

**ARKANSAS DEPARTMENT OF EDUCATION  
SPECIAL EDUCATION UNIT**

<b>XXXX AND XXXXXXXXXX, as Parents of XXXXXXXXXXXX,</b>	)	
<b>vs.</b>	)	<b>No. <u>H-20-05</u></b>
<b>BENTONVILLE SCHOOL DISTRICT</b>	)	<b>Respondent</b>

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**ORDER**

**NOW** on this 2<sup>nd</sup> day of October, 2019, came on for hearing Petitioner's Request for a Due Process Hearing. Petitioners, **XXXX AND XXXXXXXXXX, as Parents of Student, XXXXXXXXXX**, represented by Theresa Caldwell, Attorney, and Respondent, **BENTONVILLE SCHOOL DISTRICT**, represented by Marshall Ney, Attorney. 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 October 2<sup>nd</sup>, October 3<sup>rd</sup> and October 4<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 Bentonville School District (hereinafter referred to as District or Respondent) from August 23<sup>rd</sup>, 2017 to August 23<sup>rd</sup>, 2019 reasonably calculated to provide Student (hereinafter referred to as "Student") with a free, appropriate public education (hereinafter referred to as FAPE)?

- a. Did the District comply with procedural requirements of IDEA?
- b. Did the District provide services in the Least Restrictive Environment?
- c. Did the IEP contain inconsistencies and incorrect data?
- d. Did IEP measure goals and objectives adequately?
- e. Did District fail to follow the IEP?
- f. Did the Petitioners have the ability to have meaningful participation in the Students education?
- g. 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 first Due Process Complaint filed by the Parents. The current Due Process Complaint was filed the 23<sup>rd</sup> day of August, 2019 by [REDACTED] L. (hereinafter referred to as "Parents" or "Petitioners"), the parents and legal guardians of [REDACTED] (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. §§ 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. When Parents filed the Complaint for Due Process Hearing, the Student was an eight-year-old second 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 26<sup>th</sup> day of August, 2019 and time-lines were established and transmitted to the respective Parties by the Department. On August 28, 2019, a conference call was held to establish dates for the Due Process Hearing. Opening Orders and Pre-Hearing Orders were drafted and a Pre-Hearing date of October 1<sup>st</sup>, 2019 was set, along with the Due Process Hearing dates of October 2<sup>nd</sup>, October 3<sup>rd</sup> and October 4<sup>th</sup>, 2019. On the 30<sup>th</sup> day of August, 2019, the Respondent filed its Answer. Both Opening Orders and Pre-Hearing Orders were transmitted to the Parents and the District on September 3<sup>rd</sup>, 2019 by the Hearing Officer. On September 5<sup>th</sup>, 2019, the Petitioner filed an Objection to the Sufficiency of the District's Response. On September 6<sup>th</sup>, 2019, the District file a Supplement to Answer. A Resolution Session was required to be conducted no later than September 7<sup>th</sup>, 2019, which was held in a timely manner without the ability to resolve the issues. On September 12<sup>th</sup>, 2019, the Hearing Officer entered and Order Overruling the Motion Objecting to the Sufficiency of the District's Response.

On September 25<sup>th</sup>, 2019 five-day-disclosures and witness lists were exchanged by the Parties, both submitted timely. On October 1<sup>st</sup>, 2019 the Pre-Hearing Conference was held as agreed by conference call. At this time Pre-Hearing Briefs were received by FAX. Issues and the possibility of settlement were discussed along with remedies desired by the Parents. The Due Process Hearing commenced on October 2<sup>nd</sup>, 2019 and continued through October 4<sup>th</sup>, 2019 where it concluded at the end of that day's testimony. The transcript was completed on October 17<sup>th</sup>, 2019 and provided to the Parties on that date. Post-Hearing Briefs were submitted on October 28<sup>th</sup>, 2019 by both Parties. At that time the Hearing Officer had until November 6<sup>th</sup>, 2019 to prepare and publish the Final Order regarding this matter.

## **FINDINGS OF FACT**

The Student is a second-grade, male student enrolled in the Bentonville School District, and has attended that District since kindergarten.

The Student lives with his mother and father.

The Student has been tested and identified with Autism, receives Speech and Occupational

therapy, and has had an IEP since the first grade.

The Bentonville 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.

### RELEVANT WITNESS TESTIMONY

[REDACTED]

The witness [REDACTED] testified she has an undergraduate in psychology, a Masters in Special Education with an emphasis on autism from the University of Missouri-Columbia in 2009 and a special certificate through Florida Tech in behavior analysis, that she sat for the national exam and is a board-certified analyst since 2011. The witness testified she taught for about a year in Missouri, and she went straight from undergrad to working in an autism clinic. The witness testified since she graduated in 2009 she worked for the Lovaas Institute for two years doing in-home behavior therapy with children full time before she moved to Missouri. As to the Lovaas Institute, the witness said Ivar Lovaas is one of the fathers of ABA, so to speak, and his methods are pretty widely used in ABA today, and his main core hub was at UCLA in southern California, they had a lot of outreach clinics, so she was able to work at one of those, which was great experience. The witness explained that ABA is applied behavior analysis, taking the science of behavior, which is behavior analysis, and applying it to teaching skill deficits and things to any individual, and also trying to reduce problematic behavior, challenging behavior, it is most widely known for autism, but can be used to teach almost anyone anything, it is the science of behavior and how we learn things. The witness testified a BCBA is a board-certified analyst, meaning the necessary course work has been taken in applied behavior analysis and the national exam was taken and passed to then do applied behavior analysis with individuals. The witness said there are strict ethics which must be followed, part of that requiring gathering data to analyze behavior, since all the decisions made on whether progress is occurring or if changes to intervention are needed are all based on the data collected. The witness said she has worked as a behavior analyst in homes, schools and clinics, and has been employed now yearly two years by Thrive Autism Solutions in Bentonville. The witness said before that she worked for the Thompson Center in Columbia, Missouri for perhaps five years, and has been in both public and private schools, and that when she does intervention in public schools, depending on the child's needs, they can do social skills intervention, instruction with their peers, they can do behavior reduction strategies is mostly what they have done.<sup>1</sup>

The witness testified the Student is a client of hers, that the Student came in, they did an initial evaluation where she spent an hour speaking with the Student's mother, then an hour with the Student just about doing the Assessment for Functional Living assessment, the AFLS, to get a feel for the Student, talking with him, getting to know his communication style, how he interacted with her when given specific instructions, was he compliant or not. The witness said she found that following directions was pretty difficult for the Student, especially things he did not necessarily want

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<sup>1</sup> Vol. I, P. 15, line 22, through P. 38, line 18

to do, that there was a lot of resistance to that, so that was definitely part of the treatment plan, being able to work with following instructions and reducing some of the behavior problems, then a lot of communication skills. The witness said the Student was not talking to her much, not using a lot of words in the initial evaluation, that he made a lot of grunts, sounds and gestures to try to get his point across, so she wanted to definitely work on communication with him and his being able to express himself. Looking at the parents' binder pages 398-473, exhibits from Thrive Autism Solutions, the witness said there is a re-evaluation every six months, that the first was done 11-09-18, and looking at the Assessment of Functional Living Skills the Student was tested as to community participation skills, a wide range of things, such as basic communication, self-care, grooming, toileting, eating, an assessment based off what a typically developing child in a certain age range would be doing in those different skill areas, with benchmarks for those skills, such as brushing teeth with only verbal prompts, which would give less points than brushing them independently.<sup>2</sup> The witness said she did not have time in every evaluation to assess every skill, so as they work with the clients she tries to fill in some new categories and get new skills going every six months to make sure they are covering the whole picture. The witness said the second category was Basic Communication, and on the initial evaluation for the Student the witness focused mainly on Self-Management and Basic Communication, where there were definitely several gaps from what she observed and from information she obtained from the Student's mother. The witness said when she tested the Student on Community Participation Skills, Community Participation, Social Awareness and Manners, she saw a lot more skill deficits as to social interactions and knowledge of community safety type things. The witness said she looks through the initial diagnosis paperwork and reads what the physician or diagnostician was able to glean from their interactions with the Student to give the witness a basis for where the Student started, where the Student may still now be, looking at different levels applied to social communication and restricted behaviors they put the Student at a level two. The witness said that is in the middle of the road with autism, the Student still needs a bit of support. The witness testified that doing background information, the interview she does with parents, asking what home life is like, what school is like, what behaviors are they seeing in different areas, what things have been done in the past, that is the first section. The witness said they talk about education, what services are being provided by the school, what outside services are being provided, such as speech or occupational therapy, and when are those occurring, what interventions the child is receiving. The witness said then their assessment is done after that background. The witness said she does the AFLS, then emails out additional assessments to be done by the care givers. The Vineland, and she thought the insurance company requires the Pervasive Developmental Disorder Behavior Inventory, that the insurance company requires a lot of assessments prior to authorizing treatment.<sup>3</sup>

Looking at the Student's initial Treatment Plan, the witness testified the PDD Behavior Inventory is a rating scale for care givers to assess functioning levels of adaptive behaviors, maladaptive behaviors, with different domains, such as sensory behaviors, more stereotype or ritualistic behaviors, where the child falls in that range, and some social behaviors and expressive language is also assessed, just where the parent feels the child falls. The treatment plan was driven by the PDDBI, the PDD

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<sup>2</sup> Vol. I, P. 38, line 19, through P. 42, line 3

<sup>3</sup> Vol. I, P. 38, line 19, through P. 46, line 11

Behaviors Inventory from the teacher and parent.<sup>4</sup> Looking at the Teacher Score Report, the witness testified the first one she did was completed by the school teacher, but the witness was able to complete the second one which was due in the summer when the Student was not at school.<sup>5</sup>

The witness said the Treatment Plan for the Student was to hit the broad domains first, that Communications was a huge one, there were a lot of goals for communication, that Social Skills was another big deficit, so a lot of skills were written for that, that Adaptive Skills and self-management focused on more of those adaptive skills, the Student being able to take care of himself and be independent. Behavior was another big one, particularly on the second Treatment Plan after they really got to know the Student, the behavior excesses, the problem behaviors. The witness testified that from there they decide on instruction methods, that until they know a child well, she likes to check off more boxes than maybe are needed just to cover all the bases, that they check all the interventions thought relevant for each individual and then write the specific objectives. The witness said the Student was definitely verbal, but they focused on the Student using words instead of gestures and grunts as he was doing. The witness said they wanted to make sure there was a lot of motivation and reinforcement for the Student to use words and basic manners, be able to navigate his environment safely, and they wanted the Student to be able to ask for breaks at school, to be able to ask for alone time to calm down when needed, that sort of replacement behavior instead of problem behaviors.<sup>6</sup>

The witness testified that with autism children are not looking around their environment to pick up needed skills from others, so they need to be taught skills, with repetitive teaching of the same skill over and over, as they do not naturally generalize or maintain those skills, so the skills are taught over and over do it with different people, with different stimuli, to be applied in all environments.<sup>7</sup>

The witness testified consistency of care is important, so the Thrive team collaboration with the OT and speech therapists on goals care and goals would ensure similar goals and working in similar ways so the child is not confused and progress is delayed. The witness also said she contacted and collaborated with the Student's school team, but she did not know if the school team consistently implemented, or did at all, what the witness was implementing at Thrive as far as approaching the behavior goals.<sup>8</sup>

As far as the ABA therapy for the Student, the witness testified they had to submit it to the insurance company, to request a certain number of hours, and the maximum for this Student's age and insurance

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<sup>4</sup> Vol. I, P. 46, line 12, through P. 47, line 9, and  
Vol. I, P. 47, line 21, through P. 48, line 2

<sup>5</sup> Vol. I, P. 47, lines 10-15

<sup>6</sup> Vol. I, P. 47, line 21, through P. 51, line 21

<sup>7</sup> Vol. I, P. 51, line 22, through P. 52, line 22

<sup>8</sup> Vol. I, P. 53, line 10, through P. 54, line 14

company is 25 hours weekly, so that is what the witness requested in the first initial Treatment Plan, 25 hours of one-to-one direct therapy with the behavior technician. She said the ABA therapy provided by Thrive with the Student at first was kind of inconsistent with the times and days, then they thought they had the Student's schedule figured out. The Student has had very consistent technicians on his team, that they have gotten to know him well, that he is the kind of child you have to really get to know and build trust with before demands and targets are thrown at him. They had to work on antecedent and consequence strategies and learn what reinforcers worked and what motivated the Student, and the first six months was figuring how the Student was going to be most successful while putting in targets where the Student was having fun and did not even realize he was working.<sup>9</sup> The witness said they did quarterly progress updates on the Student, but they had to make sure the Treatment Plan they report on has been implemented for a month and then it is reported on progress from there.<sup>10</sup>

The witness testified there was a new Treatment Plan over the summer, where they redid all the assessments and wrote the new Plan, that the insurance company requires that either annually or every six months. The Vineland did not need to be redone, that is an annual assessment, but the PDDBI, the SRS and the AFLS were all updated for the most recent Treatment Plan, which is good until 10-31. The witness said she does update any current new things with the family, if someone moves out, if someone moves in, if things at school have changed, and she did change the Student's attendance dates at school because that was when they went to the Monday-Tuesday schedule.<sup>11</sup>

