

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

XXXXXXXXXX XX

as parent of  
XXXXXX XX

vs.

HEBER SPRINGS SCHOOL DISTRICT

)  
**PETITIONER**  
)

)  
**CASE No. H-20-28**

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**RESPONDENT**

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**ORDER**

**NOW** on this 12<sup>th</sup> day of May, 2020, came on for hearing Petitioner’s Request for a Due Process Hearing, Petitioner, XXXXXXXXXXXX XX, as Parent of XXXXXXXX XX, *represented by Theresa Caldwell, Attorney, and Respondent, XXXXXXXX XXXXXXXX SCHOOL DISTRICT*, represented by Cody Kees, 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 May 12<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup> 22<sup>nd</sup>, and June 9<sup>th</sup>, 2020. Based upon the testimony of the witnesses and the evidence presented and admitted into the record of this proceeding, I find the following

**Procedural History:**

On March 25<sup>th</sup>, 2020, the Arkansas Department of Education (hereinafter referred to as “Department”) received a request to initiate due process hearing procedures from XXXXXXXXXXXX XX (hereinafter referred to as “Parent” or “Petitioner”), the parent and legal guardian of Student. Parent requested the hearing because he believed that the District failed to comply with the Individuals with Disabilities Education Act of 2004, 20 U.S.C. §§1400-1485, as amended (hereinafter referred to as “FAPE” or the “Act”) and the regulations set forth by the Department by not providing the Student with appropriate special education services, as noted in the statement of issues. At the time Parent filed a request for due processing hearing, Student was a six-year-old, kindergarten, male enrolled in the District.

In response to the Parent’s request for hearing, the Department assigned the case to this hearing officer. This request for a Due Process Hearing was filed on March 25<sup>th</sup>, 2020 and a Timeline Order was issued on March 26<sup>th</sup>, 2020 Thereafter, the date of May 12<sup>th</sup>, 2020 was set as the date

on which a hearing would commence should the Parent and District fail reach resolution prior to that time. An Order setting preliminary timelines and instructions for compliance with the Order was issued on March 30<sup>th</sup>, 2020. The Due Process Hearing was set for May 12<sup>th</sup>, 13<sup>th</sup> and 14<sup>th</sup>, 2020. On March 30<sup>th</sup>, 2020, an Opening Order and Pre Hearing Order was issued and mailed to the Parties. On May 7<sup>th</sup>, 2020 the Hearing Officer received and reviewed the Petitioner's and Respondent's Pre Hearing Brief. On May 8<sup>th</sup>, 2020 a Pre Hearing Conference was held using ZOOM Conference.

On May 12<sup>th</sup>, 2020 the Due Process Hearing was called and held by ZOOM conference in Heber Springs, Arkansas. One witness testified and the hearing was recessed until May 13<sup>th</sup>, 2020. On May 13<sup>th</sup> and 14<sup>th</sup>, 2020 additional witnesses were called and evidence admitted. At the end of testimony on May 14<sup>th</sup>, 2020, the Petitioner moved on the record to continue the Due Process Hearing for one additional day. The Motion was granted and the Hearing was Continued until June 9<sup>th</sup>, 2020 where testimony was resumed. At this time both sides rested and the Hearing was concluded.

Issues Presented:

Were the educational placements offered by **XXXXXX XXXXXX SCHOOL DISTRICT** (hereinafter referred to as District or Respondent) from March 27<sup>th</sup>, 2019 to March 25<sup>th</sup>, 2020 reasonably calculated to provide **XXXXXX XX** (hereinafter referred to as "Student") with a free, appropriate public education (hereinafter referred to as FAPE)?

If not, is Student entitled to be declared eligible to receive special education services including but not limited to: compensatory educational services; an evaluation to address pragmatic language deficits, adaptive behavior deficits and functional impairment; a functional behavior assessment and development of a behavior support plan including training for teachers and staff; the need for a personal healthcare aide and needed related educational services as a result of the alleged failure of Respondent to offer special education and related services?

