness testified there were times throughout, when the parents asked Ms. Robinson not to come because the Student was not feeling up for instruction that day, even though the witness could not give specific dates. The witness testified even when they tried to transition back, there were times the parents said that today would not be a

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<sup>206</sup> Vol. II, P. 207, line 19, through P. 211, line 3

<sup>207</sup> Vol. II, P. 211, line 4, through P. 212, line 21

good day, they could not make it work. The witness testified she asked the parents to stay in communication with them, and she felt it was okay they communicated directly with Ms. Robinson, as the witness thought having a go-between can be quite confusing. The witness testified she agreed that Ms. Robinson and the family worked out the schedule together, the same as speech and OT, and no concerns were raised to this witness.<sup>208</sup>

The witness testified Ms. Robinson kept track of the Comp Ed time provided to the Student, and the witness thought they documented later how many hours they still had left, and that Comp Ed would continue until it was all exhausted, that it was tracked through Ms. Robinson's time sheets. The witness testified she had no reason to think Ms. Robinson's time sheets were not accurate.<sup>209</sup>

Looking at the Notice of Action document signed by the parents May 22, 2018, the witness testified that was the annual review conference. Where the document said that carryover comp hour amounts were provided to the parents, those are 29 OT hours and 59 SPED hours, the witness testified that meant there were still 29 OT hours to provide and 59 Special Ed Comp Ed hours, so for that summer it would be fair to say that if 90 hours were offered, 42 had been provided to that point. The witness testified the parents were at that annual review meeting, so they would have been provided those hours and did not dispute them. The witness testified the parents were kept informed of the Comp Ed hours at this meeting and they discussed progress at the others, they did not reflect exactly how many hours had been done. The witness testified she assumed the 90 hours of Comp Ed had been provided to date, and to her knowledge the 28 hours of OT Comp Ed she assumed had been provided.<sup>210</sup>

The witness testified the District paid for the evaluations of the Student, that they did a comprehensive evaluation, autism observations, various adaptive rating scales for autism, a BASC, and she thought they also did a Bender and a TAPS for auditory processing and various things, as well as an OT evaluation and speech evaluation. The witness testified the District also sought a Psycho educational Evaluation with Dr. Nichols, that all those components were included in with the IQ and achievement testing. Looking at Dr. Nichols' July 2017 report, the witness testified at the time Dr. Nichols conducted the evaluation and made his recommendations, the witness she thought it has always been the intention for the Student to return to school. The witness testified she understood that most of Dr. Nichols' recommendations would have been made for a classroom setting, not a Homebound setting, as certain of the recommendations could not be implemented in a Homebound setting if made for the classroom, like accommodations are designed for the General Ed setting. The witness testified that accommodations are to help a child access the General Ed curriculum, like preferential seating would not make sense in a Homebound setting where you are one-on-one with the child. When asked if Homebound instruction in and of itself is a modification, the witness testified it is a complete change of placement.<sup>211</sup> Looking at the Evaluation/Programming Conference Notice of Decision, the new IEP being written around that time, July of 2017, the witness testified the District sought Dr. Nichols' input

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<sup>208</sup> Vol. II, P. 212, line 22, through P. 214, line 15

<sup>209</sup> Vol. II, P. 214, line 16, through P. 215, line 18

<sup>210</sup> Vol. II, P. 215, line 19, through Page 217, line 12

<sup>211</sup> Vol. II, P. 217, line 20, through P. 219, line 20

and he did attend the meeting. The witness testified the IEP team had Dr. Nichols review the results of his evaluation, which impacted the team in determining eligibility categories, and the team considered his recommendations. The witness testified she believed some of Dr. Nichols' recommendations were included in the IEP.<sup>212</sup>

Looking at the Notice of Action dated July 25, 2017, when asked to explain what went on at that meeting, the witness testified that was the conference that went along with the Eval/Programming Conference Decision, and this is the Notice of Action, where they determined the continued eligibility category and developed the IEP for the following school year. The witness confirmed the Basis for Action notes the evaluation data was considered, parent input was considered, and teacher input was considered. The witness testified the evaluation data would be Dr. Nichols' report as well as the OT evaluation and the speech evaluation, all those things that had been done in May 2017. The witness testified the parents and their attorney were present at that meeting, and they agreed with the IEP.<sup>213</sup>

The witness confirmed that on the July 25, 2017 IEP the parents provided private evaluations and supported Homebound services, and at this point were absolutely in favor of Homebound services. The witness agreed the Summary incorporated Dr. Nichols' evaluation and his findings, and where it lists the effects of the child's disability, it accurately reflects Dr. Nichols' evaluation and his diagnoses. The witness confirmed the assistive technology devices and services provided, so at this point a Chrome book was provided by the school to the Student. Explaining the discussion of Homebound services in the document and what discussed and what was offered, the witness testified they discussed as a team the number of hours of Homebound services and what would be beneficial to the Student, and knowing the minimum was four that you could provide, she was not one to propose the minimum amount, so it was recommended they look at more. The witness testified that is five educational hours per week, as well as 30 minutes of speech and 30 minutes of OT a week, and one hour of cognitive behavioral therapy, but they noted the stepfather in that conference said he was not sure the Student could handle that many hours. The witness testified she then said they stood ready to provide these services, and the stepfather said he was not sure the Student could handle one, to which the witness testified she said they were not willing to just say they would provide one, but that she would make a note they would rely heavily on the parents and work together as a team for what the Student can tolerate, that they stood ready to provide this number of hours, but would rely on the cognitive therapist as well as the family to let them know what the Student could handle, all of which is documented where there are asterisks.<sup>214</sup>

When asked if the parents explained why they thought the Student could only handle one hour of instruction, the witness testified she did not recall the exact reasoning, but thought it was just based on the Student's struggles at that time. The witness also confirmed the document reflected that parents and staff would work on increasing exposure to the campus to assist with future transition, and supplementary aids, services and modifications would be added when Student returned to General Ed setting, and the witness testified that not only at that time, but she thought that had been discussed at

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<sup>212</sup> Vol. II, P. 219, line 21, through P. 220, line 17

<sup>213</sup> Vol. II, P. 220, line 18, through Page 221, line 23

<sup>214</sup> Vol. II, P. 221, line 24, through Page 224, line 7

every conference she attended, the end goal was getting the Student back at school full time.<sup>215</sup>

The witness testified Ms. Robinson provided the Homebound services for the 2017-2018 school year, and those would be on her time sheets. The witness testified she did know the IEP was written to provide up to five educational hours a week, and that although she did not know how many hours a week were being provided or the days of the week Ms. Robinson attended, but that would have been based on her working that out with the family and what work for both their schedules. The witness testified that there were times the parents canceled Homebound meetings with Ms. Robinson because the Student could not tolerate it, and she believed there were times the parents told Ms. Robinson to leave early because the Student just could not handle any more instruction. The witness testified that speech therapy and OT was provided in the home at this time also.<sup>216</sup>

The witness confirmed the IEP team was meeting regularly during this time frame, and looking at the Notice of Action dated October 11, 2017, the witness testified they met every nine weeks, partially per the last Hearing Officer's request they update the parents on progress, but also because for Homebound services it must be documented whether it continued to be appropriate, as a continuing need, as it is not designed to be a long-term service. The witness testified that in that meeting they decided Homebound did continue to be appropriate, that she believed it was based on Ms. Colvin, or Doctor, certified therapist, her recommendation that it be continued. The witness testified the parents agreed with the decision to continue Homebound, and it was discussed that the Student would transition back to school. Referring to the notes as to Other Factors Relevant to the Action, where it recited the committee addressed state testing at home with the Student with the needed accommodations, the witness testified she could not remember the discussion if they were able to test the Student at home, perhaps that is why that was written, maybe the rules had been changed, as the witness testified she did know for one year during this process they would not let them do the statewide assessment at home, but that it was done the following year, so she was sure they were just having that conversation they would need to add the accommodations for the Student to be tested at home and have those allowable accommodations for the statewide assessment. The witness testified she believed that would have been the ACT Aspire.<sup>217</sup>

Discussing the Other Factors Relevant to the Action, the witness testified she did not remember who decided the Student was not at a place to handle increase in speech and OT, but the witness testified she thought it was a combination of the therapist and the parent as to whether the Student was able to tolerate the increased time. The witness testified that since the Student was at that time receiving five hours of Homebound and an hour of speech and OT, based on that note, that seemed to be the limit of what he could handle.<sup>218</sup>

Looking at the Notice of Action dated March 27, 2018, the witness testified that would have been the third quarter progress update and review for continuing Homebound services, similar to the

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<sup>215</sup> Vol. II, P. 224, line 17, through P. 225, line 9

<sup>216</sup> Vol. II, P. 225, line 19, through Page 226, line 21

<sup>217</sup> Vol. II, P. 226, line 24, through Page 229, line 6

<sup>218</sup> Vol. II, P. 229, line 7, through Page 230, line 2



last one reviewed, and testified it was determined continued Homebound services were appropriate, and the witness testified the reason for that is indicated to be Ms. Colvin's request for continued Homebound services through June 2018, and the witness testified she believed the parents were in agreement. The witness testified the team also discussed transitioning but the document shows it was rejected at that time. The witness testified that in addition to talking about bringing the Student back, the IEP team decided to attempt re-integration. The witness testified the team talked about how best to approach that, and that the Student had a really good, solid relationship with Ms. Robinson and the therapist, discussing maybe it could be done after school, and the stepfather was concerned about the Student going back to school and seeing certain people, that maybe that would bother the Student. The witness testified the parents agreed with the re-integration. The witness testified that at one time the stepfather said it had to happen, and she believed at some point there was a letter from Ms. Colvin saying it was time to rip off the band-aid and take the leap. The witness agreed that at that time there was full buy-in from the IEP team, the school, the parents, and from the medical side of things.<sup>219</sup>