Talking about the PDDBI, the Pervasive Developmental Disorder Behavior Inventory for the Student in June, and looking at the parent scoring sheet, the witness said the parents' report showed they were definitely seeing skills, more success, at home than in other environments. Looking at the presence and severity of social impairment within the autism spectrum, the witness said the Student's T-score was an 86, meaning he is kind of in the severe range of social impairment, having deficits in social interactions with family, with peers, with siblings.<sup>12</sup> On challenging behaviors, the witness wrote the Student displayed aggression toward teachers, hitting and kicking in school, throwing items in the classroom and tantrums that could last up to two hours, which information was provided to the witness by his parents.<sup>13</sup>

The witness denied meeting with the Bentonville School District last summer or this year, but said she did meet with them last year. The witness said she was still recommending 25 hours per week of therapy, but that was not what they ended up requesting, since insurance companies are tricky, and

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<sup>9</sup> Vol. I, P. 57, line 24, through P. 59, line 11

<sup>10</sup> Vol. I, P. 59, line 12, through P. 60, line 1

<sup>11</sup> Vol. I, P. 72, line 7, through P. 73, line 20

<sup>12</sup> Vol. I, P. 74, line 20, through P. 77, line 1

<sup>13</sup> Vol. I, P. 79, line 10, through P. 80, line 15

due to restrictions in schedule, they only asked for 15 hours weekly, that the restrictions were not due to the insurance company, but due to scheduling restrictions with the Student's family. The witness said the Bentonville School District wanted the Student in school as much as possible, they were not resistant to the Student coming to therapy.<sup>14</sup>

Discussing that Thrive recommended 25 hours weekly of ABA therapy, the witness said she did not know if the parents agreed to 15 hours instead, it was just they decided 15 was more reasonable for the parents' schedule, their availability when they said they were available, with other therapies going on and school going on and family time, that they adapted to the parents' schedule to arrive at an agreement for 15 hours a week, even though the witness thought 25 was more appropriate.<sup>15</sup>

The witness agreed Thrive delivers ABA services after school hours, in the evenings and on weekends. The witness said the Student's parents did not bring the Student to Thrive for ABA services at any time other than during school hours, so it is the parents' choice to miss school and not bring the Student to Thrive or make the Student accessible by Thrive in hours other than school. The witness testified that they went into the homes of other children Thrive serves on a Sunday afternoon, or a Saturday morning, or after school, and agreed that if the Student's parents were willing to bring the Student to Thrive in those alternative times, the Student would not have to miss school. The witness said she was concerned about the Student missing so much school.<sup>16</sup>

As far as the Student missing school to attend ABA therapy, the witness said she thought they had at least one phone call with DHS back when it first began, and then they provided, in the summer I was monthly, and in the school year weekly, letters to the school and to DHS as to when the Student attended that week and what his hours of therapy were and why he was attending. The witness said she received a referral from Dr. Neaville for ABA therapy for the Student, and agreed it was medically necessary, opining that if the Student stopped ABA therapy now, there could be a regression in skills and maybe an increase in the problem behaviors.<sup>17</sup>

As far as Dr. Neaville, the witness said sometimes they get an actual letter from the referring physician, just without diagnostic information, just a letter stating they are recommending the ABA service, and looking at pages 194-196, a 06-21-18 office visit and progress note by Virginia Neaville, on page 195, under "Plan," the witness agreed it said the Student would be referred for ABA therapy "as per Mom's request." The witness said if this counts as a referral from Dr. Neaville, they would have all that documentation.<sup>18</sup>

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<sup>14</sup> Vol. I, P. 79, line 16, through P. 81, line 24

<sup>15</sup> Vol. I, P. 100, lines 5-23

<sup>16</sup> Vol. I, P. 100, line 24, through P. 102, line 12

<sup>17</sup> Vol. I, P. 81, line 25, through P. 83, line 19

<sup>18</sup> Vol. I, P. 86, line 19, through P. 87, line 19

Looking at page 195 in the parents' binder, one page out of the Merc, the Clinic Northwest Arkansas Medical notes, the witness read out loud number one under "Plan," reciting the Student "will be referred for ABA therapy as per his Mom's request," and the witness agreed that was not a medical diagnosis. The witness also agreed that Donna Van Kirk, who recommended the Student be evaluated for ABA services, was not a medical doctor. The witness also agreed that Dr. Neaville related the referral to Mom.<sup>19</sup> The witness agreed that to her knowledge they are required to have a medical referral for ABA therapy, and that oftentimes they would get a letter from Dr. Neaville, which usually states something to the effect of "this is the diagnosis and this is the treatment I'm recommending," or "referring to."<sup>20</sup>

When asked about the Student's progress the witness had seen in the year he has been having therapy, the witness said they were definitely seeing progress in the first six months, and even in the summer they saw reduction in problem behavior and increase in skills, that the Student was happy to be in sessions, he enjoyed the sessions and was working and having fun with them. The witness said in the last months or so, they definitely saw an increase in problem behavior, longer duration tantrums during sessions, which has hindered skills progress if they are managing a tantrum for an hour plus. The witness said this could be because of a lot of factors, she could not pinpoint which exactly.<sup>21</sup>

Looking at a psychological evaluation of the Student dated 03-21-18 by Donna Van Kirk, the witness said that would have been included in their initial intake paperwork on the Student.<sup>22</sup>

Discussing ABA therapy, the witness said, explaining the differential observing response and the functional communication training, that differential observing response is what they consider an antecedent strategy, so it happens before the behavior, that it is basically a way to cue an individual to the response you are looking for, maybe putting in prompts to cue what the response is, a strategy for things like that. Functional communication training is one they use later in the behavior reduction domain, teaching a functional way for the child to get his need met to replace the problem behavior, such as asking for a break instead of trying to get out of a task. The witness said with the Student, they know some of his kind of warning behaviors are, so they might tell him he may need a break, and he will respond. The witness said they also make sure there is social time set aside during the Student's day and that they are pre-teaching him social skills before going into those social engagements.<sup>23</sup>

The witness said the Student historically was in the mean area, if not lower, as far as the hierarchy of their clients, while recently he has displayed more problems so she would put him a bit higher than

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<sup>19</sup> Vol. I, P. 98, line 5, through P. 100, line 4

<sup>20</sup> Vol. I, P. 119, line 16, through P. 120, line 5

<sup>21</sup> Vol. I, P. 84, line 6, through P. 85, line 6

<sup>22</sup> Vol. I, P. 86, lines 4-14

<sup>23</sup> Vol. I, P. 88, line 8, through P. 91, line 19



her mean, as she has been called away more often to come help the Student's technician with the Student's problem behavior in the last few months, since school started, maybe the end of summer on.<sup>24</sup> The witness said her Treatment Plan projected five years of treatment for the Student.<sup>25</sup>

The witness agreed inconsistency is not good for a student with autism, that they want consistency, and that they got off to a rough start with the Student, as he would be at school a day, Thrive a day, school a day, Thrive a day. The witness agreed the school reached out and worked directly with Thrive to develop consistency, so now instead of going back and forth, the Student goes to Thrive Monday and Tuesday, and to school Wednesday, Thursday and Friday. The witness testified the Student is not brought to school Mondays and Tuesdays, which is the parents' choice.<sup>26</sup>

When asked if she did ABA therapy in the school setting in Northwest Arkansas since she had been employed by Thrive, the witness said a little bit with Rogers public schools, but it was not on her caseload now, it was on others'. The witness agreed Thrive predominantly delivers its ABA services either in the home or in the clinic setting. The witness said she did have some kids in private school.<sup>27</sup>

The witness agreed the majority of delivery of her services for her caseload is in the home or clinic, that it is documented, and that if they were going to be in the school, that will be documented. The witness testified as it pertains to the Student, the witness' recommended therapy is for in the clinic, in the Student's home, and in the community as necessary, and that locations are in every Treatment Plan.<sup>28</sup> The witness agreed that to the extent she is going to be concerned with the school setting, she is going to coordinate with the Bentonville Therapy Team, that she had been invited to and attending IEP and other meetings with Bentonville staff, and that those engagements were positive, no difficulty working with the Bentonville staff. The witness agreed that not only has she come into Bentonville schools, but the Assistant Director of Thrive, Brandon Thurman, has also come in, and the two of them have been invited in and worked with the IEP teams with respect specifically to the Student.<sup>29</sup>

The witness did not think of anything Bentonville schools has done to interfere with the delivery of services to the Student. The witness agreed she had not personally requested the opportunity to come in and provide the Student's ABA services in the school setting, nor was she aware of Thrive

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<sup>24</sup> Vol. I, P. 91, line 20, through P. 92, line 13

<sup>25</sup> Vol. I, P. 93, lines 8-13

<sup>26</sup> Vol. I, P. 103, line 7, through P. 204, line 12

<sup>27</sup> Vol. I, P. 105, line 7, through P. 106, line 4,  
P. 121, line 24, through P. 122, line 2

<sup>28</sup> Vol. I, P. 106, lines 7-23

<sup>29</sup> Vol. I, P. 106, line 24, through P. 108, line 1

making that request.<sup>30</sup> The witness said as far as seeing some regression in the Student, she had no answer or data supporting a specific reason, it could be a multitude of causes, and agreed it could even be things happening in the Student's home.<sup>31</sup>

Looking at page 410 in the parents' binder, the witness agreed it said intervention would be implemented in the clinic, the Student's home and in the community as necessary. The witness testified it went on to say that some of the goals, example, adaptive skills, independent play, behavior reduction, must be targeted to specific settings, and again gave the same three examples of location. The witness agreed to school was not listed, and that in terms of how they would approach school, it was going to be under the coordination of care, and that was going to be with the Bentonville Therapy Team. The witness agreed those engagements have been successful from her perspective.<sup>32</sup>

Looking at the PDD Behavior Inventories, starting on page 429, the witness agreed there was one from the witness and one from the Student's mother. The witness agreed there was a reference made to an inventory with [REDACTED] the interviewee, which the witness had seen, and said it meant nothing that she was listed as interviewee as opposed to rater, that was just the wording on the Treatment Plan as far as the witness knew, and agreed that [REDACTED] could not have been interviewed as opposed to given an instrument and asked to rate it. The witness did not know why, at least in the book, there does not exist that inventory from Jamie Cook.<sup>33</sup>

Looking at the District's binder, tab 48, pages 379 and 380, the witness agreed that was an email exchange between the witness and staff members of the Bentonville School District as to the Student. The witness said she believed [REDACTED] was the Student's teacher last year. The witness said she believed Angela Winfield was the school principal, but that she (the witness) was horrible with names. School counsel advised the witness Angela Winfield was the SPED lead. The witness agreed she had said in the email she was sorry the Student had a rough day after coming back from his Thrive sessions, and did not want his Thrive sessions to cause a regression or setback at school, that their goal was progress in all environments. The witness went on to say in the email she was requesting continued feedback in the Student's new schedule, and that she was absolutely open to looking at other session times, but that right then they were following the schedule provided by the Student's parents. The witness agreed she reiterated in the email they were flexible and wanted to make sure the Student was progressing across all environments. The witness agreed that was part of the coordination of care between Thrive and Bentonville schools, which is how it is supposed to work. The witness agreed the discussion was about the concern the inconsistency of schedule and the boomerang back and forth was negatively impacting the Student. The witness agreed she was concerned about the Student missing that much school, and that she was still concerned about it

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<sup>30</sup> Vol. I, P. 108, lines 2-11

<sup>31</sup> Vol. I, P. 108, line 12, through P. 109, line 2

<sup>32</sup> Vol. I, P. 109, line 3, through P. 110, line 10

<sup>33</sup> Vol. I, P. 110, line 11, through P. 111, line 11

today, but that she believed it is fixable. Looking again at the email exchange, the witness agreed she referred to having seen some refusal and frustration with harder tasks with the transitioning away from preferred activities, that she would love to give more details and hear about school, and asking if there was any time next week for that. The witness agreed this was at least happening in January of 2019 based on this email, and said the Student was missing significant portions of school. The witness agreed that occurred the entire Spring semester of 2019, so far to this date. When asked if the Student would do best in school environment if he actually comes to school, the witness said yes, if you are there, you make progress.<sup>34</sup>

The witness said she works with the Children's Therapy Team as well, and agreed that was 4 hours. Vol. I, P. 116, lines 19-23 When asked what she did to get into the schools, the witness said she did not deal with that, she is told when and there to go by the higher-ups at Thrive. The witness said when she first started at Thrive she was told they historically do not to into the Bentonville Public Schools to provide therapy, so that is why it would not be listed in her Plan of Care.<sup>35</sup>

The witness said in her perfect world view, on what they were going to do with the Student to make progress with the Student, she would love to go to school with all her kids, to be there with them and helping in all environments, but they are limited to what they can do, so she does the best therapy she can where she can.<sup>36</sup>