Petitioner is seeking:

- 1) Evaluation, consultation and development of an appropriate IEP in with placement in the least restrictive environment;
- 2) A BCBA Consultant to conduct a comprehensive Functional Behavior Analysis;
- 3) Development of a Behavior Intervention Plan based on the Functional Behavior Analysis;
- 4) Compensatory education for related missed services;
- 5) *Training for Administrators, Teachers, Paraprofessionals and staff;*
- 6) *Reimbursement for transportation costs for related services.*

Findings of Fact:

- 1) Student is age 6 and is enrolled in kindergarten in the District and is a child with an Autism Spectrum Disorder;
- 2) District is a Local Education Agency as defined in 20 U.S.C. 1401(19);
- 3) Student has attended Pre School at The Community School, a local Developmental Disability program in Heber Springs;
- 4) The curriculum provided for the Student in kindergarten was not Phonics First for reading.<sup>1</sup>
- 5) No curriculum was identified or produced as to teaching social skills.<sup>2</sup>
- 6) The Respondent District used Phonics First in kindergarten to teach reading. The Students teacher used Recipe for Reading instead. The Students teacher testified she did not have that particular program. There were no assessments for Recipe for Reading.<sup>3</sup>
- 7) No sequencing charts were produced for the Recipe for Reading curriculum to track the Students's progress.<sup>4</sup>
- 8) A transition conferences requires the presence of professionals to interpret their evaluation results. Neither the speech therapist nor the occupational therapist were present .There was no discussion about aids or supports that could be provided for the Student in the regular kindergarten class.<sup>5</sup>

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<sup>1</sup> Vol I, p 88 line 13, through p 89

<sup>2</sup> Vol. I, p. 106, line 16, through p.107, line 1

<sup>3</sup> Vol. I, p. 148, lines 14-22

<sup>4</sup> Vol. I, p. 120, line 7, through p. 122, line 14, and Vol. I, p. 126, line 8, through p. 130, line 11, and Vol. I, p. 133, line 8, through p. 134, line 21

<sup>5</sup> Vol. I, p. 174, line 25, through p. 180, line 18

- 9) The Student's time at school was reduced..... his math time was cut in half.<sup>6</sup>
- 10) Student's Kindergarten IEP listed 57 minutes for functional skills with no goals or objectives.<sup>7</sup>
- 11) The OT recommended the Student receive OT four times weekly for 30 minute sessions each to address the Treatment Plan. The Student received only 90 minutes per week.<sup>8</sup>
- 12) The Parent did not want the half days for the Student.<sup>9</sup>
- 13) The Student's shortened school day resulted in math being cut in half, to 30 minutes, reading was cut to 30 minutes, writing was cut to 20 minutes, The Student received 90 minutes of speech and 90 minutes of OT weekly.<sup>10</sup>
- 14) Neither IEP team, the parent nor the District psychologist ever received a copy of the teacher's written narrative notes concerning the Student's behaviors,<sup>11</sup>
- 15) In October 2019, the Student's Behavior Plan was not working.<sup>12</sup>
- 16) The Speech Therapist recommendations for a Student with a severe impairment, like this Student, would be 3-4 times a week for 30 minute sessions.<sup>13</sup>
- 17) The OT recommended the Student have OT four times a week, each for 30 minutes. The Occupational Therapist was not invited to the IEP meeting where the Student's IEP was developed. When school started in August the OT was informed that the IEP team scheduled only 90 minutes, three times a week at 30

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<sup>6</sup> Vol. I, p. 226, line 3, through p. 227, line 8

<sup>7</sup> Vol. II, p. 5, line 21, through p. 6, line 15, through p. 7, line 8

<sup>8</sup> Vol. II, p. 31, line 23, through p. 32, line 21

<sup>9</sup> Vol. II, p. 34, line 4, through 53, line 16

<sup>10</sup> Vol. II, p. 55, line 11, through p. 59, line 4

<sup>11</sup> Vol. II, p. 64, line 8, through p. 67, line 14

<sup>12</sup> Vol. II, p. 85, line 19, through p. 94, line 10

<sup>13</sup> Vol. III, p. 33, line 23, through p. 40, line 14

minutes each.<sup>14</sup>

- 18) The PE Coach did not remember or recall any relationship with the Student and he is the physical education teacher at Heber Elementary, serving “K” through fifth grade, that kindergarten students had PE with him, depending on the class, once or twice a week.<sup>15</sup>
- 19) The General Ed teacher could only guess how many times the Student had been in her classroom, saying maybe 10 or 15 but the longest he ever stayed was about five minutes, so he never participated in anything they were doing.<sup>16</sup>
- 20) When the Parent received the diagnosis of autism for the Student, she enrolled him in The Community School at age 3 in a classroom of 3 and he was there 8 hours a day.<sup>17</sup>
- 21) The Parent wanted the Student to be in a regular classroom with a one-on-one aide, but was told the District did not do that, so from the beginning the Student was going to be in a self-contained classroom.<sup>18</sup>
- 22) The Parent asked to go in and observe, even to just peek through the door, to see where the behaviors were coming from or why the school could not de-escalate the situation, but she was shut down, was told it would undermine their authority, that the Student might act differently, better or worse, if she was there.<sup>19</sup>
- 23) The Parent never saw the Functional Behavior Assessment Observation Forms beginning on page 299 until the Due Process Hearing.<sup>20</sup>
- 24) The Parent has never received a report card for the Student.<sup>21</sup>