Looking at the Notice of Action from May 2018, although the date says March, the witness testified that meeting is where they were provided with a letter from Dr. Colvin with recommendation for integration back to school, so they met to discuss her recommendation and they discussed shortened day and talked about how to do the last two periods of the day. The witness testified she believed this was coming towards the end of the school year, as they talked about how that would begin May 10<sup>th</sup>, which must have been the last few weeks of school that year. The witness testified she did not know why they did not just correct the date there.<sup>220</sup>

Looking at the next page of the document, the witness testified it sets out what the school was going to provide for the Student's return to school, that the district would secure a sub para for the remainder of the school year, and stood ready to provide transportation with bus aide at parents' request. The witness testified the school did provide a para, but she thought the stepfather chose to bring the Student each time, and she thought the stepfather remained at the school during those times also, that he was on campus. When asked if she knew how many days the Student came back in May 2018, the witness testified she did not remember, but would say more like five than twenty-five. The witness testified that on each of those days, the Student's stepfather was on campus the entire time, and when asked if the stepfather was in the classroom, the witness testified she thought it was a mixture of both, that she thought the stepfather was very anxious and nervous about the process and wanted to be there in case the Student needed him. The witness testified she was sure the Student knew his stepfather was there.<sup>221</sup>

Discussing again the document saying Basis for the Action was parent input and Dr. Colvin's letter, the witness testified she thought the parent input to the school in terms of the Student's re-integration in May of 2018, was the stepfather mentioning he needed to get back to work, that it was time, and that Dr. Colvin's letter to the school May 3, 2018 set out her agreement with Ms. Robinson's suggestions for visual schedule, red-yellow-green card system, para support and daily positive reinforcement, etc. for re-integration. The witness testified she thought these were already things Ms.

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<sup>219</sup> Vol. II, P. 230, line 3, through P. 232, line 9

<sup>220</sup> Vol. II, P. 232, lines 10-25

<sup>221</sup> Vol. II, P. 233, line 1, through Page 234, line 14

Robinson was doing with the Student at home, except for para support.<sup>222</sup>

Looking at Dr. Colvin's letter, the witness testified that although she would have to look at the Student's IEP, she would assume the recommended para throughout the day and incorporating occupation and speech therapy were incorporated by the school. Then, looking at the IEP dated May 8, 2018, the witness said it was originally drafted at the previous conference, and then amended with re-integration in mind. The witness, looking at page four of the report, testified it lists modifications and the supplementary aids, which were, for the behavioral piece, positive intervention, it notes the red-yellow-green card system would be used, and then, for the aids for the General Ed classroom, they would utilize the para support, the visual schedule, safe place, daily behavior report cards, shortened assignments, preferential seating, scheduled and unscheduled breaks, and opportunity to contact home, which list the witness testified she thought was the same list in Dr. Colvi's letter as well as maybe a few additions. When asked if the school did anything else to help with re-integration efforts, the witness testified she thought it was just communication between home and school in that when the Student could tolerate it, they did that, and the witness testified she was pretty sure they still provided some additional services to go with when the Student wasn't able to come. The witness testified in looking at her notes they turned the Homebound instruction into they would continue that to continue to make up the Comp Ed time, as well as then that shortened school day, which is reflected on the IEP update. The witness testified they left the Homebound instruction included in the IEP and noted that would then become Comp Ed time, so that was 2 hours of literacy a week, 2 hours of math, and 1 hour of social studies a week for the Comp Ed time, then they would stand ready to provide the direct instruction for literacy one class period a day, and in the related services they would continue to do the 30 minutes of OT, the 30 minutes of speech, continue to compensate the family for the cognitive behavioral therapy, as well as the para in school two hours a day, and they stood ready to provide the bus aide. The witness testified the direct instruction in literacy and math, that would have been in Ms. Robinson's classroom in the afternoons, then the two hours of para support a day would be for the two hours the Student was with Ms. Robinson. When asked if she knew if the Student had been on campus again since that time in May of 2018, the witness testified she did not, as she resigned her position after the next annual review conference, around June 2018.<sup>223</sup>

Discussing the ACT Aspire, the witness testified it was typically administered in March or April, and she did not believe it was allowed to be given in the home in 2017, she believed that the school counselor, Mr. Roberts, had been told it could not be by ADE. The witness testified that she believed Mr. Roberts offered for the Student to take the test after school hours, with Ms. Robinson to be in with the Student and she would offer any room the Student felt comfortable in to take it, but the witness did not remember the parents bringing the Student in for that test, and the district took a hit for that, which means the annual report to the Department of Ed asks if they tested 100% of the students, and since they did not, if you do not get a certain percentage you get a red or a yellow instead of a green.<sup>224</sup>

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<sup>222</sup> Vol. II, P. 235, line 25, through P. 237, line 19

<sup>223</sup> Vol. II, P 237, line 20, through P. 242, line 1

<sup>224</sup> Vol. II, P. 242, line 6, through Page 244, line 20

The witness testified, explaining what the Star test is, said it is associated with Arkansas Renaissance Learning, and it is a way districts administer Star reading and Star math to give a grade equivalency, which is a district measure. The witness testified it is not a required test, and it is computer-based only, she thought.<sup>225</sup>

Talking about extended school year services, looking at the extended school year review for the summer of 2018 that was conducted in May of 2018, the witness testified it is the 14 factors, it is not an ADE-required form, but is used to meet the requirements under the Arkansas regulations for extended school year. The witness testified they consider the degree and nature of a student's impairment, look at regression and recoupment, if a child has progressed or regressed toward goals and objectives on the IEP; if there is regression, are they able to recoup those skills in a reasonable time, typically two days for each days missed of service, whether parents are able to provide some support in the home, and whether the rate of progress is expected; they look at are there significant behavioral problems, available alternative resources to the parents, is there opportunity to interact with non-disabled peers, are there certain areas of the curriculum that need continuous attention for the child to achieve vocational training, whether it is just an extraordinary service, and see if the regression and recoupment data is predictive a child is going to regress over that extended period of time, as well as looking at any other factors the team has determined. The witness agreed regression is the primary focus. The witness testified it would not consider the Student for extended school year services, and the parents agreed, the parents signed the paperwork and there were no concerns noted. The witness agreed that even though extended school year services were not being provided in the summer of 2018, the Student was still receiving Comp Ed in the Homebound setting. The witness testified that the parents attended all the IEP meetings while the witness was there, they signed off on all the IEP's while she was there, they never complained about the content, and they were very pleased, they loved Ms. Robinson's services and never complained about her schedule.<sup>226</sup>

The witness testified she had met the Student a few times going into the classroom before he ever left school, but had never sat down and talked with him. Referring to her job with the co-op to serve the district, the witness testified she had four school districts and she tried to get to each campus at least once a week when possible, and special ed was her focus. The witness testified she would estimate 375 students between the four districts were special ed students. The witness testified that working under her as far as Special Ed teachers, there were six teachers at Ozark Mountain and one speech pathologist, she believed six special ed teachers and one speech pathologist at Cotter, as well as they had contract OT, PT, in all the districts; in Eureka Springs she thought five teachers and a speech pathologist, and at Omaha three Special Ed teachers and part-time speech and OT and PT, just as in the other districts. When asked if she became familiar with the Student's trigger words, the witness testified she thought those were discussed early on, but she did not recall what they were. When asked how Ms. Robinson's time sheets were monitored, the witness testified they were submitted to the administrative office, and the witness testified she did not have to take her word, that the time sheets were filled out and they handle that. The witness testified she agreed only Ms. Robinson and the parents would know whether the hours were actually done. The witness agreed Ms. Robinson was paid \$25 per hour, and the witness testified she did not have personal knowledge as to cancellations

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<sup>225</sup> Vol. II, P. 245, line 3-20

<sup>226</sup> Vol. II, P. 246, line 4, through P.250, line 21

being worked out between the parents and Ms. Robinson. The witness testified that the Student was a big part of her load for the last few years, and she would say that of all her districts, that was a big chunk of her time spent. The witness testified that when she was asked about the stepfather's anxiety, she would not have personal knowledge of that other than if he said he was concerned. The witness said she was involved with the discussions of Infinity Academy towards the end of her job at Omaha. When asked about discussions between Omaha and Infinity as to the Student actually being educated at Infinity and Omaha paying for it, the witness testified she thought there was a conference where Dr. Sherood and she were both fine with that, as long as Infinity could meet the Student's IEP as it was written, then the witness was no longer there. The witness testified that if the Student was at Infinity, Omaha would still be responsible for services within the IEP, that Infinity would have to meet the requirements of the Omaha team meeting and ensure they were covered in that aspect. The witness testified that is because they are obligated to provide specialized services unless the parent revokes consent for that, or withdrew the Student as an Omaha student or revoked consent of his IEP, they would still be obligated to provide his services, regardless of where he was educated.<sup>227</sup>

Looking at the document sayings Child's strengths in language include learning and using new vocabulary, using appropriate grammar, and phonics, and in math, strengths were listed as including place value, measurement, volume, finding data using charts and graphs, the witness agreed. Then, under Reading, it listed the Student had very low word recognition/basic reading skills, and struggles with passage comprehension, so the question to the witness was how were those two comments reconciled, the witness testified there are various aspects of literacy, those are different components; there is comprehension and word recognition, which is related to basic reading and fluency, but this is learning new vocabulary words and grammar, which would be some of the written and spoken; and then, phonics, which could be like decoding words, so those are, there are various aspects of literacy. The witness testified she did not see the disconnect between the two statements, that there can be components of literacy that are strengths and parts that are weaknesses.<sup>228</sup>