#### **FATHER**

The witness, Student's father, testified he graduated high school in 1991, went to MEPS in Little Rock and became a U.S. Marine where he enlisted and participated four years. He left in 1995 and went to Kenna Metal, he worked there approximately 17 years, until he decided to move to CNC Machining. The witness said he loves computerized machinery and always eager to learn to do more with it. He testified he has had a few different jobs, generally as a machinist, and has been with Precision Compacting Technologies now for close to a year and a half. The witness testified he is still in the military, 20 years in the Air Guard. The witness said sometimes his job takes him out of the area, his most recent military deployment was to St. Croix for about three months for hurricane relief, that before that he went to the United Arab Emirates for six months, and before that to Afghanistan for three months. The witness said since the children have been born, in the last 10 years he has had three deployments, and that sometimes he goes out for training, that he recently went to a Silver Flag, which is a special duty for civil engineers, which is what he is now, and that lasted 2 weeks in Germany. The witness also said he had been to 2 different schools, each for about six months. The witness said he is typically gone one weekend a month and two weeks out of the year, that the Silver Flag exercise

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<sup>34</sup> Vol. I, P. 111, line 12, through P. 116, line 12

<sup>35</sup> Vol. I, P. 118, line 4, through P. 119, line 11

<sup>36</sup> Vol. I, P. 122, line 8, through P. 123, line 10

is about every 3-4 years, and often that counts as your two-week obligation. The witness said he works days.<sup>37</sup>

The witness testified he has a stepson and a daughter who are in their 20's, so he has some experience with raising children before having the Student and his sister with the Student's mother. The witness said he and the Student's mother have been married 11 years, and he has watched the Student struggle on different levels, that in the beginning when upset or if he did not understand, the Student would curl up in a fetal position, for a long time he refused to speak, then he would point or grunt or say a word or two, but progressed enough to speak on his own, that even now he has a tough time communicating thoughts.<sup>38</sup>

Talking about the Student before and after ABA therapy, the witness testified that before this therapy the Student had a rough time in school, he could not harness his feelings and emotions and he would either hit or throw something, it could be at a teacher, another child, not deliberately, he just did not know what to do. The witness said at home there was only one time the witness saw the Student violent, but the witness calmed the Student down. The witness testified, as to behaviors at school, the Student would get belligerent and not be compliant. The witness testified that since ABA therapy the Student is far more compliant, he hears less complaints in the school, and it is getting less and less. The witness also testified the Student is progressing and communicates a lot better. The witness testified he has seen gradual social progress, that the Student is a real social child and it is easier for him to warm up to people than it was. As far as academic progress, the witness testified the Student can spell his name, can write it generally with coaxing and instruction for the letters, but sometimes he does not want to talk about school and being able to put the letters together to write his name on his own, he could not do it.<sup>39</sup>

Asked about what he attributes to the Student's progress or lack thereof, the witness said he did not have that answer, that he has attended a couple of the IEP meetings for the Student, and he hears nice things about progress, but that he sees very little from the Student.<sup>40</sup> The witness said it was his understanding that the school does not allow therapy to go into the school. The witness said he would like for the Student to get therapy in the school, and that it was his understanding there is a wait list for after school availability and it might take time for the Student to attend after school. The witness said he would like to have his family on the weekend, but if it helps the Student get better, the witness would sacrifice some of that time if it is available to the Student. The witness said he did not understand how it would be possible to get 25 hours of therapy in during the week and weekend.<sup>41</sup>

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<sup>37</sup> Vol. I, P. 125, line 3, through P. 128, line 11

<sup>38</sup> Vol. I, P. 128, line 12, through P. 130, line 11

<sup>39</sup> Vol. I, P. 131, line 18, through P. 136, line 22

<sup>40</sup> Vol. I, P. 137, lines 1-12

<sup>41</sup> Vol. I, P. 138, line 2, through P. 139, line 12

When asked where he got the information that Thrive had a waiting list for appointments outside of the school day, the witness said he asked his wife about it, and it was his understanding from her there was a wait list of up to a year and a half, that they are on the wait list, and that the reason his kids are missing two days a week in school is because Thrive has no openings in its schedule to see them otherwise.<sup>42</sup> The witness testified the therapy is paid for by his insurance, Tri-Care due to his being in the military.<sup>43</sup> The witness testified DHS had been to their home a few times, that it felt like a wellness check to look around the home, and he believes it is the school who sent them because of the Student missing some school, and said he believed it was because the Student is missing school when going to ABA therapy.<sup>44</sup>

The witness said since he works full time, his wife goes to the IEP and other meetings in his stead. The witness did not dispute what the documentation showed, that his wife did not attend the January 10, 2018 IEP meeting as to the Student, nor did she attend the December 2018 IEP meeting, but said he did not recall that his wife communicated with the school on those two occasions saying to go ahead without her and send her the paperwork.<sup>45</sup> The witness said he did think it important that one of them, he or his wife, attending the IEP meetings.<sup>46</sup>

As to his military deployment away from home, the witness testified that in the last calendar year, other than his two weeks a year and his weekend a month, he has missed no time at home, and his wife is not employed outside the home.<sup>47</sup> The witness testified he has a 2012 Nissan Frontier four-wheel drive vehicle, and his wife has a Chevy Trax, and the licensed drivers in the home are the witness and his wife.<sup>48</sup>

When asked if he could describe the difference between ABA therapies and strategies the school district itself might be employing, the witness said they are professionals and he was not real clear exactly what the school does that is in comparison to what they do, but he has seen a big, vast difference since they have been with the Student. When asked if he has any idea what kind of professionals the district has on its staff and that it employs, the witness said it was his understanding they have been to some kind of class to help with those kind of therapies, but not in the strict professional setting they say Thrive is. When asked where he got that understanding, the witness said he never heard anything personally from the school of what they specifically did, he had talked to his

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<sup>42</sup> Vol. I, P. 147, line 15, through P. 148, line 19

<sup>43</sup> Vol. I, P. 139, line 22, through P. 140, line 4

<sup>44</sup> Vol. I, P. 140, line 5, through P. 141, line 5

<sup>45</sup> Vol. I, P. 142, line 6, through P. 143, line 17

<sup>46</sup> Vol. I, P. 145, lines 19-21

<sup>47</sup> Vol. I, P. 149, line 5, through P. 150, line 20

<sup>48</sup> Vol. I, P. 151, line 1, through P. 152, line 15

wife about it, and his understanding is they went to a class to deal with children with problems, but not anything like what Thrive does.<sup>49</sup>

## MOTHER

The witness, the Student's mother, testified she has been a licensed insurance agent, property, casualty, life, health, variable, all aspects, a licensed medical care giver, and primarily an in-home care giver later on. The witness said she had given up her licenses since then, that she is medically disabled and no longer works outside the home.<sup>50</sup> The witness testified she did recall missing one or two IEP meetings, and said she remembered saying could they reschedule, that they would want to meet and she thought she was okay, but with MS and arthritis she did not know when she was going to have an exacerbation or if she is going to feel good today, then tonight is bedridden.<sup>51</sup>

By way of background information as to the Student, the witness said the Student from early childhood exhibited signs of the sensory processing disorder, autism, anxiousness, but since he had an older sister who was already diagnosed or being tested at that point, they held off official diagnosing the Student. The witness said the Student had problems from the beginning, that he met milestones as far as walking and rolling, but he did not talk, he was not affectionate or loving, that he was non-verbal prior to entering kindergarten, his communication was grunts, groans, yells, screams, hits.<sup>52</sup>

The witness testified that prior to getting ABA therapy, they had problems at home, but she did not think they had the extent of problems the school had. The witness said since starting ABA therapy, maybe one time she could think of in the recent year, two at most, that the Student had a fit at home.<sup>53</sup>

Asked about meltdowns by the Student at school, the witness said she is not at school when the Student is there, but that she has gotten papers from the school sent home saying the Student has cleared tables, thrown books, hits, kicks, bites, cleared off his teacher's books last year, and there were tantrums last year and the year before, but this year has been a little bit different. The witness said she did not think the Student ever really hit kids, that it was primarily aides and teachers. When asked if she has seen improvement in the Student since starting ABA, the witness testified she has seen improvement, that prior to ABA it was several times a week, up and down, to the point she felt like she was forced, pressured to medicate the Student to keep him calm. The witness said the Student was started off on a low dosage of medication, that she felt medication was the school's idea, as they

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<sup>49</sup> Vol. I, P. 145, line 25, through P. 147, line 3

<sup>50</sup> Vol. I, P. 153, line 18, through P. 155, line 25

<sup>51</sup> Vol. I, P. 156, lines 3-20

<sup>52</sup> Vol. I, P. 157, line 5, through P. 158, line 6

<sup>53</sup> Vol. I, P. 158, line 7, through P. 159, line 5

kept saying something needed to be done to calm the Student down, and that she was asked to call her doctor during a meeting with [REDACTED] she did not recall who else was present.<sup>54</sup>

The witness said she recalled several incidents where the school said they were having increased problems with the Student having meltdowns, that there was occasional destruction or property and injury to school employees, a teacher's hand was hurt, and the Special Ed supervisor said the episodes of aggression were unprovoked, so the witness said she did not feel there was any other option but to medicate the Student. The witness testified it seemed to help, but she remembered a phone call about two months after starting the Student on medication saying in their opinion it needed to be increased. The witness said she said no, that any medication needs a full 90 days before you even start to think about reacting, and not to ask her again. The witness said she gave Dr. Neaville permission to speak with the school about medication for the Student and to share records with them.<sup>55</sup>

The witness testified the Student was in a Special Ed classroom when he first came into school, he got 90 minutes of speech and the rest of the time he was in the General Ed classroom. 2,010 of General Ed.<sup>56</sup> The witness testified the Student improved some in second grade, after he and his sister were separated, and he was basically in the Special Ed classroom all day, that it was improving because he was not in the fetal position, not as many fits.<sup>57</sup>

The witness testified she had been told there was no Behavior Plan in place for the Student, that [REDACTED] both said there was no Behavior Plan in place. The witness testified she had been told they put the Student in a time-out, put him in a chair, make him miss recess, that it is in the classroom with the teacher.<sup>58</sup>

The witness said they learned about the Student's behaviors at school by the sheets the school sends home, there were tally marks setting out different occurrences, all unprovoked, getting up to 162 in one day, and there was a note about medication. The witness said when she first began giving the Student medication it was in the evenings, but it took the Student a long time to go to sleep, and he would be up at 2-3 a.m. and then when she tried to wake him at 5-5:15 a.m. to get ready for school he was asleep again, then would wake up and get to school, then would fall asleep. The witness said after calling the doctor, they changed the medication to 7 a.m. and the Student's sleeping patterns went back to normal.<sup>59</sup>

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<sup>54</sup> Vol. I, P. 160, line 23, through P. 163, line 20

<sup>55</sup> Vol. I, P. 164, line 7, through P. 166, line 21

<sup>56</sup> Vol. I, P. 168, line 21, through P. 169, line 2

<sup>57</sup> Vol. I, P. 170, line 13, through P. 171, line 5

<sup>58</sup> Vol. I, P. 172, line 18, through P. 173, line 14

<sup>59</sup> Vol. I, P. 174, line 8, through P. 177, line 25

Explaining what she had to do to get ABA therapy for the Student, the witness testified it was brought up at some point at a pediatric visit with Dr. Neaville and the Student's behaviors, that all his issues would be critical to his well-being, his growth, his maturity, to learning, to everything, and when she was told ABA would be critical, her first question was for insurance to pay for it, it has to have a referral, and the doctor said do you want a referral and the witness said that she said yes, if it is critical.<sup>60</sup>

Looking at the third tab in the blue book, pages 194-196, a medical office visit documentation 6-21-19, for Mercy Clinic Northwest Arkansas, [REDACTED] the witness testified by way of background that [REDACTED] had been both her younger children's pediatrician for around six years, and she had seen the Student for quite a while. The witness testified that during one of the visits, because of the Student's problems with behavior and problems at school, it came up that ABA is very beneficial and helps teach a child behavior tricks, how to get along, how to go through society, that it would be critical to the Student with all his meltdowns, all his anger and issues to have ABA therapy. The witness said she then asked for a referral, as for Tri-Care to pay, it has to be medically necessary and/or a referral. The witness confirmed that on page 195 of the exhibit, it has a plan that the Student will be referred for ABA therapy per mom's request. The witness said that referral had to go to the provider of choice, in their case Thrive, that it had to be sent like a prescription or an order form, that it was a very long, drawn-out process, that Tri-Care sent something to [REDACTED] wanting more, and it went back and forth.<sup>61</sup>

The witness testified that before she got the referral from [REDACTED], she was referred to [REDACTED] for the Student to have a psychological evaluation, and that on pages 197-200 is that evaluation. The witness testified she shared that with the school, it was dated 3-21-18, and that she has shared every evaluation and every report that she has been given. The witness testified that the school would have had this back in September when they did a re-evaluation and looked at all the evidence. The witness testified she did not recall when she gave it to them, but if it was dated and then mailed out within a week or two weeks, upon receiving it from [REDACTED], she turned it over to [REDACTED] both had copies in person within a week of the witness' receipt.<sup>62</sup>