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<sup>14</sup> Vol. III, p. 247, line 18, through p. 250, line 8

<sup>15</sup> Vol. III, p. 264, line 4, through p. 270, line 23

<sup>16</sup> Vol. III, p. 282, line 5, through p. 285, line 12

<sup>17</sup> Vol. IV, p. 10, line 6, through p. 14, line 19

<sup>18</sup> Vol. IV, p. 19, line 16, through p. 20, line 13, through p. 21, line 8

<sup>19</sup> Vol. IV, p. 48, line 14, through p. 50, line 10

<sup>20</sup> Vol. IV, p. 55, lines 17-23

<sup>21</sup> Vol. IV, p. 56, lines 18-23

- 25) The Parent did not know how the decision was made that the Student would be in the self-contained classroom.<sup>22</sup>
- 26) Discussing her experience in the effectiveness of reducing a child's school day as far as addressing behaviors, Dr. Sheila Barnes testified she had never seen reducing the school day ever change behavior.<sup>23</sup>
- 27) Per Dr. Barnes the antecedents and/or consequences have to be changed or you will continue to have the same behavior.<sup>24</sup>
- 28) Per Dr. Barnes a shortened school day or less hours of intervention is not recommended for children under age six, you want more intervention, not less.<sup>25</sup>

Witness Regina Snow

The witness Regina Snow testified she was the Student's Special-Ed, self-contained teacher for this year. Ms. Snow testified she first obtained a BSE in early childhood elementary ed from UCA at Conway and taught kindergarten for five years before becoming a stay-at-home mother, then she was the director and teacher at Cleburne Headstart for 12 years, then obtained her Master's degree in special ed and taught at Guy Perkins School District 5 years, and then went to work at Heber Springs in 2017, and had self-contained experience before coming to Heber Springs.<sup>26</sup>

Ms. Snow agreed she was familiar with the IDEA and implementing such regulations, as well as being familiar with working with the ADE regulations as relating to Special Ed.<sup>27</sup>

Ms. Snow testified she has two self-contained special ed classrooms adjacent to each other and she can access each through a door between the two, one designed as a sensory room with a swing and mats and balls, lots of sensory input, for K-2.<sup>28</sup>

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<sup>22</sup> Vol. IV, p. 160, line 6, through p. 161, line 24

<sup>23</sup> Vol. IV, p. 114, line 23, through p. 118, line 21

<sup>24</sup> Vol. IV, p. 126, line 6, through p. 128, line 5

<sup>25</sup> Vol. IV, p. 129, line 11, through p. 130, line 2

<sup>26</sup> Vol. I, p. 16, line 8, through p. 17, line 1, and p. 17, line 23, through p. 18, line 7

<sup>27</sup> Vol I, p. 17, lines 15-22

<sup>28</sup> Vol. I, p. 18, line 8, through p. 19, line 16

The witness said there are other Special Ed teachers (Resource teachers) in Heber Springs Elementary, Ms. Stone (K-1), Ms. McCann (2<sup>nd</sup> grade) and Ms. Bishop (third grade), that they are the ones in her building, the K-3 building.<sup>29</sup> Ms. Snow said in looking at possible Special Ed rooms for the Student, there would be the choice of the witness' self-contained classroom or a Resource classroom.<sup>30</sup>

Ms. Snow said, looking at the Notice of Conference for a June 24, 2019 conference, that she participated in that conference as to the Student, and that when she understood the Student would be placed in her room was after the committee discussed the Student's needs and went over the Student's evaluation, and talked about what was coming and read the documentation they had and what they had from Community School, it was decided the best placement would be a smaller environment, and that the way students move in and out, her numbers are smaller than it would be all the time in the Resource room.<sup>31</sup>

Looking at the 2019-2020 school year list of student, the witness said there were three kindergartners including the Student, five first graders, three second graders (although that number changed to one), and she was not sure how many the limit was in the state for self-contained classrooms.<sup>32</sup>