**Witness: Father XXXXXXX**

The Student's stepfather testified he has known the Student since the Student was 4 years old, and the Student lives with the stepfather and mother.<sup>229</sup> The witness testified the bookend dates when re-integration efforts were made for the Student were toward the end of April 2017, and then almost a full year later, May 18, 2018.<sup>230</sup>

As to the first re-integration effort, when the Student's mother was not present, the witness testified he was told repeatedly by Anne Colvin to try to re-integrate the Student at Omaha, and in April, end of April, the witness testified he took the Student to the school after hours, they just walked around the parking lot and left. The witness testified the Student's reaction is what it always was, the

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<sup>227</sup> Vol. II, P. 251, line 6, through Page 258, Line 1

<sup>228</sup> Vol. II, P. 261, line 18, through P. 263, line 6

<sup>229</sup> Vol. III, P. 9, line 2, through P. 10, line 4

<sup>230</sup> Vol. III, P. 11, line 19, through Page 112, line 5

tics would get bigger, stronger, the face pulling, his neck, they would be substantially bigger than usual. The witness said the second time was the end of July, maybe the first of August, 2017, and those steps were to help put the room together, as in giving the Student a job, a chore, "This is where you will be, help me to put it up." The witness testified they tried that two different times. The witness said one of the days was on a Saturday, that he and the Student stayed maybe 30 or 40 minutes, then the Student said he was hungry and the witness, the Student and Ms. Robinson went to the diner in town and ordered food, and the Student just sat there, he would not eat. The witness said they asked the Student if he was okay, if he wanted to leave, the response was no, so the witness and Ms. Robinson got their food, ate about a third of it, maybe a bit more, then they left. The witness said one of those two times was when they ate at the diner, and the other they did not, they were just there integrating and then left. The witness said when they went to the diner was the second time, that the Student just shut down completely. The witness testified he thought the next time was around November, around deer season, the witness bringing the Student and walking him around. The witness testified he thought they brought a basketball or a soccer ball to bounce around in the parking lot, and the Student's reaction was the same, they could stay five minutes, ten minutes, and the Student's tics would get progressively bigger. The witness testified the next time was when he had a meeting with Patricia Phillips (the new Principal) and Sandy Roberts, and his daughter (Cambria Humphrey) was also present, sometime in early December 2017, that Anne Colvin was telling the witness they needed a treatment plan, they needed to get things set in place, that they had to get the Student back up there see if it was going to work. The witness testified he had a list of five or six things he wanted to go over, one being that the Student needed a para, who realized that the Student's trauma was real to him, whether or not it was real to others. The witness testified they did not want any verbal or visual communication with Dawn Dillon, Holly Petty or Amanda Green, those being teachers plus the principal, another thing on the list was the Student needed to feel safe, that he needed to be welcomed with open arms to the new place, new principal, new beginning. The witness testified another thing was that the Student could come and talk to them at any time and not be in trouble, that is what the parents wanted said to the Student, that he was more than welcome to come and talk. The witness testified the discussion lasted maybe 30-40 minutes, and Sandy Roberts (the counselor) took, the witness thought, two pages of notes, and agreed they bought into the project. The witness testified it was about December 5<sup>th</sup> or 7<sup>th</sup> when he and the Student first went to the school, it would be after school when everyone was gone, they would pull up right in front of the office and Jennifer Robinson would meet them either outside the door or they would knock on the door because it would be locked. The witness testified the Student's reaction got worse as they went on, the same thing, 15 or 20 minutes. The witness testified in one of those two days they met a Ms. Benson, who he thought was the Special Ed teacher from the elementary, the witness thought she was a friend of Jennifer's there visiting, and she visited with the Student 15 or 20 minutes and he and the Student left. The witness said the next event was around the 20<sup>th</sup> or 21<sup>st</sup> of January of 2018, and it was the same thing, it was just the witness, the Student and Jennifer, and the witness said he thought they did a three day progress there, not necessarily in a row, but toward the end of January, and of those three days, the Student saw Holly Perry two of those days. The witness testified that was one of the days that the witness was in there and he was marking the chalkboard and talking to the Student about how the past was past, we are riding the train, the train keeps rolling, everything else is behind us. The witness testified he thought Jennifer had the Student rearranging some books a little bit, and the witness and Jennifer were talking at a table and the Student was pacing around the tables, back and forth, and he stopped and was about three or four feet beside them, and the witness and

Jennifer both stood up; the witness testified they thought the Student was going to pass out, and the witness grabbed one side of him and Jennifer came to him, and they left. The witness testified they tried one more day in April. When asked if there was a time when there was a lot of other students around

and there was a lot of activity in the room, the witness testified that did not take place until the last four days of integration, May 10<sup>th</sup> through 18<sup>th</sup>.<sup>231</sup>

Referring to handwritten notes by Robert Reynolds, who the witness testified he thought was a para and a substitute at the school, and the first entry May 20, 2018, saying the Student met with the principal and joined in the class, worked on socialization with peers, they reviewed games and things of interest with peers, he noticed some level of increased leg movement, that the Student expressed he felt good about being with peers, but expressed some negative feelings about Ms. Perry, the witness testified he was sitting by Ms. Robinson's desk in the other adjoining classroom so was not able to see what was happening, but had no reason to dispute the notes. The witness testified that there was more done that day, that Robert came to their home and met the Student and stayed and they sat on the porch, Robert went in the house and they just socialized. The witness testified they were pumping the Student for going to school, and the Student rode to school with Robert, and the witness followed in his truck. The witness said he took the Student home, and the Student's demeanor was the same as it always was, that his tics would elevate to the point they were big, his pulling of the neck, his arm muscles. The witness testified that day he was not pacing back and forth by the door so the Student could see him. Referring to Robert Reynolds' note dated May 11, 2018, saying the Student went to school for approximately one hour, visited peers, did not want to engage in any work, the witness testified he took the Student to work that day and was there, he was able to observe what Mr. Reynolds was saying because the witness was sitting by Ms. Robinson's desk actually in the room. The witness testified that the Student has people at the school he considers to be his life-long friends that he misses those people, two boys are his neighbor boys, they live close by, and those are his two friends from Omaha. The witness testified that when taking the Student home that day, his reaction was the same, he would get quiet, his pulling, his Tourette's would exceed. The note on May 14, 2018, which said Mr. Reynolds noticed the Student became very stressed, tics, legs moving up and down, bouncing knees, that he took a break and they took a walk outside to calm down, the witness testified was a day the witness took the Student to school and then took him back home. The witness testified he was in the room that day, but was not pacing around and looking in the room or bothering the Student in any way when all this took place, and did not leave because Robert had met the Student twice, the Student was in a very stressful place and, as a father, the witness wanted to make the sure Tourette's did not get out of hand. Referring to the May 18, 2018 note, that the Student was there about an hour, engaged with his peers, was not interested in doing work, that overall the Student's engagement of peers was doing well, but when engaged in work the Student started to become agitated, the witness testified the Student's peers were everyone in the Special Ed room, the witness assumed was high school kids, that there were at least 15 kids in the classroom and he did not know how many were coming in and out, that there was chaos. The witness testified that when he walked into the room, there was a boy sitting in a chair, who the witness assumed was in detention, ISS, because the witness thought the same boy was in the same chair the day before, but the witness did not know if the boy was

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<sup>231</sup> Vol. III, P. 11, line 23, through P. 19, line 9

there the first two days. The witness said the boy was answering the phone, there was a rabbit running loose in the room, which the witness guessed was a pet of Jennifer's, there was rabbit poop on the floor, and there was a boy in the room that the Student had trouble with in the past, who was explaining to Ms. Robinson how he had gotten in trouble and gotten into a fight and he was mad because the school had given him ISS and he was wanting to talk to his mom to get OSS to help his dad on the farm. The witness testified the Student was about ten feet away from this. The witness testified that on these visits, they would arrive on the last hour of the day, so around 2 p.m., and they always left before 3 p.m. The witness testified he felt the school held up their end of the bargain with a para, but kids were running in and out of each room, a boy with Down's Syndrome and his para, and Student was right in the middle at a table, and he and Robert were working on a math sheet, and the Student left the room crying with Robert. The witness said the Student and Robert were outside two or three minutes, then the witness walked out and got the Student and they left. The witness testified that was the last re-integration effort, May 18, 2018, a little over a year ago.<sup>232</sup>

Testifying as to things he has done at home in terms of trying to understand the Student's triggers and calm him and things of that nature, the witness testified Bob Ross, who shows how to paint late at night on television talks in a real calm voice, a monotone, and he looks funny, that the witness had watched a lot of Bob Ross tapes with the Student, as in Jennifer Savage's appointments and Anne's, it was the calm and trying to keep the Student calm, that the witness had learned that if he tries to explain it like Anne Colvin or a doctor, the witness can't do it, he apologizes. The witness testified that tapping of the Student's feet sets off something in his brain to relax him, it is soothing, so they would lie down on the couch, turn everything off, and we would turn Bob Ross on the TV on YouTube, that his voice was calming and the Student loved it. The witness testified sometimes the Student would watch it with his eyes closed, the calm voice is what he liked. The witness testified they learned the Student's Tourette's would virtually go away when he was swimming, so they swam a lot. The witness testified as to exercise, saying the Student could do 300 sit-ups at a time, he could walk way more than the witness could keep up, and they learned that was the Student releasing the energy of getting away from the PTSD, it would calm his body down. The witness testified he would put meditation on, during a test, after a test, even when JoAnna was doing the year-end Benchmark test, and when the Student was done they would put him on the couch and put it on the phone, and it was the soothing calmness and the patting of the feet helped the Student.<sup>233</sup>