The witness testified she secured occupational therapy and speech therapy evaluations and she received ABA evaluations and recommendations and reports.<sup>63</sup> When asked why she sought out private therapy instead of getting it at school, the witness testified because upon every request she was denied to bring ABA, speech, occupational therapists of her choice. The witness said the Student has had therapy outside school as well as inside school for as long as she can remember, preschool.<sup>64</sup>

<sup>60</sup> Vol. III, P. 152, line 7, through P. 153, line 5

<sup>61</sup> Vol. III, P. 153, line 7, through P. 155, line 9

<sup>62</sup> Vol. III, P. 155, line 10, through P. 156, line 11

<sup>63</sup> Vol. III, P. 156, lines 15-18

<sup>64</sup> Vol. III, P. 157, line 20, through P. 158, line 18



As to how much therapy has been recommended for the Student consistently by the Children's Therapy Team since the Student has been in school, the witness testified it is 120 minutes for speech, but that she did not understand why the school district did not provide that, that they never listened to her, as she brought evaluations. The witness testified she did not know what the 90 minutes of speech therapy was based on. The witness testified she did not know why the Student was not getting 120 minutes of OT in school. The witness testified the Student has always been taken out of school to get OT and speech therapy prior to getting ABA therapy. The witness testified she was not turned in to DHS for the OT and speech therapies, that it was explained to her that the school attended has the choice to report it as excused or unexcused, it is entirely up to the principal.<sup>65</sup>

Discussing the IEP developed and the evaluation done by the District on page one, and the District book saying something about the witness being ill that day, the witness denied telling them to go ahead with a meeting where they were going to explain evaluations to her and develop a new IEP, saying she thought it was going to be just a data review or progress reports, like the Student's time in class.<sup>66</sup>

The witness testified she had never missed a meeting where evaluations are shared, that she would never intentionally miss that meeting. When asked about what kind of participation the witness is allowed in developing an IEP, when they bring an IEP in that is already typed up, she is given a copy at the meeting.<sup>67</sup>

The witness said she did not feel she had a voice about wanting ABA therapy, that no matter how many times she has asked for Thrive, for Bentonville Therapy Team, for provider of her choice into the school, she is shot down immediately, it is not an option.<sup>68</sup>

The witness recalled being in a meeting with DHS and the School District as to educational neglect, and [REDACTED] was the investigator who did a home investigation, asked the witness and her husband, the Student's father, why the Student was missing so much school (as well as his sister), and the witness testified she showed [REDACTED] all the documents, and [REDACTED] was the one who requested the meeting at the school and came in to the witness' defense and said she felt it was necessary that the absences should be excused for the therapy.<sup>69</sup> Referring to why the Student's IEP could not be modified to reflect he was receiving ABA therapy, the witness said it was still the School District's stance that it was not medically necessary, that they teach ABA type technique in the class is how she

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<sup>65</sup> Vol. III, P. 158, line 19, through P. 161, line 17

<sup>66</sup> Vol. III, P., 161, line 18, through P. 162, line 7

<sup>67</sup> Vol. III, P. 162, line 8, through P. 163, line 8

<sup>68</sup> Vol. III, P. 163, line 23, through P. 164, line 8

<sup>69</sup> Vol. III, P. 164, line 9, through P. 165, line 16

thought it was referred to, and that because an ABA technique is taught in the class, they do not have to allow outside therapists because of liability.<sup>70</sup>

Looking at the District book, page 1971, as to the Student's attendance and FINS petition, March 28, 2019, where the first bullet point said that ABA services were provided previously through qualified school personnel, and data showed the Student progressed to the point where these strategies were no longer necessary for him to access appropriate academic education, the witness testified she saw nothing as far as proof to support that, and she was not told about ABA services that were going on.<sup>71</sup>

Explaining why she reduced the Student's ABA therapy time from the recommended and insurance approved 25 hours to 12, the witness testified there was simply not enough time in the day for the Student to do it in school, after school, on the weekend, and that actually it was 29 because of the speech and OT. The witness testified even she saw there was a problem with check out times and days the Student was out, it was hard to establish a routine, so several people had a meeting at the school, [REDACTED] were there from Thrive, and Monday and Tuesday was brought up to do everything on those two days and then the Student would have three uninterrupted days at school a week.<sup>72</sup>

The witness testified she thought everything was fine at that point, until DHS showed up. The witness testified that what happened next, as far as the 12 hours, they kept going on through the remainder of the year.<sup>73</sup>

Looking in the parents' binder at a May 14, 2019 letter from Thrive, the Clinical Director, to the Bentonville School District, page 555, the witness identified it as one of the papers provided for the Student's therapy excuse, being To Whom It May Concern, and testified she would have turned it over to the school, to [REDACTED] [REDACTED] we co'd everybody [REDACTED] and she attached the excuses, she believed weekly, maybe every two weeks, for each time attended.<sup>74</sup>

Looking at page 552, a letter of September 20, 2017 from [REDACTED] To Whom It May Concern, the witness testified [REDACTED] verified both the Student and his sister were enrolled in Osage Creek Elementary, they were both students served in the 1:15 classroom, they have an autism diagnosis, and the mother had provided to the school that her physician required clinical-based therapies outside of school-based therapies and the mother had indicated she had tried to obtain therapy times outside the school day, without success. The witness read the letter also said she [REDACTED] had spoken with the provider and they are attempting to find times outside of school, that

<sup>70</sup> Vol. III, P. 165, line 22, through P. 166, line 13

<sup>71</sup> Vol. III, P. 163, line 23, through P. 168, line 1

<sup>72</sup> Vol. III, P. 169, line 9, through P. 171, line 1

<sup>73</sup> Vol. III, P. 171, line 3, through P. 172, line 14

<sup>74</sup> Vol. III, P. 172, line 10, through P. 173, line 5

if the mother is summoned to court due to the children missing in the afternoon for therapy, she would go with her to the provider about this, and it was signed [REDACTED]. The witness testified that was before Thrive. The witness testified there as no problem with the children attending OT and speech therapy at Centerton Gamble, that [REDACTED] the principal, had the right to overrule any IEP team according to the IEP team, it was explained to the witness that even if they have recommendations or believe a child needs whatever service, the principal has a right to overrule that.<sup>75</sup>

The witness testified it was her understanding that the two FINS petitions filed in the Student's second grade year were both about the ABA therapy, speech and occupational therapy.<sup>76</sup> Looking at a letter on page 552 dated 3-5-19 from the Assistant Principal at Osage Creek Elementary, discussing absences, after the meeting where the witness testified she thought everyone was on the same page, saying she had violated the conditions of an agreement granting special arrangements, the witness testified she did not know what they were talking about, since the Student attended ABA, speech and occupational therapies on Monday and Tuesdays.<sup>77</sup>

Looking at page 550, a document from Arkansas Medicaid dated 5-3-19, the witness identified that as something from their insurance company that she keeps receiving, she thought it is the portion that Tri-Care has not paid that Medicare or Medicaid or TEFRA was to pay, but it was denied and says she is responsible.<sup>78</sup>

The witness said in November, right before the Student started ABA, he was doing things like growling, refusing to follow directions, kicking and refusing per documentation, and those were the things the witness was hearing about.<sup>79</sup> The witness testified she remembered getting discipline reports on the Student in March and April of 2019 as to behavior, like hitting the para in the legs with a jacket, refusals, his speech and not going with the therapist, being off-task, and the witness said time lost being off-task was not made up to her knowledge.<sup>80</sup>

The witness said she did not see the same behaviors at home she was told about happened at school, and in her opinion it was because the Student had no control or stability outside of the home. The witness said to see that out for the Student, she had met with the school, the school district, the school board, with what she thought was the superintendent, to fight the rezoning, the moving of schools, the changing of teachers, everything in general. The witness said the Student is only in third grade.

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<sup>75</sup> Vol. III, P. 174, line 4, through P. 175, line 13

<sup>76</sup> Vol. III, P. 175, line 20, through P. 176, line 7

<sup>77</sup> Vol. III, P. 176, line 8, through P. 178, line 16

<sup>78</sup> Vol. III, P. 178, lines 17-25

<sup>79</sup> Vol. I, P. 178, lines 3-10

<sup>80</sup> Vol. I, P. 178, line 24, through P. 183, line 5

and has been in three different schools, each farther from home than the last, each one a change in teacher, bus, kids, friends.<sup>81</sup>

The witness testified she believed ABA therapy was first brought up by [REDACTED] who said it would help the Student, so they began pushing for it. The witness agreed [REDACTED] sent or asked the witness to go get a psychological evaluation done. Looking at a psychological evaluation done by [REDACTED] on 3-31-18, the witness agreed the diagnosis is on 199 and said the Autism Spectrum Disorder was discussed with her, and that it is different for different people. The witness agreed that [REDACTED] recommended the Student be evaluated for Applied Behavior Analysis services, which the witness said would teach the Student how to interact and live and communicate and function in the world, everything from how to tie his shoes, brush his teeth, hygiene, how to interact with people, social skills, etiquette classes.<sup>82</sup>

The witness testified [REDACTED] ordered ABA, and at that point a prescription was sent, the witness thought by Dr. Neaville, since it had to be sent by a medical doctor, not a psychiatrist or psychologist, and that the witness handed it over to the IEP team and asked that they put the ABA, the speech, and the occupational therapy, as the prescriptions were written, into the Student's IEP. The witness testified ABA, speech and occupational therapy were denied to be put in the Student's IEP, as not medically necessary. The witness testified the insurance company agreed it was medically necessary and agreed to pay for it.<sup>83</sup>

The witness agreed the Student was evaluated by [REDACTED] in March, then in November they had to go through Dr. Neaville, then they had to go find Thrive.<sup>84</sup> The witness testified the Thrive services began around the first week in January.<sup>85</sup> The witness testified they have a secondary insurance, TEFRA, which is a type of Medicaid.<sup>86</sup>

The witness agreed that she did attempt to have ABA therapy integrated into the Student's school day, that she made several requests with the IEP team, with the school, with the assistant principal, she thought the principal was in there on at least one of those meetings that they requested Thrive and/or Bentonville Therapy Team come in and do the therapy at the school so the Student and his sister would not have to miss. The witness testified she gave the school every letter, every prescription that [REDACTED] has written or given, the same for [REDACTED] all of her reports, and signed papers and forms for them to be able to interact with each other, to talk to one another. The witness testified she

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<sup>81</sup> Vol. I, P. 186, line 17, through P. 187, line 16

<sup>82</sup> Vol. I, P. 187, line 17, through P. 191, line 15

<sup>83</sup> Vol. I, P. 191, line 17, through P. 193, line 2

<sup>84</sup> Vol. I, P. 195, lines 3-7

<sup>85</sup> Vol. I, P. 196, lines 4-9

<sup>86</sup> Vol. I, P. 201, lines 5-6

also gave the school the Thrive evaluations, each to the school, either to Ms. Jamie Cook or Ms. Angela Winfield.<sup>87</sup>

The witness testified there were three Thrive evaluations she took to the school.<sup>88</sup> When asked about there being no documentation of her asking for ABA therapy, the witness testified she did not remember when she asked for ABA therapy, but said it was every time they had a meeting at the school. IEP meeting with the DHS investigator, even when she came to that school meeting, they requested that ABA and Bentonville Therapy Team be integrated into the school district.<sup>89</sup>

The witness testified DHS came to IEP meetings because they were brought up on educational neglect through DHS for excessive absences due to ABA therapy, that they were unexcused absences. The witness testified that the school district, the IEP team, would not allow Thrive to come into the school. The witness testified that to her understanding, the school district has an ABA or BCBA, the actual therapist at the district office, but there is not one in school, that they are taught on an applied behavioral like learning statute, that they look up on the Internet and they are told the types of things we do for ABA kids, so therefore they are going to model their teaching efforts after that. The witness said she had no data to support they have been using ABA methods with the Student.<sup>90</sup>

The witness testified she started pushing the school for ABA during the Student's first grade year, around January, and was told they did not allow outside therapy or outside entities into the school, that it was a liability reason.<sup>91</sup>

The witness testified when insurance approved the therapy, they tried getting them in, and they were denied, so they began taking the Student out for therapy to Thrive. The witness testified that [REDACTED] t, then [REDACTED] both came to a meeting at school and offered to come into the school, and it was shot down, that meeting being after it started, and the school was concerned about the Student's excessive absences last school year, second grade.<sup>92</sup>

Discussing the Student's 2<sup>nd</sup> grade report card, for the 2018-2019 school year, page 474. absences from school, the witness agreed that the first semester, before ABA therapy began, the Student was not being counted absent when the witness took the Student out early, and he was only out one day that first semester, then the third quarter he missed 15 days, being absent when he was taken out of school those two days for therapy. Discussing page 478, the Student's second quarter report card