Looking at a sample of one of the schedules with planning for the day and having all her therapies for her students, the witness said there were 10 students' names there. The witness said the schedules were continuously changing in the classroom trying to meet the needs of students. The witness testified, that as far as the Student's schedule, the Student had a schedule that was through when they did their changing of times, as to reflect with the Student's minutes to be received, but the witness was not really sure where that was.<sup>33</sup>

Ms. Snow said, as to academics, they do circle time, which is on the carpet, during that time they do days of the week, months of the year, counting, there was a calendar coming in, that there is a small group time, as with those students they do small increments of time to stay focused and keep moving through, that everything is a circle, that she goes over instructions as there are stations set up in the room that are rotated in, and the students work one-to-one with paras. The witness said they discuss what work is coming in that morning, they draw names from colored

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<sup>29</sup> Vol. I, p. 19, line 6, through p. 20, line 4, and p. 21, lines 12-25

<sup>30</sup> Vol. I, p. 22, lines 4-12

<sup>31</sup> Vol. I, p. 23, line 15, through p. 26, line 16

<sup>32</sup> Vol. I, p. 26, line 17, through p. 28, line 17

<sup>33</sup> Vol. I, p. 27, line 18, through p. 29, line 14

sticks to see what station they are going to first, then they sit one-to-one with a para to work.<sup>34</sup>

The witness testified, when asked to go through the Student's schedule and testify as to, for instance, the Student's reading, said part of the reading is following directions, that the morning started with General Ed time, trying to get everyone where they go in to the classroom of their kindergarten room, that they would leave and come back to their room and sit down at the circle, that they are to listen and point to certain things. The witness said she had a reading table set up and the Student also comes up and works with the witness at the table, and do letters and sounds that letters make, as well as work with writing the letter, being able to anchor yours to the line and making sounds with those. As far as where the data was from Phonics First as to the Student, the witness testified she did not see it.<sup>35</sup>

The witness testified she had no work that the Student can do before getting to a certain level, but that she was working to get the Student where the Student was participating, that the Student first has to listen and come to perform and do as asked, be a willing participant, but if the Student refuses to hold a pencil that is through to make the sounds, that would be there she had to use a different observation to see for the Student, that she needs to see if the Student is making a choice not to respond or is it something the Student does not understand what is coming. The witness said sometimes the Student is hearing but not engaging, so she will sit down beside the Student and engage one-on-one on what is needed to be done.<sup>36</sup> Ms. Snow testified the school does use Phonics First, that there was a scope and sequence, and that teaching sounds and teaching writing blend together.<sup>37</sup>

As to implementation of goals for the Student, the witness testified the Student is able to recognize upper case letters, his lower case letters, his sight words.<sup>38</sup>

The witness said she had 5 paras, Vickie Brown, Madison Shanks, Crystal Guinn, Sonjia Brooks and Bonnie Lee, so there are six adults in the room to the 8-10 students, and that the Student had an aide working one-on-one, Madison Shanks.<sup>39</sup>

The witness testified that three pages of a worksheet allkidsnetwork.com were not Phonics First

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<sup>34</sup> Vol. I, p. 29, line 19, through p. 30, line 23

<sup>35</sup> Vol. I, p. 30, line 24, through p. 32, line 22

<sup>36</sup> Vol. I, p. 34, line 1, through p. 36, line 17

<sup>37</sup> Vol. I, p. 39, line 23, through p. 41, line 20

<sup>38</sup> Vol. I, p. 42, lines 9-16

<sup>39</sup> Vol. I, p. 43, line 21, through p. 44, line 20



worksheets. The witness testified there was a Phonics First worksheet that came out of their book that is listed under Phonics First, that she pulls these out and also pulls in different formats so the Student sees it in different methods, but the witness agreed there was no name on the bottom to show it was a Phonics First worksheet.<sup>40</sup>

When asked how she knew how the Student did on a worksheet, she said she keeps up with data from her other sheets, she had a list that is ongoing and checked off the Student was able to make the sound of “J” and was listening to it.<sup>41</sup>

When asked if goal three was the reading goal for the Student, and was asked for data sheets to show what letter sound the Student knows, the witness testified the Student did not know all the sounds and she did not have the piece of paper with her, nor could she tell what letter sounds the Student knows, that the piece of paper was at her home.<sup>42</sup>

The witness testified as to three additional worksheets not being Phonics First worksheets, but said a fourth one was, that the Student was able to understand the sound of “G” and identify it in pictures starting with that letter, that the Student had it correct, but not whether the Student learned it.<sup>43</sup>