The witness testified he had heard Jennifer Robinson say the number of hours she spent in 2017 and 2018 educating the Student three times. The witness testified that she told the witness in a conversation in April 2018, she was only there 54 hours, while the witness testified he was telling Ms. Robinson they had to get more hours in. The witness testified that Ms. Robinson was sporadic in the times she would come. The witness testified that JoAnna Jaro first came to the house September 18, 2018, and Jennifer Robinson came also, to introduce her to the Student. The witness testified that he was explaining to Ms. Jaro about the Student and that his education was what they wanted, and as she was leaving Jennifer made a comment she was only there 54 hours in passing to Ms. Jaro. The witness testified the third time was at the October 2<sup>nd</sup> IEP meeting in Omaha, that in that meeting were Missy Criner, Dr. Huff, Angela Artherton (the school's attorney), Laura King the Gen Ed teacher, Martha

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<sup>232</sup> Vol. III, P. 19, line 10, through P. 29, line 15

<sup>233</sup> Vol. III, P. 29, line 18, through Page 32, line 11

Hicks, Jennifer Robinson, JoAnna, both the parents, and Michael Sutton. The witness testified it was a long meeting, the context of the conversation as to Jennifer Robinson's hours the witness said they were saying they wanted hours, they wanted them steady, and he thought he said to Jennifer did she not tell him he was only there 54 hours she said yes. The witness testified that last week was the first time he learned Ms. Robinson turned in time sheets that said a lot more.<sup>234</sup>

Looking at the summary sheet of Ms. Robinson's time sheets created by school counsel, the witness testified it was not accurate as to an actual depiction of the time she was at the witness' house and are exaggerated. When asked how he could identify dates Ms. Robinson was not at the house when she claims on the time sheets she was, the witness testified that on some of the dates he was in Eagle, Colorado, elk hunting, some of the times the Student was in Springfield at Dr. Colvin's at the exact same time, and that Ms. Robinson came very limited on Fridays, he would say a maximum of one Friday a month, so every Friday on the time sheets except maybe one or two here or there, she was not at the house. The witness testified he thought he was elk hunting 13 days in September 2017, and that the Student was with the Student's mother, the witness' parents, and the witness' mother-in-law. The witness testified very rarely was Ms. Robinson at the house the same day they had an appointment with Anne Colvin, as sometimes the Student's treatments would be pretty serious and Ms. Robinson didn't come because she thought it would be too hard on the Student.<sup>235</sup>

As to dates when the Student was at Dr. Colvin's but Ms. Robinson's time sheets show she was at the house, the witness testified the Student was at Dr. Colvin's October 30, 2017 (when Ms. Robinson's time sheets shows 2 hours), the Student was at Dr. Colvin's November 13, 2017 (when Ms. Robinson's time sheets show 2 hours), the Student was at Dr. Colvin's November 27, 2017 (when Ms. Robinson's time sheets show 2 hours), the Student was at Dr. Colvin's January 24, 2018 (when Ms. Robinson's time sheets show 1 hour), the Student was at Dr. Colvin's January 26, 2018 (when Ms. Robinson's time sheets show 1 hour), the Student was at Dr. Colvin's January 31, 2018 (when Ms. Robinson's time sheets show 3 hours), the Student was at Dr. Colvin's February 14, 2018 (when Ms. Robinson's time sheets show 2 hours), the Student was at Dr. Colvin's March 1, 2018 (when Ms. Robinson's time sheets show 2 hours), the Student was at Dr. Colvin's March 21, 2018 (when Ms. Robinson's time sheets show 2 hours), the Student was at Dr. Colvin's April 16, 2018 (when Ms. Robinson's time sheets show 2 hours), the Student was at Dr. Colvin's May 23, 2018 (when Ms. Robinson's time sheets show 2 hours), the Student was at Dr. Colvin's June 1, 2018 (when Ms. Robinson's time sheets show 3 hours), the Student was at a medical doctor's, Dr. Tan, in Springfield August 16, 2018 (when Ms. Robinson's time sheets show 2 hours), the Student was at Dr. Colvin's August 20, 2018 (when Ms. Robinson's time sheets show 2 hours), the Student was at Dr. Colvin's August 27, 2018 (when Ms. Robinson's time sheets show 2 hours), the Student was at Dr. Colvin's September 4, 2018 (when Ms. Robinson's time sheets show 2 hours), the Student was at Dr. Colvin's September 7, 2018 (when Ms. Robinson's time sheets show 2.5 hours), and the Student was at Dr.

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<sup>234</sup> Vol. III, P. 31, line 12, through P. 36, line 13

<sup>235</sup> Vol. III, P. 37, line 16, through P. 38, line 9, and Vol. III, P. 38, line 18, through P. 40, line 22



Colvin's September 10, 2018 (when Ms. Robinson's time sheets show 2 hours).<sup>236</sup>

When asked about what happened October 25, 2017, the witness testified he remembered it because he thought it was one of the weeks they called cooking week, they cooked for the OT therapist that worked for TheraPlay, and the witness testified he thought that was one of the days they were supposed to cook spaghetti for Jennifer and she did not show up, and that they never did any more cooking with her. The witness testified Martha Hicks was Jennifer's mentor at the school, and she called and said an ambulance had picked up Jennifer at school or her husband picked her up at school.<sup>237</sup>

As to it already being in the record on May 10, 11 and 14, 2018, when Ms. Robinson put down 2 hours for each of those days, the witness testified they were involved in the re-integration attempts at the school and that although she put down 2 hours each of those days, she was not at the Student's home.<sup>238</sup> Discussing re-integration attempts, the witness testified it was an assumption she was charging for Homebound services. The witness testified that in November they had a lot of Jennifer Savage appointments, that was the Rapid Eye Movement doctor, one of the Student's therapists, and the witness thought they had an appointment November 16.<sup>239</sup>

When asked about June 7, 2018, when the time sheets show 3 hours, the witness testified as to a text he received from Ms. Robinson that she needed to cancel that day, that she would make it up to the Student, as her child was ill and husband was not off until later. Discussing June 12 and 14, 2018, when Ms. Robinson's time sheets showed 2 hours each day, the witness testified the Student was in Infinity Camp.<sup>240</sup>

Looking at a text exchange between the witness and Ms. Robinson on August 31, 2018, the witness testified his part of the exchange was telling her it was a good thing she had not come that day because of an incident involving a skunk and the dogs and the house smelled like a skunk. Looking at a text exchange September 11, 2018 the witness testified September 10, 2018, she sent him a text saying she would not be able to come tomorrow, she had to pick someone up, so she did not come September 11, 2018 when she billed 2 hours, and the witness also testified as to the text September 14, 2018, saying she would not be able to come that day and would see him Monday, migraine, and she billed 2 hours for that day.<sup>241</sup>

The witness, when asked how long he had been a iPhone user, testified he did not know the difference between an iPhone or a flip phone, that he had his current phone a year or so, so some time in late spring, early summer of 2018, he switched to his current phone. When asked if his prior phone

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<sup>236</sup> Vol. III, P. 40, line 23, through P. 44, line 7

<sup>237</sup> Vol. III, P. 45, line 12, through P. 46, line 12

<sup>238</sup> Vol. III, P. 47, line 10, through P. 48, line 4

<sup>239</sup> Vol. III, P. 49, line 5-14, and Vol. III, P. 50, line 20, through P. 51, line 18, and Vol. III, P. 52, lines 1-2

<sup>240</sup> Vol. III, P. 52, lines 10-24

<sup>241</sup> Vol. III, P. 55, line 15, through P. 57, line 14

was a Samsung Galaxy, the witness testified he assumed, and that it was a smart phone like his iPhone, but with a different manufacturer, and before that he had a flip phone. Looking at pictures the witness took of text messages from his old Samsung Galaxy, the witness agreed it was a smart phone. The witness agreed that by August 31 of 2018 he was using his iPhone. The witness agreed the iPhone text messages were all dated in the last 12 months or so, and the Samsung Galaxy messages show the year 2018 and say "Samsung." The witness testified there was a message from the flip phone that did not show the year, and denied it was in 2017. When asked about there being no June 7 picture from either the Samsung or iPhone that the witness used book-ended to June of 2018, the witness confirmed there was no picture of that message from either of those phones. When asked to explain why is June 7 message is the only one the witness elected to take from his flip phone and it does not have a year on it, the witness testified when they looked at all the times turned in, he kept the flip phone in a drawer and he did not have a charger for it, and he went back and turned it on and there were only four or five texts complete from the whole phone, and there were one or two texts from her, and he took it from his phone. The witness agreed that a month earlier, on May 10, 2018, he was snapping pictures out of his Samsung Galaxy, and when asked if this was a 2018 message, why would it not be out of the witness' Samsung Galaxy, the witness testified he did not guess he could explain. Responsive to questioning as to the earlier recitation of the dates Ms. Robinson listed she was at the witness' home and every time the witness said they were at Dr. Colvin's, the witness agreed there was no date Mr. Elrod stated when the witness said they were not at Dr. Colvin's. Looking at a document for September 4, 2018, one of the days the witness testified they were at Dr. Colvin's, the witness testified that "CAN" means the patient canceled the appointment, so he would not have been there. As to September 10, 2018, the witness testified he believed he was at Dr. Colvin's, but said possibly "CAN(PRO)" means canceled, then said he did not know what it meant. The witness admitted that he agreed there were some instances when Ms. Robinson taught on the same day as a Dr. Colvin appointment. Looking at Dr. Colvin's records, the witness agreed that "Length" meant the length of the session, and agreed that the sessions were somewhere in the range of 60, 40, 30 and 20 minutes, but testified he believed it was a minimum of 30 minutes and maximum of an hour. The witness agreed the majority of the sessions had a start time between 9 a.m. and 11 a.m. The witness agreed that overwhelmingly the sessions are done by noon. The witness agreed one of his complaints was that Ms. Robinson did not come until after 3 p.m. The witness agreed that typically there was at least 3 to 4 hours from the time Dr. Colvin's therapy session ended before Ms. Robinson showed up at their home. The witness testified the drive from Springfield to his home was approximately an hour and 20 minutes.<sup>242</sup>