<sup>87</sup> Vol. I, P. 201, line 9, through P. 202, line 13

<sup>88</sup> Vol. I, P. 202, line 14, through P. 203, line 3

<sup>89</sup> Vol. I, P. 203, line 20, through P. 204, line 4

<sup>90</sup> Vol. I, P. 204, line 5, through P. 205, line 9

<sup>91</sup> Vol. I, P. 208, line 10, through P. 209, line 1

<sup>92</sup> Vol. I, P. 209, line 2, through P. 210, line 1

narrative reflecting the Student reading at first grade level, 2018-2019 during the second grade year, the witness said she had not seen that, but knew the Student was behind.<sup>93</sup>

To contrast the Student's progress from before he began ABA therapy and before he began school this year, the witness testified the Student is no longer totally nonverbal, he is more active, more loving, more caring, more interactive with peers, friends, teachers, her, his dad, that he is starting to tell jokes now, which he never did before, they are dumb to the witness but she laughs because he is trying; that behavior-wise he is sweet, loving, respectful with not just her and his dad, but his older brothers, older sisters, his friends' parents, that it seems the only problem they hear negative are from the school district.<sup>94</sup>

As to her husband's deployments as to why she is not getting ABA and the other therapies outside of school, the witness testified that she understands a deployment to be outside the U.S. jurisdictional waters longer than a certain period of time, and that although he has not deployed in two years, he leaves every month, not the same weekend a month, that when he was in Texas about a year and a half ago, he was there six months but it was not a deployment because he was stateside. So, the witness testified they cannot plan ABA therapy in the home and cannot provide for all that because of her husband's schedule, his work schedule, their schedule. The witness testified that her husband, the Student's dad, did not say in his testimony he went to Texas very recently, he didn't say he was in Fort Smith for two months just a few months ago, because of hurricane needs, he did not say he went to Germany for three weeks, he didn't say he had gone to Florida a second time, and just because he is not deployed does not mean he is home.<sup>95</sup>

The witness testified she had tried to make arrangements to have these therapies after school, but they are considered on the wait list and she was told it would be approximately summer of 2020 at the earliest before a position would become open, that she has an email from them as to that.<sup>96</sup>

The witness looked at parents' exhibit as to speech therapy logs of the school on the Student from kindergarten, first and second grades, and for the OT logs the District furnished showing the OT minutes the Student received for kindergarten, first and second grades, and said those are the data she took from those logs, you can look down the columns to see the minutes, for example, 2,515 minutes of speech therapy and 2,640.<sup>97</sup>

Discussing the Student's IEP for kindergarten and the fact it said permission was given for the Bentonville School District to bill her insurance, the witness said it was only good for one year and

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<sup>93</sup> Vol. II, P. 181, line 21, through P. 183, line 10

<sup>94</sup> Vol. II, P. 183, line 11, through P. 185, line 11

<sup>95</sup> Vol. II, P. 185, line 22, through P. 187, line 21

<sup>96</sup> Vol. II, P. 187, line 24, through P. 188, line 8

<sup>97</sup> Vol. II, P. 188, line 25, through P. 191, line 15

it was her understanding she had to re-fill forms every year.<sup>98</sup>

As to why the witness could not take the Student to therapy in after-school hours, describing and clarifying when her husband gets home, the witness testified the her husband works both jobs Mondays, and he can get home anywhere from 10 to 11:30 p.m.; Tuesdays, Wednesdays and Thursdays he is home by 3:15 to 5 p.m.; Fridays he works both jobs, he is home roughly at midnight; on Saturdays and Sundays he leaves about 1:30 and comes home, she believed his shift gets out at 10 p.m., so, she rarely sees her husband between the time school lets out and 10 p.m., she might see her husband after school Tuesdays, Wednesdays and Thursdays, sometimes not until 5 p.m., Fridays she does not see her husband until midnight, and Saturdays and Sundays he is gone the entire afternoon and evening.<sup>99</sup>

The witness agreed she has a vehicle and is able to drive and that she is able to let people in her home, so she has the capability if a Thrive therapist comes and knocks on the door between 1:30 p.m. and 10 p.m. on Saturday and Sunday, to let them in, so there is nothing that has anything to do with her husband's Guard service or deployments that have any impact on her ability to let her children receive ABA therapy from Thrive without interfering with her husband's schedule or being impacted by his afternoons, Saturday afternoons or Sunday afternoons. Then the witness testified that, as to why she was not arranging for Thrive during those hours, she is disabled, part of her medical conditions, she cannot do all of that, that was one of the reasons, that there were several reasons, that she was on a wait list, her husband was deployed, and testified that she explained all of them to the school numerous times.<sup>100</sup>

Discussing the Student's absences, the witness clarified that when the Student was attending Centerton Gamble and she was not turned in to FINS, she was not taking the Student out for two full days a week, that all she was doing there was checking the Student out at 1:30 or 2 in the afternoon a couple of days a week, that despite her earlier testimony, she was not doing anything similar at Centerton Gamble that she is now, which is checking the Student out two full days weekly, which is substantially different.<sup>101</sup>

As to the witness' earlier testimony she met with the Bentonville School Board, she testified she had several meetings with [REDACTED] was at a few, they had the therapist, it was the meetings to discuss the Student's progress, and when advised she had not met with the School Board, she testified she thought that was who she was meeting with, that the IEP team is the School Board, was it not. The witness recalled yesterday's testimony that she had met with the superintendent, and said that she was told she was speaking with the superintendent, [REDACTED]

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<sup>98</sup> Vol. II, P. 195, line 25, through P. 198, line 11

<sup>99</sup> Vol. II, P. 203, line 15, through P. 205, line 19

<sup>100</sup> Vol. II, P. 205, line 20, through P. 207, line 6

<sup>101</sup> Vol. II, P. 207, line 11, through P. 208, lines 8-17

However, [REDACTED] was present at this hearing and advised the witness she is not the superintendent. The witness testified Ms. Sharp and she met at the Bentonville school, maybe Student Services Offices, it was when the witness was fighting the re-zoning from going from Centeron to Osage, and she kept saying no, it was not allowed, because whatever reason they were moving, that she had told [REDACTED] she disagreed and wanted to go to the next level, and [REDACTED] said she was the highest person to talk to, what she said goes, her decision was final. When asked if she knew who the School Board members are, the witness testified she thought the team she met with at the school a few times a year, and she did not know the process that school board members are elected by a formal election in November yearly by the patrons of the Bentonville School District. The witness said she did not vote at School Board elections.<sup>102</sup>

When asked if she had any written documents other than pages 194-200 to support her assertion the Student's private ABA therapy is medically necessary, the witness testified there is one from Dr. Neaville, there are two medical documentation in here from medical doctors that show ABA is needed, and that the medical doctors are [REDACTED] and the psychologist, the psychological doctor, [REDACTED]. Looking at pages 194 and 195, the witness was asked to point to any language where [REDACTED] states the Student medically needs ABA therapy, and her testimony was to read in the first full paragraph where [REDACTED] said she, the mother, was quite concerned. Vol. II, P. 213, line 10, through P. 214, line 19. Then, looking two sentences later, the witness agreed that [REDACTED] actually attributed the Student's recent adjustment to overall interaction with the family appearing to have improved over the past year since the Student's mother had extensive medical issues in the past, but had improved, and the children's adjustment mirrored this improvement.<sup>103</sup>

Looking at [REDACTED]'s report on page 199, the witness agreed that the last paragraph said that due to special therapies, educational accommodations and parental guidance, the Student had made developmental gains. Looking at page 200, the recommendations, the witness agreed that with her consent a copy of the report was faxed and it was recommended the Student be evaluated for Applied Behavior Analysis therapy.<sup>104</sup> The witness confirmed that it was Thrive that did the evaluation for ABA therapy.<sup>105</sup>

When asked if she remembered the District asking for releases of [REDACTED] medical records, the witness testified she signed several releases.<sup>106</sup>

The witness confirmed, looking at page 207, an 8-17-17 record that said release of information forms were completed by the mother to allow communications between the clinic and the school system

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<sup>102</sup> Vol. II, P. 209, line 8, through P. 211, line 12

<sup>103</sup> Vol. II, P. 217, lines 13-23

<sup>104</sup> Vol. II, P. 217, line 24, through P. 219, line 25

<sup>105</sup> Vol. II, P. 220, lines 1-3

<sup>106</sup> Vol. II, P. 224, line 13, through P. 225, line 4



regarding educational planning and medical diagnoses, that there would be an attempt to call the Student's teacher, [REDACTED], during the next week, and looking at 202 she signed releases for [REDACTED] to talk to the school or release records to the school district, and testified that to the best of her recollection those releases were filled out every year.<sup>107</sup>

[REDACTED]

The witness [REDACTED] testified she is the Director for Special Services for Bentonville Schools, which includes Special Education services. The witness testified she is familiar with the Student's records, that she began employment a year ago in October, so has completed almost two years. The witness testified she gathered the records in this case, and was not surprised the box of records for the Student had 3,078 pages.<sup>108</sup>

The witness testified the Department of Ed requires she document what happens in IEP conferences with a Notice of Action sent to the parent, and agreed she is required to send out a Notice of Conference also.<sup>109</sup>

Asked to look at the Notice of Action dated May 15, 2017, the witness read from the document what occurred at the meeting: that the team met to discuss the Student's progress, determine eligibility for extended school year services, develop a new IEP, and review occupational therapy evaluation; that the Student would have 600 minutes weekly in General Ed, paraprofessional support for all minutes in General Ed; 1,350 minutes weekly in Special Ed for reading, math, written expression and adaptive behavior and 90 minutes weekly of speech/language therapy, to give him a total of 1,440 minutes weekly of Special Education; he would also receive 30 minutes weekly occupational therapy; the Student was eligible for specialized transportation to and from school daily; the Student's mother expressed concerns about the Student being reasoned for Osage Creek Elementary, reporting the Student does not do well with change and will have a difficult time adjusting to new situations/settings, reporting the Student's pediatrician agreed that would impede their progress; the Committee discussed that, in reviewing the criteria for the least restrictive environment, that also includes the Student being able to attend the school he would normally attend if non-disabled, which school would be Osage Creek Elementary School, his zoned school.<sup>110</sup>

Referring to a Notice of Action dated 1-10-18, the witness read from the document as to Explanation of Action that the committee met as a provision of FAPE to complete an annual review of the Student's IEP and to determine if ESY services were needed for the Student. The witness explained

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<sup>107</sup> Vol. II, P. 229, line 10, through P. 230, line 4

<sup>108</sup> Vol. II, P. 7, line 18, through P. 10, line 2

<sup>109</sup> Vol. II, P. 10, line 20, through P. 11, line 7

<sup>110</sup> Vol. II, P. 11, line 8, through P. 13, line 23

that the review six months after development of an IEP 5-15 at the end of kindergarten was because of a change in schools for the Student.<sup>111</sup>

Looking at the IEP goals, the witness testified that putting in direct instruction in social skills would normally have a time put in, and the total amount of Special Ed minutes was 1,640. The witness testified OT is a related service as far as Special Ed minutes and whether it counts as Special Ed depends on where it is pulled from, so she would assume the remaining minutes were outside the Student's OT therapy in the General Ed setting.<sup>112</sup>

The witness testified the Bentonville School District bases its week off of 2,110 minutes, and there has been an adjustment in start and end times, so give or take 10 minutes, amounting to some 35 hours a week or so, approximately 7 hours a day.<sup>113</sup>

The witness discussed the purpose of the Notice of Conference dated 9-25-18 was to conduct an Existing Data Review as part of an initial evaluation, or re-evaluation was checked at the top, and to collaborate with outside therapies. The witness agreed "collaborate with outside therapies" meant therapies the Student was getting, like OT and speech therapy, outside school. Looking at the list of names invited to that meeting, the witness said [REDACTED] was the psych examiner for that school, that [REDACTED] was listed under "Other," and she was the speech and language pathologist. The witness testified she did not see the name of the OT. The witness testified she did not see the names of the people from the Children's Therapy Team on the list. The witness testified she knew their names, as they (Bentonville) work closely with them, and the ABA therapist is Brooke Burnett, but she did not personally know the Children's Therapy Team doing the speech or occupational therapy. Looking at the Notice of Action the witness read that the Student's educational committee met to discuss possible re-evaluation for planning and programming purposes; it was determined a comprehensive evaluation needed to be completed in the areas of cognition, achievement, adaptive behavior, speech/language therapy and occupational therapy; and that classroom observations, curriculum-based assessment, teacher input and parent input would also be included.<sup>114</sup>

The witness testified she did not know whether [REDACTED] report was in the school documents, but said she did know [REDACTED] was referenced in a lot of the documents. Vol. II, P. 33, lines 18-24. As to an evaluation dated 3-21-18, the witness confirmed no receipt stamp on it, and stated as far as it being in the School's records, she did not know how they got it, that there are different ways they receive documents, a parent can bring them or the School can request records.<sup>115</sup>

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<sup>111</sup> Vol. II, P. 19, line 16, through P. 20, line 20