The witness testified he was aware that two of the three people the witness says the Student reacts negatively to in the Omaha School District are no longer employed there. When asked, regarding the re-integration attempts the witness testified about earlier, if the Student was taken to school between March 18, 2017 and what the witness testified to was the beginning of the re-integration efforts, the witness testified he believed it was in April. The witness testified he thought took the Student to the parking lot around the first week of April 2017 with no one on campus. The witness confirmed his earlier testimony that he and the Student were at the school in July or August of 2017 with Jennifer Robinson, on two different days. The witness testified there was never a lengthy visit for

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<sup>242</sup> Vol. III, P. 58, line 9, through P. 72, line 8

the attempted re-integration, and the two times the witness brought the Student to Jennifer Robinson was an hour total. The witness confirmed the meeting he had with the new principal and the counselor, when his daughter was there but not the Student in December of 2017. The witness confirmed that after the December 2017 meeting he took the Student to the school twice for 15-20 minutes each, and he was with the Student the entire time. The witness testified he brought the Student to the school three times toward the end of January 2018, for an estimated total time of 90 minutes. The witness said Jennifer went to the car a couple of times to get the Student, and the witness testified he sat in the truck. The witness testified that when they went through the doors, the doors locked. Of the total 90 minutes, the witness agreed 30 minutes was with Jennifer. The witness said they went back one more time before May, for 15-20 minutes, and at that point the Student's tics were being excessive. The witness testified he was with the Student the entirety of the April visit. When asked how long the Student was at school May 10, 2018, as Robert did not list how long the Student was there, the witness said he did not remember, but that it was never a full hour, but he thought a couple were 45 minutes. When asked if saying 50 minutes times four, or 200 minutes, was a fair representation of the four days, the witness said yes. The witness testified that yes, he was in the building with either the Student or in the adjacent room with the Student the entire time. The witness confirmed he never brought the Student back to the school after May 18, 2018. The witness agreed that in a period of 27 months, the Student has been on campus in some fashion for only approximately 7 hours, plus or minus an hour, and of those seven hours, the witness was by the Student's side six and a half hours. The witness agreed that the Student has had in the last two years and three months 30 minutes to try to re-integrate back into the Omaha School District without his dad present. The witness agreed that one of Dr. Colvin's recommendations was to give the Student the release, and having a para was a recommendation of Dr. Colvin and a parental request, and that the para during the four days the Student was at school, would take the Student outside when he felt stressed.<sup>243</sup>

When asked to go into greater detail about the Student's tics when leaving the school, the witness testified the Student would pop his neck, he would pull his neck to the point he looks like he is almost choking himself, and he will pop. The witness testified that when they saw Dr. Colvin, oftentimes they had lunch up there. The witness testified that the Samsung is the Student's phone. The witness testified texts showed the Student's ability to communicate by texting. The witness, when asked about his earlier testimony that he used a Samsung Galaxy smart phone prior to the use of his iPhone, the witness said he did not recall, he did not know what his phones were. The witness did agree that he had stated his phone before his iPhone was a smart phone like his current phone is, and that before that he had a flip phone. When asked how stressful it was for the witness to bring the Student to the campus, the witness testified it was pretty stressful, but when asked how stressful it was to collect the Student and drive him with him, the witness testified he was not stressed out and emotional driving home at all.<sup>244</sup>

**Witness: JoAnna Jaro**

The witness JoAnna Jaro testified she was the Student's teacher beginning September 19, 2018,

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<sup>243</sup> Vol. III, P. 72, line 15, through P. 85, line 25

<sup>244</sup> Vol. III, P. 88, line 21

providing Homebound services, and taught him for the 2018-2019 school year through this May. The witness testified the Student is large, very gentle, enjoys learning new things, is social, is a very loving child. The witness testified that when she sat down with him, he was always ready to learn, eager in some areas, not to eager in other areas. The witness said she taught the Student in all subjects, math, English, ELA, English literature, science, social studies and an adaptive kind of health. The witness testified she went to the home five days a week, arriving daily at 8:30 a.m. Describing a typical day, the witness testified she would get there, and about 98% of the time the Student would be at the table ready for her, that they would do math, as he enjoys that the most, English, and then she would try and out some social studies into the English, then some type of science-y thing, project, an article, that he likes animals, so they would do that; the Student would take breaks, then she would pack up and leave. The witness said she tried to cover those four subjects every day. The witness said normally the Student's stepfather is there, but there have been some times when the Student's mother is there, and

a couple of times the Student's grandmother Trish was there, and they were in the room while the instruction was going on.<sup>245</sup>

The witness testified her instruction to the Student was about two hours a day each day, and when they get into something the Student really enjoys, it is more than two hours, but she documents two. The witness testified when she began providing services in September, she could get 45 minutes to an hour, that they would start, and she believed they were getting used to each other, they would do some math and the Student would have to get up and walk, then they would do a little bit more, he would have to get up and walk, so it was doing some, and longer breaks than they now take, that he worked up to two hours. The witness testified she thought the Student could do more than two hours now, that he would probably be able to do four if gradually worked up to that, not right now, but eventually. The witness testified the Student could probably do two and a half, three now, but like before, it would take time for him to gear up in that direction. The witness testified that at that time she was providing ten hours of instruction weekly. The witness said the Student was receiving speech and OT as well during 2018-2019. The witness testified that usually once a week the Student would shut down before the two hour mark and she would need to leave early.<sup>246</sup>

The witness testified that the Student displayed tics in the home when he was under stress, when he was anxious, learning something new, that when she asked him to do a little bit more and it is a little bit harder, he would start displaying tics.<sup>247</sup>

The witness testified the Student's tolerance for a longer time has progressed, and his academic achievement has progressed absolutely during the 2018-2019 school year, that when she got there the Student could not multiply with flash cards, he would have to use his fingers, but she got him to the point, with the parents' help, that he was doing them right off, with no fingers, that when she got to him he could not add, if he had to regroup he would just kind of forget the number to carry over, but

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<sup>245</sup> Vol. III, P. 90, line 18, through P. 92, line 22

<sup>246</sup> Vol. III, P. 92, line 23, through P. 94, line 22

<sup>247</sup> Vol. III, P. 94, line 23, through P. 95, line 5

he can do that now, that he can do order of operation, if you ask what is this and what is that, he can do it in his head and tell you, which he could not do before, his reading is stronger and he can tolerate longer reading periods and a larger amount of questions on a higher reading level. The witness testified these are things she worked with the Student on over the last year.<sup>248</sup>

The witness testified she thought it was the meeting in October when it was determined an evaluation of the Student was needed, the owner or someone of TheraPlay wanted a re-evaluation, and the witness said she was aware an evaluation was done in the Fall of 2018. The witness testified she was involved in that evaluation, she received an email from Q Global, a question and answer, as to what the Student could and could not do, his strengths and his weaknesses, that she completed that questionnaire for the evaluation, and that was in the first-ish week and a half in November.<sup>249</sup>

The witness testified the Student's IEP was rewritten in January 2019, she believed based on the new information gathered from the new evaluation. The witness testified she sent Missy some goals in math and language arts, and she thought some in the adaptive area she thought would be good for the Student. Looking at a document saying "Goals for IEP," the witness testified she believed that was the document she created, referencing the document she had sent, and that she created this document because she had been working with the Student and knew his strengths and weaknesses, and believed it would help Missy in creating the draft IEP, because except through the witness Missy did not know the Student's strengths and weaknesses. The witness testified Missy was free to use what the witness submitted or not, as she chose. The witness testified she came up with the list of goals from the internet, that she knew where the Student was and where she wanted to see him go with her experience of teaching, and she emailed Missy Criner January 9, 2019, as to goals and the Student's academic abilities, what he could do in ELA and math.<sup>250</sup>

Looking at the January 24, 2019 IEP, the witness testified she was familiar with the document, and that it set out her thoughts and feedback on the Student's strengths and needs incorporated into the IEP. Looking at the goals, the witness testified they were suitable for the Student, that she had been able to measure those and track the Student's weekly progress with a spreadsheet, and at first she provided the parents with weekly reports.<sup>251</sup>

Looking at a May 23, 2019 email from the witness to Missy Criner, the witness testified it showed the Student's progress, that she did his progress every nine weeks and made sure Missy had it, the May 22<sup>nd</sup> was right before she was released, and whether or not she was rehired to work with the Student, someone could pick this up and know what the Student could do, what needed to be reviewed, and go on.<sup>252</sup>

The witness testified she administered the Star test, the Star reading and math, to the Student, but the Student did not respond well, it stressed him out a lot and he was getting a lot wrong, so the

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<sup>248</sup> Vol. III, P. 95, line 6, through P. 96, line 5

<sup>249</sup> Vol. III, P. 96, line 9, through P. 97, line 6

<sup>250</sup> Vol. III, P. 97, line 7, through P. 100, line 1

<sup>251</sup> Vol. III, P. 100, line 8, through P. 102, line 6

<sup>252</sup> Vol. III, P. 102, line 7, through P. 103, line 8

tics started coming out and he was very aggravated, that after the second test, on one of the two days, he was highly upset, calling himself retarded, stupid, he just couldn't do this and was dumb. The witness said she and the stepfather talked the Student through it, that this was telling her what she needed to teach him.<sup>253</sup>

The witness testified she administered the ACT Aspire test to the Student in the Spring, and his reaction was about the same, he was highly upset and told her he did not know any of it, and told her she needed to teach it to him. The witness testified it was on an eighth grade level and he was not on an eighth grade level, and it distressed him.<sup>254</sup>

The witness testified, as to modifications in the home she implemented for the Student, the Student takes breaks, at first he would get up and walk and pace to get the energy out, then after he got used to her he would say look at a video, so he would do more of her work than he had done previously. The witness testified she ignored the tics when they start, and if it got really bad she would have him take a break, and then he came back and finished, there were times when she read aloud to him while he was walking and he comprehended it and could answer questions, so he was not losing a lot of time that he was getting his energy out. The witness testified that if there was a lot of math, then she would do the writing for him, and would tell him she knew his hand hurt, so let her do the writing and he could tell her. The witness said then they went back as to the capitals, where is punctuation, what is this word, so he did it all, she just wrote it for him.<sup>255</sup> The witness testified the Student got anxious using a computer, and it has not really gotten better.<sup>256</sup>

The witness testified that she did not think she provided Excel spreadsheets anymore, but provided a daily documentation of what they did generally, but more specifically of the Student's behaviors and academic triggers, if any, to the parents and Missy. The witness testified that since March she believed, she was doing a separate academic summary of the week where she would like to direct the Student.<sup>257</sup>

The witness said she could not recall the Student telling her he missed his friends, and said he would not go out the front door with her unless his stepfather was there, that the three of them have gone to the marina, where she focused more on science, and the Student knows what biomes are, which blew her away. The witness testified they talked about the weather there, animals, where do they get their food, what are their predators, what is their prey. The witness testified the Student can go to the counter and get something and charge it, that he could generalize and be social, that he did well outside the home when she was with him.<sup>258</sup>

The witness confirmed she has 30 years experience in Special Ed, and confirmed that she began

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<sup>253</sup> Vol. III, P. 103, line 13, through P. 104, line 6

<sup>254</sup> Vol. III, P. 104, lines 7-17

<sup>255</sup> Vol. III, P. 104, line 18, through P. 105, line 20

<sup>256</sup> Vol. III, P. 105, line 21, through P. 106, line 3

<sup>257</sup> Vol. III, P. 106, P. 23

<sup>258</sup> Vol. III, P. 106, line 24, through P. 108, line 12

with the Student in September, but as of December the school had not provided learning materials for the Student that were grade-appropriate for his age and grade level, and although she had made requests of the school, up to that point she provided out of her own resources what she was using for the Student. The witness testified that Laura King sent the witness Ms. King's weekly lesson plans, and then sent the witness her entire from August to May lesson plans that tied into the curriculum that the witness could use. The witness said that was in 2019 after their meeting in approximately January. The witness testified she provided the Student with a laptop with her own money the last week of May, she thought, as she felt it necessary because ESY was not established and she knew the Student would lose what he had learned if he did not stay somewhat focused on it, so with that she and the Student could email each other and she could send him a list of what she wanted him to do. The witness testified she did not believe the Student was receiving summer extended services, but she stays in touch with him.<sup>259</sup> The witness testified that it took her months of working with the Student to figure out what his grade level was. The witness testified that when she first went to work, she was told by Missy Criner that the Student's diagnosis was verbal Tourette's and eye issues, but the witness said he does not have verbal Tourette's, he has muscular Tourette's.<sup>260</sup>

Looking at some of the entries in her weekly reports, the witness testified, as to October 22, 2018, that she had written when she arrived the Student was telling her about his busy weekend, about deer hunting that morning, that they went to "his school" in "Springfield to a medieval festival." The witness testified the Student talked to her a couple of times about Infinity Academy, about making swords out of PVC pipe, foam and duct tape, he told her everyone was really glad to see him, that his teacher, Mike, bear hugged him, that the teachers there did not bully him and did not let anyone bully. The witness testified that when the Student talked about bullying he became upset and talked about how he was dumb, but that they talked about what he could do and how smart he was, which did not help because he started to tic and blink his eyes rapidly and tense his neck muscles. The witness testified probably once a month the Student talked to her about going to Infinity Academy and referred to it as his school. The witness testified the Student normally brought it up, sometimes she would. The witness testified when the Student talked about Infinity there was a positive mood change to her.<sup>261</sup>

Looking at the February 11, 2019 document, the witness testified it said the Student became agitated after math, telling her about a teacher who was very mean to a child, that she would not help him when he asked for help and made fun of him, that he said the teacher cannot work for any school because the child brought in a tape recorder and recorded the teacher being mean, then he started talking about "Dillon" should not be able to work at any school, she was mean, and he became agitated and said she hurts people, who the witness believed was a lady who used to work for Omaha schools.<sup>262</sup>

Looking at the April 11, 2019 document entry, the witness confirmed it said she received a copy of the Student's IEP, which would have been about a month before she left, that she had asked for it

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<sup>259</sup> Vol. III, P. 109, line 4, through P. 111, line 24

<sup>260</sup> Vol. III, P. 112, line 17, through P. 113, line 5

<sup>261</sup> Vol. III, P. 113, lines 6-11, and P. 113, line 25, through P. 116, line 15

<sup>262</sup> Vol. III, P. 116, line 16, through P. 117, line 20

earlier but never got it. The witness testified it was important to her because it can be referred back to for the Student's strengths and weaknesses, to recheck what she was doing and was supposed to be doing, and up to that point, she did not have the goals until March 25<sup>th</sup>, so she was working off the old one until then.<sup>263</sup>

Looking at her April 30, 2019 document, the witness confirmed she had written the Student was very unfocused and irritable that day, talking about mean people, people who bully. The witness testified she did participate in the IEP and was present for the January IEP meeting for review of that. The witness testified when she began working with the Student in September of 2018, she met with Jenn Robinson and Ms. Robinson said the Student was a love, he was absolutely in her heart, and the parents had always treated her very well. The witness testified Ms. Robinson did not provide the witness with worksheets, and the witness did not think she asked about the Student's grade level in that meeting. The witness testified she was aware the January IEP was not signed at the meeting, but that the parents and their lawyers took several days to review it.<sup>264</sup>

As to her credentials, the witness testified she went to Indiana University, got a degree specifically in Special Ed, which is what they did at that time, and she has been teaching ever since. The witness testified she is certified in Arkansas.<sup>265</sup>

**Witness: Missy Criner**

The witness Missy Criner testified she works for OUR Co-op as supervisor for four districts, Ozark Mountain, Cotter, Omaha and Alpena, that her general duties are to oversee anything under the Special Ed umbrella as far as budgets, supervising teachers, writing IEP's, making sure progress monitoring is happening, going through monitoring with the district, things like that.<sup>266</sup>

The witness testified she thought from the December 1 count that Omaha had 86 Special Ed students, then they do a Cycle Seven report, and it was in at that time, so approximately 86. The witness testified all four of their Special Ed teachers were there on campus, with a one-to-twenty caseload ratio, and that in per class period ratios it was a one-to-eight per class period, or a two-to-ten if there is a para in the classroom. The witness testified there are probably four to five other students with autism, which would be typical for a school this size. The witness testified all staff is trained in Special Ed issues, there are classes and professional development that focuses on students with

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<sup>263</sup> Vol. III, P. 117, line 23, through P. 119, line 10

<sup>264</sup> Vol. III, P. 119, lines 14-24, and P. 121, line 10, through P. 122, line 11

<sup>265</sup> Vol. III, P. 122, line 16, through P. 123, line 14

<sup>266</sup> Vol. III, P. 124, line 13, through P. 125, line 9



autism.<sup>267</sup>

Asked about when she began her role with Omaha, the witness testified she started through the OUR Co-op July 1, 2018 as her contract date, but she started a little sooner than that because it was a transition, she was coming from one school district to being multiple school districts, so she started kind of meeting staff and getting familiar with the campuses probably in late May of 2018 when her schedule from her other schools would allow it. The witness testified when she started, May, June 2018, the Student was receiving Homebound services, that she knew they had looked at doing some integration, but that his placement was primarily Homebound services. As to Compensatory Education being offered to the Student, the witness testified she was aware of that, that she had lots of meetings with Gwen Benton, who was in the witness' position formerly, trying to get an understanding of especially the Student's needs since he was a Homebound student, and trying to figure out where they were and where they needed to be trying to go. The witness testified as part of her transition, she met the Student in June or July, that she had been talking to the parents prior to her official July 1 start date, trying to get familiar with the family and figure out the best resources. The witness testified she had met the Student three times, once very briefly at Infinity, and then when she sat in on two sessions with OT and speech at the Student's home. The witness confirmed the Student had not been back on campus since the witness' actual start there.<sup>268</sup>