<sup>112</sup> Vol. II, P. 23, line 22, through P. 27, line 18

<sup>113</sup> Vol. II, P. 27, line 19, through P. 28, line 8

<sup>114</sup> Vol. II, P. 29, line 10, through P. 32, line 15

<sup>115</sup> Vol. II, P. 33, line 18, through P. 37, line 15

Looking at the Notice of Action on pages 1905-1906, 12-12-18, the witness read the document, saying in the Explanation of Action, the Student's educational committee met and reviewed the results of his completed re-evaluation; that it was determined on the basis of that review, the Student continues to qualify to receive Special Education services under the eligibility category of autism in all academic area, adaptive behavior skills, speech/language therapy and occupational therapy; that the committee updated the Student's IEP; that he would receive specialized instruction in reading, written expression and math; he would also receive support in the area of adaptive behavior, and he would continue to receive speech/language therapy and occupational therapy. The witness testified that evaluation conference was to review the evaluation results.<sup>116</sup>

Referring to the Explanation of Action, the witness read the document, stating that the educational committee met and reviewed the results of the student's completed re-evaluation. The witness agreed that there was nothing on the Notice of Conference to indicate whether or not Dr. Van Kirk's evaluation was considered.<sup>117</sup> The witness testified they reviewed the evaluation results and updated the Student's IEP on 12-12-18.<sup>118</sup>

Looking at the Student's second grade IEP developed 12-12-18, the witness testified she did not see the parents' signature, that the parent is a required member of the IEP team, and the District is required to make efforts to make sure the parent attends the meeting. The witness testified the phone call from the parent was on 12-12-18, listed under Parent and Guardian Input section, which listed per a phone call on 12-12-18 the parent was unable to attend and indicated she was fine to let the meeting be held without her, said she did not feel well. The witness testified marks indicating "Mailed 12-13-18" and "Per phone call 12-12" were signed by [REDACTED].<sup>119</sup>

Referring to the Notice for the 5-16-19 conference, the witness testified the parent requested to dismiss therapies. The witness read the Notice of Action of the 5-16-19 conference, reciting that the Parent requested therapies be discontinued in the school setting, that she was providing speech and occupational therapy evaluation from Children's Therapy Team, that the occupational therapy school OT requested to speak with the outside therapist; that the speech therapy report was reviewed by school SLP, that articulation goals were similar; there was some correlation on language goals, but not all; pragmatic goals given in school were discontinued at outside therapy; the therapist agrees to determine if it meets FAPE needs; that a release was signed by the parent for Children's Therapy Team consultation, and the parent requested her insurance not be billed.<sup>120</sup>

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<sup>116</sup> Vol. II, P. 39, line 25, through P. 41, line 1

<sup>117</sup> Vol. II, P. 43, line 13, through P. 44, line 9

<sup>118</sup> Vol. II, P. 44, lines 10-17

<sup>119</sup> Vol. II, P. 44, line 21, through P. 49, line 14

<sup>120</sup> Vol. II, P. 50, line 12, through P. 52, line 20

Discussing the parent's request for therapy discontinuing, the witness testified she remembered requesting the records from Children's Therapy Team so they (the District) could look at them and see if they were denying FAPE, since in order to discontinue, you have to determine whether you are denying FAPE. The witness said they had the speech and OT evaluation only, and they needed records for the progress notes also, that having evaluations and looking at progress is not the same.<sup>121</sup>

The witness testified they needed the progress notes to determine whether or not the IEP goals were the same, and that was why they signed a release for the Children's Therapy Team to consult with them, as they did not know the progress at that point, that this was May 16, about the end of the Student's second grade year. The witness testified you can see the speech therapist report was reviewed by the SLP, who determined that in that report the articulated goals that the school had and the outside therapist had were similar, and there was also a correlation in the language goals, but not all of them, and the pragmatic goals given in the school were discontinued at outside therapy.<sup>122</sup>

The witness agreed there was a problem with the Student missing school to go to ABA therapy, and agreed the District filed two FINS petitions with DHS. The witness testified they changed the Student's schedule for the OT and the speech and asked the parent if there was a way they could have consistencies in the days they were present, and they changed to get the therapies on Mondays and Tuesdays, but there was still an issue as that did not meet the compulsory attendance. The witness testified the purpose of the IEP was to look at the provisions of FAPE, and in order for the District to say a child could miss the therapies outside of the school, they had to look and see if OT and speech the Student was receiving outside also met what was going on at school, and that was why the report of reviewing the outside therapies, to see if they did discontinue the OT and the speech, that it would not be a denial of FAPE if the Student only received them in the outside therapies.<sup>123</sup>

When asked if the IEP team had the authority to allow the Student to go and attend his ABA therapy, the witness responded it was possible.<sup>124</sup> When asked if the IEP team had the authority to exempt the Student from the regular school discipline policy, the witness responded they did.<sup>125</sup>

The witness testified Ms. Birge asked for Thrive to come to the school to provide the ABA therapy there. The witness testified the IEP team would have the authority to allow that. When asked why they did not do that, the witness responded the Student was on a Tier 2 intervention for behavior, they did not have ABA in the district, and the Student's Tier 2 interventions from his teacher had to be in place before they could move to a Tier 3, where usually they would go ahead and move into a formal Behavior Support Plan. The witness testified Bentonville did not conduct a Functional Behavior

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<sup>121</sup> Vol. II, P. 53, line 23, through P. 56, line 1

<sup>122</sup> Vol. II, P. 56, line 2, through P. 57, line 5

<sup>123</sup> Vol. II, P. 57, line 16, through P. 62, line 4

<sup>124</sup> Vol. II, P. 62, lines 8-11

<sup>125</sup> Vol. II, P. 62, lines 12-15

Assessment or put in place a Behavior Intervention Plan, but they did put in behavior supports, behavior goals, in the Student's IEP.<sup>126</sup>

The witness testified she remembered a meeting with Thrive, but could not state if it was an IEP meeting or just a meeting with them.<sup>127</sup> The witness testified she knew that there was a meeting she did not attend to address the Student's absences, and she knew there was a DHS meeting that talked about the absences.<sup>128</sup>

Looking at an email string, an email from [REDACTED] at Thrive, to [REDACTED] 2-6, where the witness was copied, the witness agreed it said she wanted to pass on a request from the Student's mother that asked she and [REDACTED] were invited to the meeting next week, as she stated that she wanted them to attend, and that they were looking forward to developing a plan that would benefit the Student in all environments. The witness testified she did not know the purpose of the meeting, and agreed that [REDACTED] asked to look at the Student's behavior data from school, but the witness said she did not know whether or not she got it. The witness agreed [REDACTED] sent the progress report, and looking at an progress report, 11-20-18, the witness said she also saw one right after that email from Feb. 6, 2019, and the range of the report is from 1-16-19 to Feb. 6, 2019, the author being [REDACTED] data that came with the email. Looking at page 403, the witness agreed it said [REDACTED] an, her program director, and she would be attending the meeting tomorrow, which would be Feb. 12th. The witness testified it was Angela Winfield's obligation to document IEP meetings and send out the Notice of Conference when they are going to have an IEP meeting. The witness testified as to a February 12<sup>th</sup> meeting being a parent meeting, but was not aware of any documentation thereon.<sup>129</sup>

Looking at a March 7<sup>th</sup> email from [REDACTED] who works for DHS, the witness agreed she was copied on that email. The witness also testified that a statement the school was not at liberty to exempt any student from following the established Bentonville Schools Attendance Policies was not accurate, as there are some exceptions to that. As to a meeting requested by Ms. Lohr, the witness testified she was not present, but the witness read the document [REDACTED] wanted an exemption from the Bentonville Schools Attendance Policy. The witness agreed the Student missed 17 days due to ABA therapy, OT and speech therapy between January 8 and March 28<sup>th</sup>, agreed the document recited the Student's mother maintained she had referrals from medical professionals to support the need for those therapies, and agreed she (the witness) had witnessed those referrals from [REDACTED] for ABA therapy. The witness did not recall if she was made aware of the referrals or the medical necessity of the Student attending OT and speech therapy for the amounts of therapy needed outside of school. The witness said the document reciting "Stance, Osage

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<sup>126</sup> Vol. II, P. 62, line 16, through P. 64, line 14

<sup>127</sup> Vol. II, P. 70, lines 7-8

<sup>128</sup> Vol. II, P. 71, line 14-24

<sup>129</sup> Vol. II, P. 72, line 8, through P. 76, line 22

Creek staff does not support or recommend missing school for parent-elected therapy," was not discussed with her.<sup>130</sup>

Referring to the records produced in this case, when asked about a point saying that Thrive Therapy offered to schedule ABA therapy to the Student's family at a time that did not interfere with school hours, but the mother elected to schedule during school hours for reasons related to personal and family convenience, and whether the witness had any personal knowledge or had seen a document to support that point, the witness testified it would take her a bit, but she could find an email where it does support that.<sup>131</sup>

As far as 35 hours time in school and the recommended therapy time, and time for the ABA, speech and occupational therapy, the witness testified she knew Thrive offers weekends.<sup>132</sup>

The witness agreed the Student needs ABA therapy in order to benefit, and said the District supports the science of behavior, which is the ABA methods. The witness further testified that while she did not have an answer for whether it helped the Student in the second grade, the progress notes from Brooke helped them see that there was some progress. When asked if she thought the District made progress before ABA, the witness testified through the Student's IEP goals that progress is noted, yes, that he had behavior goals.<sup>133</sup>

As far as the Student's IEP's, the witness testified there were two different schools, Centerton Gamble Elementary in first grade, and the Student would be under the first IEP until they met in December to devise another one at Osage Creek. The witness testified there were goals set out in both IEP's, and agreed the document shown did not set out much progress.<sup>134</sup>

When asked what the District would point to show progress the Student has made, the witness agreed he would have looked at the progress on those IEP goals as a source, but agreed none was shown on the IEP's.<sup>135</sup>

Asked to recall the testimony in this case of [REDACTED] and the graphs she talked about that would show progress the Student made, and then asked if there was anything she disagreed with as far as progress the Student made, the witness replied in the Thrive setting, no, she did not. Looking at an April 1<sup>st</sup> email from the witness to the parent, the witness testified she did remember writing it.

<sup>130</sup> Vol. II, P. 77, line 15, through P. 81, line 12

<sup>131</sup> Vol. II, P. 83, line 22, through P. 84, line 6

<sup>132</sup> Vol. II, P. 84, line 11, through P. 85, line 16

<sup>133</sup> Vol. II, P. 86, line 18, through P. 87, line 25

<sup>134</sup> Vol. II, P. 88, line 1, through P. 97, line 18

<sup>135</sup> Vol. II, P. 98, line 8, through P. 99, line 15

The witness testified they look to see if a child meets the criteria of the exceptions to the District policy on attendance. The witness testified they were not provided with a medical referral at the IEP meeting. The witness testified that it is possible an IEP team make a ruling that the Student could receive ABA therapy outside of the public school setting during public school hours. When asked why an IEP meeting was not held to determine whether the Student needed the ABA therapy to benefit from his instruction at school so he could have outside therapy during school time, the witness replied that the IEP committee heard from Thrive that they were willing to do it in the evening, which is why the IEP committee did not convene to do it during school hours. When asked why Bentonville School District does not allow Thrive to come and provide the Student ABA therapy onsite, the witness said one of the reasons is that they value the instructional time as well, making sure the Student has all the minutes that they looked at in the documents, making sure he is not pulled out of the instructional time for the ABA therapy. The witness agreed that she had heard of speech and OT therapy being integrated during the classroom, and said they could do that with ABA, and their curriculum supports it as well.<sup>136</sup>

The witness agreed that whether an absence is excused or not, it is still an absence, meaning the Student is not in the building, and the Student is not coming to school on Mondays and Tuesdays, and even if she said today they would call those excused absences from now on and not call DHS, it does not solve the problem with respect to the Student being in school getting an education.<sup>137</sup>

When asked what reason the Student's mother gave the District for not allowing the Student to have his therapy with Thrive outside of school hours, the witness replied the mother said it would interfere with family time with she and her husband. The witness testified the Student's mother was always concerned that the Student's father would be deployed, and they did not want to take time away from that. The witness testified she heard the testimony in this case that the father has not been deployed in almost two years, and that he had a full-time job, so was not spending afternoons at home. The witness testified the Student's mother never said the reason she could not take the Student after school was because Thrive did not have space for him. The witness agreed that Thrive said they could be flexible and get the Student in at that time, and the witness agreed this was just a parents' choice to take the Student out of school two of the five days a week.<sup>138</sup>

The witness agreed that when determining progress, they are trying to determine whether the Student needs these supports to have access to his Special Education, and are looking at his progress not only in behavior, but also in his academics. Looking at tab 134 in the District binder, the Student's December 2018 IEP in the second grade year, the witness testified the Student was making progress in English language arts, written expression and comprehension and had mastered both of those, he had mastered all three goals for sight words, but progress was not being made on behavior related to self goals. The witness testified that when anything was discontinued, it was in favor of new goals

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<sup>136</sup> Vol. II, P. 99, line 23, through P. 107, line 16