The witness testified that to her knowledge, the Student was provided 90 hours of Compensatory Education, based on Ms. Robinson's time sheets, and said that was what the district was going off of. The witness testified she had no reason to doubt the accuracy of Ms. Robinson's time sheets. The witness testified that she did not recall any statement in an October 2018 IEP team meeting that only 54 hours of education, total, was provided by Ms. Robinson. The witness testified Ms. Robinson had never told the witness she only provided 54 hours. When asked about the Student having homework sent home which was fifth grade work when he was testing at a third grade level, if that would be typical in a Special Ed setting, the witness testified it would, depending on the child and how those things were being done, that a lot of times they start at a baseline and try to scaffold up to the grade level they should be at through lots of interventions and learning strategies, so they would typically try to provide that and scaffold those sessions up. The witness testified it was her understanding the homework provided for the Student would be provided in a Special Ed classroom.<sup>269</sup>

Regarding Benchmark testing, as to the Star testing the witness testified she did not know if the school offered to provide it to the Student during his seventh grade year, but there would be records if it was. The witness testified the school did provide the Star testing for the Student in eighth grade, his most recent year. The witness testified the end of the Benchmark piece, the ACT Aspire test, is usually given in the Spring, it fluctuates, but is usually from March, April, maybe early May. The witness testified she did not believe the Aspire test was given for Homebound services in 2017, that it changes a lot through the State Department and their assessments change, but that has just recently actually come about that they could do in to do it in the home. The witness testified it was a requirement of the Arkansas Department of Education, and if it was ACT Aspire, it would have been

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<sup>267</sup> Vol. III, P. 125, line 10, through P. 126, line 11

<sup>268</sup> Vol. III, P. 126, line 12, through P. 128, line 11

<sup>269</sup> Vol. III, P. 128, line 12, through P. 129, line 23

their requirement, or before that, she thought, they had PARCC and it would have been their requirement, so it kind of depended on the actual assessment piece, along with the State Department.<sup>270</sup>

Turning to the IEPs and IEP meetings, the witness testified the Student's parents have attended all the IEP meetings. The witness testified she would consider those meetings very long, anywhere from five to the latest one which was eight hours. The witness testified typically, if you are just trying to go over the annual review or something like that, an IEP meeting is about an hour, so here these were long meetings. The witness testified that during these meetings, the Student's parents voiced absolutely no complaints that would have been documented on the physical IEP. The witness testified the parents signed off on all the IEPs. When asked if the parents were asked for input during these IEP meetings, the witness testified in January 2019 they were going over the draft IEP, which requires parent input, and there were definitely spaces she left for present levels and things like that to get the parents to provide some input, but they were very reluctant to provide what they thought were some of the Student's strengths and his needs, and the parents were also very reluctant to help formulate any goals, it was very difficult to draw some of that out from them and gather their input, and this was in the eight-hour meeting. The witness testified she continued throughout the whole meeting to ask for the parents' input. The witness testified they would get little bits and pieces from the parents and in that IEP the witness would document what the parents provided.<sup>271</sup>

With regard to trigger words and asking the parents for a list, the witness testified she could not remember exactly what meeting that was at, but it came up that the stepfather wanted to know if all the providers knew all the trigger words, and they did not, as they were new to the situation, so they asked the parents to help develop a list and the parents refused, they said those should be known and that the school had to come up with them. The witness testified the parents were never willing to provide the list of words, they always said it had to come from the school and that a typed list should be given to every provider. The witness testified the school did prepare a list of trigger words for the IEP, but because she did not know the Student, they had to rely heavily on teachers who did know him, that Martha Hicks and Jenn Robinson were in that meeting and they basically helped come up with a list because everyone else, except the parents, were new to the Student.<sup>272</sup>

The witness testified she was involved with discussions about the Student attending Infinity Academy. When asked why a private school placement came up, the witness testified it was generated as the parents did not believe the Student would be successful at Omaha, they did not really want him there, so they had been researching alternative placements, and the stepfather called the witness at one point and told the witness about several placements and she told him she would do some research also. The witness testified they collaborated together, she told the stepfather what she knew, and he had already either checked them out or crossed them off his list, so he asked her about Infinity. The witness said she told the stepfather she did not know anything, but would be glad to research. The witness testified they talked in depth at an IEP meeting about Infinity, and she believed that was actually before her July start date, and she was asked if she would go with the parents to Infinity and look at it, and she said if her boss at OUR Co-op allowed that, she would definitely do so, so then she began trying

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<sup>270</sup> Vol. III, P. 129, line 24, through P. 131, line 6

<sup>271</sup> Vol. III, P. 131, line 7, through P. 133, line 11

<sup>272</sup> Vol. III, P. 133, line 12, through P. 134, line 9

to get that coordinated. The witness testified she did go to Infinity, she met the parents there, and they talked to Ms. Bradshaw, the director, and who she thought was kind of the lead teacher over the program Mr. Mike. The witness testified she had concerns that she had already expressed to the Arkansas Department of Education, could we do a dual enrollment, and if so could the Omaha School District write an IEP that would be followed, and how does that look across state lines. The witness said she had a lot of legitimate questions of how it would even work, or could it work, and the Department of Education responded to some things. The witness testified she wanted to explore those options with Infinity, and asked them a lot of direct questions about following the Omaha IEP, how would they show progress, what would some of the goals look like, even if we were to use what they were asking for goals, would that be something the witness could take back, some of those things, about the least restrictive environment, because Infinity is a school with all autistic students or some kind of disability, so under least restrictive environment that is not necessarily least restrictive environment. The witness testified they had a meeting, talked about that, and she and the parents were shown the facility. The witness testified the meeting lasted an hour or two hours. The witness testified that the Student was not there initially, but she believed a brother or sister brought him, as he had an appointment with Dr. Colvin. The witness testified she would say she talked to the Student less than ten minutes. The witness testified she also talked to the Arkansas Department of Education about her concerns as to dual enrollment, about transporting a minor across states lines and how that looked, about the least restrictive environment, and what about if Infinity developed this plan, could Omaha go off it, to which the answer was no, as the State of Arkansas has regulations to be followed, so the State Department said if Omaha District developed an IEP, and Infinity would go off of it, there were certain ways we might be able to do that. The witness testified the State of Arkansas was very concerned about the least restrictive environment and knowing progress monitoring.<sup>273</sup>

The witness testified that during her meetings and several conversations with Infinity, the witness was told there were scholarship opportunities, if the student was enrolled, the parents could apply for, there was also volunteering so many hours to take off so much money from tuition, there was some fund-raising things, if you participated it took off so much of your tuition, some of those things. The witness testified when they met that first day they were all very excited, thinking things were going to go through and everyone was going to sit down and come to the table and develop an Arkansas IEP since the Student was enrolled in Omaha School District, that Infinity would help develop and carry out. The witness testified, however, that later an email came that said Infinity was not going to follow that, that they had no reason to follow that, they did not follow DESE, which is the Department of Education in Missouri, they did not have to follow Department of Education in Arkansas, and they were a hold-harmless school and were not going to get involved. The witness testified that is how things ended.<sup>274</sup>

The witness testified she truly believed Omaha can provide services to the Student to provide him with an education going forward. The witness testified she by no means was saying that they would just lace the Student in a classroom and think "here you go," that would not be her intent, but that a slow integration would be best, that she had repeatedly tried to talk to Dr. Colvin about a plan.

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<sup>273</sup> Vol. III, P. 134, line 10, through P. 138, line 11

<sup>274</sup> Vol. III, P. 138, line 12, through P. 139, line 21

The witness testified that by the time she came on the scene, that plan to them did not exist and the parents have been unwilling to bring the Student back.<sup>275</sup>

The witness testified Dr. Colvin was confusing as to whether the integration should be happening, as in the back file when the witness first came in, it said integration should be happening, then they would get a letter presented by the parents saying integration should not be happening. The witness testified she knew about the IDEA, which is Federal law, and that it trumps the Arkansas Department of Education. The witness agreed it is the IDEA act looked at in terms of what powers the Hearing Officer has in terms of placing the Student in Infinity Academy. The witness testified the Arkansas Department of Education's final conclusion as to Infinity Academy, per their regs, as it would have to follow an IEP developed in Omaha as long as the Student was enrolled in Omaha. The witness testified she agreed the parents never complained about the Student's current IEP, and that for an IEP to be effective, it must be executed. The witness testified she never saw Ms. Robinson in the Student's home. Talking about the lengthy meeting when the parents refused to provide the Student's trigger words, the witness testified the stepfather had become upset when the person who owned TheraPlay in Harrison said in the meeting she had pushed children over the limit but always tried to bring them back.<sup>276</sup>

The witness denied any agreement between Dr. Sherwood and the witness at some point that the Student could be enrolled at Infinity; rather, the witness testified she thought they stood ready to work with Infinity if they would work with them. The witness testified they were looking, exploring every option possible, but she was not saying the Student was ready to be placed.<sup>277</sup>

#### **CONCLUSIONS OF LAW and DISCUSSION:**

Current case law holds that "the burden of proof absent a State Statute to the contrary in an administrative hearing challenging a denial of FAPE is properly placed upon the party seeking relief, whether that is the disabled child or the school district."<sup>278</sup>

FAPE as defined for the purposes of this part are:

- a) To ensure 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 and prepare them for further education, employment an independent living;
- b) To ensure that the rights of children with disabilities and their parents are protected;

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<sup>275</sup> Vol. III, P. 140, line 12, through P. 141, line 10

<sup>276</sup> Vol. III, P. 141, line 16, through P. 144, line 22

<sup>277</sup> Vol. III, P. 144, line 23, through P. 145, line 15

<sup>278</sup> Schaffer v. Weast, 44 IDELR 150 (U.S.2005)

- c) To assist States, localities, educational service agencies and Federal agencies to provide for the education of all children with disabilities; and
- d) To assess and ensure the effectiveness of efforts to educate children with disabilities.