<sup>137</sup> Vol. II, P. 108, lines 3-23

<sup>138</sup> Vol. II, P. 108, line 24, through P. 110, line 3

usually, and there was a new IEP. The witness testified the Student was progressing in math, mastering two of the four goals, he mastered all three goals in occupational therapy, and he was progressing in English language arts, phonics and speech/language therapy. The witness agreed the District collaborated with Thrive for the Student's benefit, but testified private ABA therapy service was not needed for the Student to access his Special Education, and that is shown by the documents. The witness testified the IEP team designed a plan of supports for the Student to have access to his Special Education, and not only did he access it, but he progressed.<sup>139</sup>

The witness testified that if a social skill is imbedded in a goal, there would not necessarily be separate minutes listed for the social skill. The witness testified it would not be unusual at all to do an extended school year analysis after a break, as they are looking for regression, so measuring from before Christmas break to after Christmas break would be typical, so the earlier questions to this witness about doing the analysis in January, that would be normal.<sup>140</sup>

When asked if the decision by the IEP team is to do a comprehensive evaluation, would that mean you would naturally include all services the student is receiving, the witness replied that was correct, and testified you would not have to have an OT present, that "comprehensive" means just that.<sup>141</sup>

Looking at page 1725 in the District's book, tab 124, the witness agreed she recalled the questioning to her suggesting that the District never considered the input of the Student's medical team, the witness read, under Previous Evaluations on 1725, that on September 28, 2016, the Student's educational committee met to review his progress and new information from his physician, [REDACTED], that [REDACTED] had diagnosed the Student with autism September 12, 2016, that the educational committee made the decision to change his Special Education category to autism, and that he began receiving services to address reading, written expression, math and adaptive behavior supports in addition to his speech/language and occupational therapy services. So, the witness testified the committee received the information, evaluated it and took action based thereon.<sup>142</sup>

The witness testified it is common in the District to at least start preparation of an IEP document in preparation for the meeting and then re-draft and adapt it as the meeting goes.<sup>143</sup> The witness testified that if a parent requests that outside therapists or providers be included in an IEP meeting or other conference, they are invited by the District, so for any meeting where a therapist did not attend, we know by conclusion the parent did not request it.<sup>144</sup>

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<sup>139</sup> Vol. II, P. 110, line 4, through P. 113, line 25

<sup>140</sup> Vol. II, P. 114, lines 5-24

<sup>141</sup> Vol. II, P. 114, line 25, through P. 115, line 10

<sup>142</sup> Vol. II, P. 115, line 11, through P. 116, line 22

<sup>143</sup> Vol. II, P. 117, lines 17-21

<sup>144</sup> Vol. II, P. 117, line 22, through P. 118, line 4



Looking at page 1909 under tab 136, under Explanation of Action, the witness testified the first sentence said the parent had requested that therapies be discontinued in the school setting, and that that was considered by the District, but it was rejected because the District requested the records from the outside therapies to review them so they could determine if it was a denial of FAPE to have the outside therapies substitute for the in-school, and they concluded it would be a denial of FAPE to discontinue the therapies as requested by the parent.<sup>145</sup>

The witness testified that in the context of "she" is providing speech and occupational therapy evaluations from the Children's Therapy Team, "she" referred to the Student's mother, who prospectively provided the evaluations, and then there was a request for additional records. The witness testified the occupational therapy was received, and they asked for the progress notes, but they did not receive the progress notes on speech. The witness said her understanding what that was the first time the parent asked that her insurance not be billed.<sup>146</sup>

As to the meeting in February of 2019 with Thrive, looking at page 379, under tab 48, the witness confirmed that [REDACTED] stated in that email to the District she was concerned about how much school the Student is missing. The witness further confirmed that [REDACTED] said on page 380 she was absolutely open to looking at other session times, they were flexible and wanted to be sure the Student was making progress across all environments, but right then they were following the schedule provided by the parents.<sup>147</sup>

Looking at page 386, the witness was not able to tell who requested the meeting, but testified the meeting did take place, an informal meeting to collaborate with Thrive.<sup>148</sup>

Looking at page 753 in the District binder, tab 89, the witness identified the document as an email from Jamie Cook, the self-contained classroom teacher, to [REDACTED] at Thrive, and it was also sent to [REDACTED], the lead at Osage Creek. The witness read that the email stated there was some of the data she had for the Student from school; from his last IEP date, 12-12-18, to the day before he began being absent two days weekly, 1-16-19, his adaptive behavior percentage were, objective number one, appropriately comply with three or less prompts, 85 percent; objective number two, interact appropriately (expected behaviors), 73 percent; objective three, work toward completion of task or assignment in required time frame, 78 percent; from 1-16-19 to 2-11-19, objective number one, 69 percent, objective number two, 67 percent, objective number three, 75 percent; it said she was going to scan and email what she received from the school OT and the Student's report card narratives accompanying the Student's IEP goals each quarter; it also said when she looked at the regression behaviorally and academically, part of her concern was the lack of instructional time, that each school

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<sup>145</sup> Vol. II, P. 118, line 5, through P. 119, line 17

<sup>146</sup> Vol. II, P. 120, line 16, through P. 121, line 22

<sup>147</sup> Vol. II, P. 121, line 23, through P. 122, line 20

<sup>148</sup> Vol. II, P. 122, line 21, through P. 123, line 14

day was 420 minutes, that when the time is added from the early checkout days, Monday and Tuesday, plus all of Wednesday and Thursday, General Education times such as lunch and recess, school-based OT and speech are taken out, she had only 560 instructional minutes with the Student each week; and it said they would love to discuss alternatives to the missed school time, thanks so much, and was signed Jamie Cook. The witness agreed it was a fair characterization that pulling the Student out two days weekly was hurting him.<sup>149</sup>

When asked if the District had ever received anything informing them that private ABA therapy is medically necessary for the Student to access his Special Education, the witness said no, and confirmed that [REDACTED] is not a medical doctor. The witness said she was present yesterday when Dr. Neaville's records were reviewed, that simply said the parent asked to be referred to ABA.<sup>150</sup> The witness said she had not seen anything from a medical doctor saying either that the Student needs private therapy at Thrive, ABA therapy, to access or benefit from Special Education in the Bentonville School District, nor had the witness seen any evidence to suggest the Student requires private ABA therapy to benefit from Special Education in the Bentonville School District.<sup>151</sup>

When asked why they go through a Tier 2 before doing a Functional Behavior Assessment, the witness testified they have a Response to Intervention in Bentonville School District which was written by, at that time, their BCBA was [REDACTED] and she developed the system so they could look at Tier 1, Tier 2 and Tier 3; when they looked at the documentation showing the behaviors the Student had, she worked with the team for a Tier 2 intervention, so they applied a Tier 2 before going to a Tier 3 Behavior Support Plan, and the District's BCBA worked specifically on the Tier 2 plan for the Student. The witness said based on all the data reviewed, she believed it had been successful, and she believed the Tier 2 is appropriate for the Student, no need to go to Tier 3.<sup>152</sup>

The witness testified attendance was addressed with the Student's mother before the FINS petition was filed, but she refused to bring the Student to school instead of taking him out two full days a week. The witness said even after the FINS petition was filed, the Student's mother did not decide to bring the Student to school.<sup>153</sup>

Looking at page 1504, tab 99, [REDACTED] opinion of March 2018, the last paragraph on that page, before the Student began receiving ABA therapy at Thrive, the witness confirmed it said that due to special therapies, educational accommodations and parental guidance, the Student has made developmental gains. Then, two paragraphs before that, the witness confirmed it said that the

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<sup>149</sup> Vol. II, P. 123, line 17, through P. 125, line 10

<sup>150</sup> Vol. II, P. 125, line 11, through P. 125, line 22

<sup>151</sup> Vol. II, P. 126, line 18, through P. 127, line 2

<sup>152</sup> Vol. II, P. 127, line 3, through P. 128, line 1

<sup>153</sup> Vol. II, P. 128, lines 2-14

Student's mother and Dr. Neaville provided extensive medical and educational records documenting the Student's ASD diagnosis and interventions.<sup>154</sup>

The witness said she gathered the records for the purpose of today, but did not sit down and read the 3,000+ pages in preparation for her testimony today, that in fact she did not know she was going to testify today, and did no analysis of all of the data to try to answer specific questions today.<sup>155</sup>

The witness testified she was aware that children in the Bentonville School District receive ABA therapy from Thrive, that they do not get their therapy during the school day, but rather after school and weekends.<sup>156</sup> \*

With regard to earlier questioning of this witness concerning when an IEP team has the authority to exempt a student from the District attendance requirements, and had the witness seen any basis for the Student to receive an exemption based on his attendance during the school day of private ABA therapy at Thrive, the witness responded no.<sup>157</sup>

Referring to the Student's second grade IEP, the witness confirmed it was developed before or around the time the Student began ABA therapy, and the witness read the Student's needs, that he was inconsistent in his academic skills, while he could read and write CVC words, he was inconsistent, he was unable to write more than one sentence about a topic, and was inconsistent with adding and subtracting over ten; his behaviors affected his learning and performance significantly, he refused and was noncompliant the majority of the time, his refusals were in the form of growling, grunting, putting his head down, tearing up work, hitting, kicking and sometimes screaming; during two weeks of data collection in September 2018, he had over 100 refusals per day. The witness confirmed that the Student's behavior significantly impacts his learning according to his IEP.<sup>158</sup> The witness testified she knew Lindsey Lovelady, she was hired by the District, and she is a BCBA.<sup>159</sup> The witness testified they had an evaluation from Thrive as to the Student and ABA therapy, and records from Dr. Neaville stating she was referring the Student for ABA therapy.<sup>160</sup>

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<sup>154</sup> Vol. II, P. 128, line 15, through P. 129, line 11

<sup>155</sup> Vol. II, P. 129, line 24, through P. 130, line 15

<sup>156</sup> Vol. II, P. 131, lines 15-22

<sup>157</sup> Vol. II, P. 132, line 17, through P. 134, line 6

<sup>158</sup> Vol. II, P. 136, line 17, through P. 138, line 6

<sup>159</sup> Vol. II, P. 138, lines 7-11

<sup>160</sup> Vol. II, P. 139, lines 8-14

The witness confirmed she did believe the Student needed some ABA therapy.<sup>161</sup> The witness testified it was her understanding that no IEP meeting was ever held where everyone came together to discuss the absences or need for ABA therapy, where all those people were invited and the District and the IEP team considered those issues.<sup>162</sup>

The witness agreed ABA therapy for the Student did not begin until January 2019, and said that looking back at the progress numbers, pages 183-189 under tab 132, progress in many categories by the Student prior to ABA therapy is shown.<sup>163</sup>

The witness agreed, as to invited guests and people for IEP and other meetings, there could be an additional answer to her earlier one that if someone was not there, the parents did not invite them, that they could just have chosen not to attend.<sup>164</sup>

[REDACTED]

The witness [REDACTED] testified she is a speech/language pathologist, having a Master's degree and a Certificate of Clinical Competence. The witness testified she has been a speech pathologist for a little over a year, and is employed by Children's Therapy Team. The witness testified she has been treating the Student since June of 2018, and that she looked over the records of other speech therapy the Student had for reference before she began treating him.<sup>165</sup>

The witness testified she received her Certificate of Clinical Competence five months ago, in May of 2019, so she did not have that Certificate the first year she worked with the Student, which means at the time she recommended the 120 minutes weekly she did not have her Certificate of Clinical Competence. The witness testified the 120 minutes she recommended weekly would not change based upon learning the Student was getting minutes by another provider. The witness testified she had never worked in a school environment.<sup>166</sup>

The witness testified she had never observed the Student in class at the Bentonville School District. As to her testimony about behaviors the Student exhibited at school, the witness testified before he comes to her, the occupational therapist told her what the Student's mom said, this happened at school, so any information the witness has about what the Student did or did not do at school would be from the Student's mom. The witness testified she had not asked for any records or data from the

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<sup>161</sup> Vol. II, P. 142, lines 15-25

<sup>162</sup> Vol. II, P. 144, lines 2-8

<sup>163</sup> Vol. II, P. 144, line 15, through P. 147, line 7

<sup>164</sup> Vol. II, P. 150, lines 3-18

<sup>165</sup> Vol. III, P. 5, line 22, through P. 6, line 20

<sup>166</sup> Vol. III, P. 27, line 6, through P. 28, line 23

Bentonville School District. The witness testified she thought the Bentonville School District has asked for her records and her data, but she was not sure, that the front desk staff handles those requests, and if the correct paperwork is there, they just send it off. The witness testified she had never visited with the speech pathologist from the Bentonville School District.<sup>167</sup>

The witness agreed, looking at Volume One, tab 73, district page 626, that it was an email from [REDACTED] at the Bentonville School District to the witness, saying [REDACTED] was working with the Student for speech therapy in the school setting, and saying she would like to set up a time to discuss the Student's progress in speech therapy at TEAM, as well as collaboration in regard to the Student's plan of care and goals. The witness agreed it did not look like she responded to the email. The witness agreed it would be important for the Student for the witness to collaborate with the Student's school speech/language pathologist, and did not know if anyone ever responded.<sup>168</sup>

When asked the legal basis of the therapy she provided, the witness testified they use the insurance guidelines to qualify the Student for therapy, and then they wrote a report and got it sent to the doctor and the doctor approved what they recommended, and agreed they qualified the treatment based upon insurance guidelines, what insurance mandates, what they will cover.<sup>169</sup>

The witness testified that in their setting, the clinicians determine the need and amount of therapy based on parent report, standardized testing, clinical judgment, observations, all that, and usually it is insurance that pays. The witness testified as to the documentation she prepares for her therapy, the guidelines used for the documentation that she is going to prepare, she uses the Treatment Plan she created when she did the evaluation, she uses those goals, but she follows the requirements of the insurer.<sup>170</sup>

When asked about the Student's most recent evaluation, the witness testified the Student was evaluated for speech back in December of last year, and based on his scores, he qualified for expressive and receptive language goals and other goals to help with articulation, that he has a phonological disorder, and they recommended twice a week to help address those issues. The witness testified some of the weaknesses are formulating grammatically correct and coherent verbal and written sentences, following directions of increasing length, following complex directions, answering comprehensive questions from passages and sentences, recalling sentences from verbal presentation, and then sound intelligibility at all levels, like understanding what he is saying.<sup>171</sup> The witness testified she was one of the two therapists

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<sup>167</sup> Vol. III, P. 11, lines 11-14

<sup>168</sup> Vol. III, P. 30, line 6, through P. 32, line 23

<sup>169</sup> Vol. III, P. 35, line 12, through P. 36, line 5

<sup>170</sup> Vol. III, P. 36, line 18, through P. 10

<sup>171</sup> Vol. III, P. 7, line 17, through P. 8, line 12

who did the Student's evaluation currently used to provide therapy for the Student, that she wrote part of it and did part of the evaluation.<sup>172</sup>

The witness testified the other person who evaluated the Student on the report besides the witness was [REDACTED]s. The witness said [REDACTED] has her Certificate of Clinical Competence, but she did not supervise the witness, and the witness pointed out there were four signatures because [REDACTED] had also been supervised, as with certain insurance, you have to have the CCC's for a couple of months without a co-signature, the [REDACTED] was [REDACTED] supervisor and [REDACTED] was the witness' supervisor.<sup>173</sup>

Explaining the Student's testing and general language capabilities and communication skills, the witness testified the Student really needs speech therapy, that he would benefit from it, and that overall he has profound delay. The witness testified that the categories for speech delays are age-appropriate, normal, mild, moderate, severe, then profound. The witness testified both the Student's receptive language and his expressive language are both profound.<sup>174</sup> The witness explained the Student's testing as to his oral language expression, and testified it is profoundly delayed also.<sup>175</sup> The witness testified the Student's articulation proficiency testing shows a moderate articulation delay.<sup>176</sup>

Discussing her recommendations from the strengths and weaknesses shown on testing results, the witness testified the recommendation was two times a week for 60 minutes, for a total of 120 minutes weekly. The witness said she did not know the Student was getting other therapy at the time, and had she known, that would not have gone into the mix, as she thinks the Student benefits from speech therapy, she has seen progress in him.<sup>177</sup> The witness testified she has been with the Student since June of 2018, and there were behaviors such as swiping things off her desk, throwing a chair, refusal to do anything, but it got better.<sup>178</sup>

The witness testified since the Student has been having ABA therapy, she has not communicated with the ABA Thrive team, then looking at a letter on page 549, the witness said she signed that letter, she was not sure it was getting sent to the school, and that she believed it was this year, that it discussed the Student has a medical diagnosis and the services he receives through her team were medically

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<sup>172</sup> Vol. III, P. 8, line 25, through P. 9, line 9

<sup>173</sup> Vol. III, P. 39, line 7, through P. 40, line 8

<sup>174</sup> Vol. III, P. 9, line 10, through P. 12, line 24

<sup>175</sup> Vol. III, P. 13, line 6, through P. 14, line 12

<sup>176</sup> Vol. III, P. 14, line 25, through P. 16, line 2

<sup>177</sup> Vol. III, P. 16, line 3, through P. 18, line 10

<sup>178</sup> Vol. III, P. 19, line 18, through P. 20, line 21

necessary. The witness agreed she would have gotten that information from some kind of doctor's prescription.<sup>179</sup>

The witness testified she used positive reinforcements for the Student, to which he responds well most of the time, and that he is showing progress.<sup>180</sup> Discussing the Student's clarity of speech now versus when he began, the witness testified she is a familiar listener, so she can understand him, and others can understand him a little bit more. As far as the Student's progress to date, the witness testified she has not made any recommendations other than the 2 hours of therapy that is medically necessary for him.<sup>181</sup>

When asked how she would rate the Student's current ability to communicate, zero to ten, putting his ability at 5 when he began with the witness, the witness said she would put him at an eight, that he has made so much progress in the last year she has been treating him, significant progress. The witness testified that eight rating did not include articulation, and starting with a five, on that she would move the Student down to a seven.<sup>182</sup>

The witness testified she was not aware an individual can be eligible for private therapy but not school-based therapy.<sup>183</sup> The witness testified she did not know whether the Children's Therapy Team, or anyone, like the mother, had asked the Bentonville School for them to be able to come over and observe the Student.<sup>184</sup>

[REDACTED]

The witness [REDACTED] testified she is an occupational therapist, receiving her doctorate at Murphy College of Health Sciences in Virginia, she has been practicing in pediatrics for the last two years at Children's Therapy Team, and holds CPR and Advanced Life Support certificates.<sup>185</sup>

The witness testified she has been treating the Student for almost the past two years at Children's Therapy Team in an outpatient setting, and she has seen a lot of progress.<sup>186</sup>

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<sup>179</sup> Vol. III, P. 20, line 22, through P. 22, line 7

<sup>180</sup> Vol. III, P. 24, line 17, through P. 26, line 1

<sup>181</sup> Vol. III, P. 26, line 5, through P. 26, line 25

<sup>182</sup> Vol. III, P. 43, line 22, through P. 45, line 21

<sup>183</sup> Vol. III, P. 38, lines 3-13

<sup>184</sup> Vol. III, P. 42, lines 12-25

<sup>185</sup> Vol. III, P. 47, lines 10-24

<sup>186</sup> Vol. III, P. 47, line 25, through P. 48, line 5

Looking at the blue book, pages 289 through 326, the occupational therapy evaluations of the Children's Therapy Team, as well as the school district, that have been done on the Student, starting with the most recent evaluation done 12/3/18, an occupational therapy re-evaluation, the witness testified that she and another occupational therapist named Cody who also treated the Student in an outpatient setting and contributed to this evaluation, looked at the standardized tests, the Berry and the BOT performed, the three subtests, and on visual motor integration the Student demonstrates minimal delay, but significant delay in motor coordination, significant delay meaning the Student is negative 1.5 standard deviations below, very outside the mean and very low for his age/level.<sup>187</sup>

The witness testified they also did the PEDI test and the sensory profile, which are both parent reports. They gather information based on observations mom or dad has seen at home to add to their evaluation. The PEDI looks at a measure of self-care skills, getting dressed by himself, brushing his teeth, being able to tie his shoes, to compare to children of his age, and the Student had a negative four, indicating a significant delay in self-care. On the social function test, the Student's score indicated a significant delay for following one or two-step directions, using one or two words together with meaning, playing with peers, those type things. The IADL, Independent Activities of Daily Living, is the ability to function in the community-based setting, going to the store, getting something from the cash register and so forth, and academic skills like writing his name, letters, words, those type things. The BOT looks at fine motor skills and manual dexterity and coordination skills. Fine motor integration is the ability to replicate simple shapes, and the Student had significant delay. The Student had moderate delay in the manual dexterity test, how well he is able to use his hands together and speed and accuracy. The Student had significant delay in upper limb coordination, such as the ability to catch a tennis ball, dribble a tennis ball, throw a ball at a target with accuracy and such.<sup>188</sup>

The witness testified as to the Sensory Profile that it gives a measure of how the Student is able to interpret information through his senses, which is a parent report, so those scores which show definite difference indicate the Student is misinterpreting the information he gains through his sensory system or does not have appropriate responses toward them, so that impedes his ability to participate in daily life.<sup>189</sup>

The witness testified she came up with the 120 minutes per week for her Assessment and Treatment Plan based off her clinical observation and the results of standardized testing and clinical judgment. Her recommendation was 2 60-minute sessions weekly.<sup>190</sup> The witness testified the Student's mother told the witness the Student was receiving ABA therapy from Thrive on Mondays and Tuesdays.<sup>191</sup>

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<sup>187</sup> Vol. III, P. 48, line 6, through P. 50, line 3

<sup>188</sup> Vol. III, P. 51, line 12, through P. 55, line 5

<sup>189</sup> Vol. III, P. 60, line 25

<sup>190</sup> Vol. III, P. 63, line 23, through P. 64, line 19, and Vol. III, P. 69, lines 14-15

<sup>191</sup> Vol. III, P. 65, lines 20-23



The witness testified she provided a letter at the request of the Student's mother for DHS saying the Student had a medical diagnosis of autism and the services he received through TEAM were medically necessary given the Student's scores on the attached OT and speech therapy evaluations, that the Student received those services to facilitate age-appropriate functioning in his daily life, and it also set out the deficits in the Student's OT and that he had improved.<sup>192</sup>

The witness testified that, looking at the District's evaluation 4-17-17, and whether or not it was similar to hers, the raw scores on the school-based evaluation indicate a ten, and the raw scores on the Berry VMI on the current evaluation indicated a nine, but she would have to look at the Z-score to determine if it is significantly different or not, and there was no Z-score on the school's report. As to the VMI, the witness testified the numbers were 73 on the school evaluation and 74 on the TEAM OT evaluation, only one higher, so that would be a slow progress. The witness testified on visual perception the raw score was higher on the school-based valuation and lower on the OT evaluation, not showing progress in that area. The witness testified on motor coordination the school-based evaluation was 45 and 62 on the TEAM evaluation, indicating progress there. As to age differences and increase or decrease in ability, when going from a raw score to a standard score, and whether or not her rating scale has a weighting component based on age, the witness testified it is based off of kids that are the Student's age. The witness agreed she could accurately compare the scores off the Z-score, but would need to have her manual to convert from raw score to a standard score to see what the weighted score would be.<sup>193</sup>

When asked if she could attribute the Student's cooperation and willingness to try to the direct occupational therapy, the witness testified it could be a lot of different things, it could be because he is getting older and is more mature, it could be other services he is receiving, school-related services, she could not say just one thing. The witness testified that some of the functional skills work she does with the Student could be transferred to the school environment. The witness testified, as to sensory issues and how those would transfer, it is different in a school-based setting, the scope of practice is related to educational goals, and while she did not have school-based experience, it is not always able to be performed in that setting, but it was her hope skills the Student learns in an outpatient setting have a translation to any kind of environment, whether school, community or otherwise.<sup>194</sup> The witness testified she had not had any contact with the school occupational therapist.<sup>195</sup>

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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,

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<sup>192</sup> Vol. III, P. 66, line 9, through P. 68, line 22

<sup>193</sup> Vol. III, P. 70, line 14, through P. 75, line 9

<sup>194</sup> Vol. III, P. 82, line 2, through P. 83, line 25

<sup>195</sup> Vol. III, P. 84, lines 9-13

whether that is the disabled child or the school district.<sup>196</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 and independent living;
- b) To ensure that the rights of children with disabilities and their parents are protected;
- 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>197</sup> In 1982<sup>198</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>199</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 educational benefits.<sup>200</sup>

As set forth below, even if the procedural violations occurred, which the Respondent disputes, they

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<sup>196</sup> Schaffer v. Weast, 44 IDELR 150 (U.S.2005)

<sup>197</sup> 20 U.S.C. 1412(a); 34 C.F.R. 300.300A(a)

<sup>198</sup> *Hendrick Hudson Dist. Bd. Of Educ. V. Rowley*,

<sup>199</sup> 458 U.S. 176, 206-07 (1982)

<sup>200</sup> *Park Hill Sch. Dist. v. Dass*, 655 F.3d 762, 766 (8<sup>th</sup> Cir. 2011)

did not compromise Student's right to an appropriate education or deprive Student of educational benefits.

Thus, Parents' litany of alleged technical deficiencies cannot support a claim that Student was denied 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 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>201</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>202</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>203</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>204</sup> Pursuant to *Andrew*<sup>205</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,

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<sup>201</sup> *Andrew F. V. Douglas County School District Re-1*, 137 S. Ct. at 1000

<sup>202</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>203</sup> *Rowley*, 458 U.S. 176, at 203 (1982)

<sup>204</sup> *T. F. v. Special School District St. Louis Co.*, 449F 3<sup>rd</sup> 816, 821(8th Cir. 2006)

<sup>205</sup> *Supra*

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>206</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" than what is set forth in the statute.<sup>207</sup> Here, Student's IEPs met all the requirements of the IDEA.

## **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 Student's circumstances within the Bentonville 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, 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  
November 5, 2019

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<sup>206</sup> 20 U.S.C. § 1414(d)(1)(A)(I)

<sup>207</sup> *Fort Osage R-1 Sch. Dist. v. Sims*, 641 F.3d 996, 1003 (8<sup>th</sup> Cir. 2011)