Pursuant to Part B of the IDEA, States are required to provide FAPE for all children with disabilities between the ages of three (3) and twenty one (21).<sup>279</sup> In 1982<sup>280</sup> 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 or not a school district has failed to provide FAPE as required by Federal law.<sup>281</sup> Pursuant to *Rowley*, the first inquiry a Court or Hearing Officer must make is whether the State, i.e., the local educational agency or district, has complied with the procedures and regulations as set out in the IDEA. Therefore, it must determine whether the IEP developed pursuant to the IDEA procedures was reasonably calculated to enable a student to make progress appropriate in the light of the student's circumstances.

Procedural violations are actionable, and an IEP should be set aside, only if (i) the procedural inadequacies compromised the pupil's right to an appropriate education, (ii) seriously hampered the parent's opportunity to participate in the formulation process, or (iii) caused a deprivation of education. Procedural violations are actionable, and an IEP should be set aside, only if (i) the procedural inadequacies compromised the pupil's right to an appropriate education, (ii) seriously hampered the parent's opportunity to participate in the formulation process, or (iii) caused a deprivation of educational benefits.<sup>282</sup>

As set forth below, even if the procedural violations occurred which the Respondent disputes, they did not compromise Student's right to an appropriate education or deprive Student of educational benefits. The District provided as much instruction as Student could tolerate<sup>283</sup> and Student progressed academically during this time.<sup>284</sup>

And importantly, Parents are satisfied with the current IEP and do not allege that it contains any procedural deficiencies.<sup>285</sup> Thus, Parents' litany of alleged technical deficiencies cannot support a claim that Student was denied a FAPE. See *Indep. Sch. Dist. No. 283 v. S.D.*, 948 F. Supp. 860, 882 (D. Minn. 1995), *aff'd sub nom.* 88 F.3d 556 (8<sup>th</sup> Cir. 1996) (finding no procedural error where technical

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<sup>279</sup> 20 U.S.C. 1412(a); 34 C.F.R. 300.300A(a)

<sup>280</sup> *Hendrick Hudson Dist. Bd. Of Educ. V. Rowley*,

<sup>281</sup> 458 U.S. 176, 206-07 (1982)

<sup>282</sup> *Park Hill Sch. Dist. v. Dass*, 655 F.3d 762, 766 (8<sup>th</sup> Cir. 2011)

<sup>283</sup> Vol. II page 223 line 4-25

<sup>284</sup> Vol. III page 95 line 6-11

<sup>285</sup> Vol. I page 128 line 7-8

deficiencies in IEP's did not negatively impact Student's educational experience and the IEPs had been accepted by parents.)

Examining the first inquiry, that of whether the District has complied with the procedures set forth in the IDEA, this Hearing Officer hereby finds that the District did not deny FAPE to the student on account of any violation of any procedural issues.

Having analyzed the first prong of the FAPE analysis, it is now necessary to consider whether or not the District substantively denied FAPE to the Student *i.e.*, whether the District failed to provide an IEP that was reasonably calculated to enable the Student to make progress appropriate in the light of the student's circumstances.<sup>286</sup> In the present case there was an IEP developed for the Student because the Student needed specialized services.

Essentially, an IEP is not required to be designed to maximize the student's potential commensurate with the opportunity provided to other children, however, the student's educational program must be appropriately ambitious in the light of his circumstances and every child should have the chance to reach a fuller potential by having challenging objectives written into their IEP. Specifically, "the IDEA requires Public School Districts to educate 'a wide spectrum of handicapped children,' and the benefits obtained by children at different ends of the spectrum will 'differ dramatically.'"<sup>287</sup>

After hearing each witness and evaluating their credibility and reviewing the evidence presented in the transcript of the Due Process Hearing, the Hearing Officer finds the following:

Having determined that the District did provide FAPE to the student it is noted that there is no requirement in the IDEA that a child shall be provided with the specific educational placement or services that his or her parents prefer.<sup>288</sup> Additionally, nothing in the IDEA requires that a school district maximize a student's potential or provide the best possible education at the expense of the public.<sup>289</sup> Pursuant to *Endrew*<sup>290</sup>, a district's obligations under the IDEA are satisfied when a child receives FAPE, *i.e.*, personalized instruction with sufficient support services appropriately ambitious, with challenging objectives, to enable the Student to make progress appropriate in the light of the student's circumstances.

The IDEA requires that an IEP contain six categories of information<sup>291</sup>, but there is no requirement that every IEP include goals and objectives for every subject matter for which the student receives special education. Indeed, the Eighth Circuit has cautioned "not to require more from an IEP"

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<sup>286</sup> *Endrew F. v. Douglas County School District Re-1*, 137 S. Ct. at 1000

<sup>287</sup> *C.B. by and through his parents, B.B. and C.V. v. Special School District No. 1, Minneapolis MN*, 262 F. 3<sup>rd</sup> 981 (8<sup>th</sup> Cir. 2011) (quoting *Rowley*, 458 U.S. 176, at 202 (1982))

<sup>288</sup> *Rowley*, 458 U.S. 176, at 203 (1982)

<sup>289</sup> *T. F. v. Special School District St. Louis Co.*, 449F 3<sup>rd</sup> 816, 821(8<sup>th</sup> Cir. 2006)

<sup>290</sup> *Supra*

<sup>291</sup> 20 U.S.C. § 1414(d)(1)(A)(I)

that what is set forth in the statute.<sup>292</sup> Here, Student's IEPs met all the requirements of the IDEA.

The Student's mother disagreed with the appropriateness of certain goals, specifically the goals related to personal hygiene, because Student had already mastered those skills.<sup>293</sup> Parents also say that another student's name was included in a previous IEP. But Parents utterly fail to articulate how any of these purported technical deficiencies impacted Student's education. The Student's mother testified that some of the goals in the July 2017 IEP were measured only through teacher-opinionated reports.<sup>294</sup> Evidence was presented that Student progressed academically during this time. And it is undisputed that Ms. Jaro provided weekly and quarterly reports to Parents and the District with objective measurements of Student's progress during the 2018-19 year.<sup>295</sup> Parents failed to present evidence as to how the District failed to implement Dr. Nichols' recommendations. The District implemented several of his most important recommendations, including continued speech therapy, OT, and behavioral therapy. The District has provided the modifications that it can to Student.<sup>296</sup> The IEP team, including Parents, agreed that Student was not at risk of regressing and therefore was ineligible for ESY.<sup>297</sup> Although Student was not eligible for ESY, he still received instruction during summers of 2017 and 2018 as part of the compensatory education the District provided.<sup>298</sup> Parents allege that the District did not provide direct instruction during one month that falls within the statute of limitations. During this time, the District stood ready to provide special education services to Student, which was his placement at that time, but Parents refused to bring him to school.<sup>299</sup> The District sent home the work that Student would have been doing in his classes.<sup>300</sup> Parents contend that the District provided approximately 55 hours of instruction in 2017-18 despite the IEP requiring that he receive 5 hours of instruction per week. The District offered as exhibits time sheets from Jennifer Robinson that show that she provided 268 hours of instruction during the 2017-18 academic year.<sup>301</sup>

The Complaint does not identify what provisions of Student's IEP the District failed to implement. Parents contend that the District failed to educate Student in the LRE. The Parents make this claim even though they are the ones that requested continued homebound instruction and their request for relief is to send him to Infinity Academy—a school with all autistic students, not the LRE.

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<sup>292</sup> *Fort Osage R-1 Sch. Dist. v. Sims*, 641 F.3d 996, 1003 (8<sup>th</sup> Cir. 2011)

<sup>293</sup> Vol. I page 60 line 4-18.

<sup>294</sup> Vol. I page 60 line 23 through 61 line 17; page 63 line 11; page 64 line 2

<sup>295</sup> Vol. III page 101 line 12; page 103 line 12

<sup>296</sup> Vol. III, page 104 line 18; page 105 line 20

<sup>297</sup> Vol. II, page 249 line 1-10.

<sup>298</sup> Vol. II, page 249 line 11-15

<sup>299</sup> Vol. II, page 206 line 11-24

<sup>300</sup> Vol. II, page 205 line 8-18

<sup>301</sup> Tab 179 (District 969-73)

Parents request that the IHO order that Student be enrolled at Infinity Academy in Springfield, Missouri, at the District's expense, and that the District provide transportation and other therapy-related services to Student. Parents have made clear this is the only relief they seek.

**ORDER:**

After due consideration of the record, evaluation of the witnesses, review of the evidence and the foregoing Findings of Fact and Conclusions of Law, it is hereby found that no relief sought by Petitioners is Ordered. The Student was provided FAPE instruction with sufficient support services appropriately ambitious, with challenging objectives, to enable the Student to make progress appropriate in the light of the students circumstances within the Omaha School District. There has been no demonstration of any diminished educational performance by the Student which has not been addressed adequately through his IEP with direct services provided by the district through trained staff, with homebound services which were requested by the parents, using proper instructional/teaching methods.

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

The decision of this Hearing Officer is final and shall be implemented unless a party aggrieved by it shall file a civil action in either Federal District Court or a State Court of competent jurisdiction pursuant to the 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, the Hearing Officer has no further jurisdiction over the parties to the hearing.

*Michael McCauley*

Michael McCauley  
Due Process Hearing Officer  
August 8, 2019