Looking at four more worksheets, the witness said they were not from the Phonics First program, and she did not recall what letter sounds the Student knew when coming into kindergarten. The witness said she does a check to see if they are able to write their name, recognize the letters of their name and state those letters, when asked what testing she did. The witness said they use the FISH assessment in self-contained K-2, the Functional Independence Skills Handbook, and that the Student did not have functional academics down, nor did the witness know the Student scored average on that, on functional academics.<sup>44</sup>

Looking at the psychological evaluation from the District dated 23 May 2019 and asked if she was familiar with the test, the witness said yes, and that the Adaptive Behavior Functional Evaluation Scale said the Student scored a nine as to functional academics, and was scored at 91 in the conceptual domain, and that was average or above. Looking at the document as reflecting that Quotients from 85 to 115 are in the average range, the witness said she was not going to teach the Student functional reading, but how to read at kindergarten level just as in a normal

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<sup>40</sup> Vol. I, p. 44, line 22, through p. 46, line 9

<sup>41</sup> Vol. I, p. 46, line 14, through p. 47, line 14

<sup>42</sup> Vol. I, p. 48, line 18, through p. 53, line 1

<sup>43</sup> Vol. I, p. 53, line 1, through p. 55, line 7

<sup>44</sup> Vol. I, p. 55, line 8, through p. 57, line 20

kindergarten class, but the difference was it is broken down to small increments, the same curriculum, just paced differently.<sup>45</sup>

Discussing fidelity, as when implementing a program like Phonics First, the witness said you stay consistent, do the same thing so students can show mastery, but she was not familiar with a test to give where she wrote down what the child says, and said that she deals with check points, but had no form. Nor did the witness know if the program had a form to write that on, or if the program gave any tests to administer to the Student.<sup>46</sup>

The witness agreed on the IEP there had to be something about the Student's present levels, as that was the goals to be worked off of, and said she used a checklist, asking questions, she asked if the Student understood sounds, what is the sound. Discussing the Student's goal three off the IEP, reading, and objective four, being able to produce the appropriate sounds for letters, the witness agreed the first half of the year sounds were not initiated, but that letters and sounds go together.

As to mastery, the witness testified the Student was up to 61% identifying letters and 76% for the upper case letters. The witness said the Student's momentum going up was attributed to the Student being able to listen and follow directions, and can name 76% of his letters. As to identifying beginning sounds in words, data was not initiated until the third nine weeks, and the Student was at 50%. The witness could not say what lesson the Student was on in the Phonics First program.<sup>47</sup>

As to written language, looking at the goals for the Student, the witness said 3-13 was the last day for data to be turned in, and they were in school that day, Friday the 13<sup>th</sup>, that she had no data after that because she did not have any packets that are turned in for AMI, and she had not been teaching the Student Phonics First. Then the witness said she did not recall if any Phonics First worksheets were sent home.<sup>48</sup>

The witness agreed that Phonics First to teach reading is a very structured, sequenced program to be moved through to teach a child how to read. When asked how to determine where in the program the Student is if there is no data to show it, the witness said it would be data you go through and ask questions to see if the information was retained. The witness agreed there was nothing in the program to show whether the Student was at 1.5 or 2.6. When asked if there were tests she gave periodically when a skill is learned, the witness said no, it was check points that she does. When asked about the program itself, how to know if a child is progressing, the witness

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<sup>45</sup> Vol. I, p. 57, line 21, through p. 60, line 11

<sup>46</sup> Vol. I, p. 60, line 12, through p. 62, line 10

<sup>47</sup> Vol. I, p. 63, line 16, through p. 69, line 22

<sup>48</sup> Vol. I, p. 70, line 9, through p. 71, line 9

said she was not sure with the tests they have, that she did not recall it.<sup>49</sup>

Looking that there were to be 145 lessons, divided into four learning layers, layer one, one plus, layer two, three and four, the witness said the Student was to be in layer one, basic short vowels, consonants and digraphs. The witness said the Student did not have a Phonics First book with his name on it, and a Phonics First book was the teacher's workbook guide, that she had the Student's tabs to know where she was working with him.<sup>50</sup>

When looking at a sheet the witness said goes along with Phonics First, but it was not a Phonics First worksheet, nor did she have a Phonics First showing in the data. When asked if she had to teach the curriculum the District dictates, like Phonics First, the witness said it is one that they can use as a guide as all the students are at different levels, and she said she was not sure if she could choose another curriculum, but was able to pull from several different sites. The witness said Phonics First was an evidence-based program, then she was not sure whether Phonics First is an evidence-based program.<sup>51</sup>

The witness said the Student has difficulty with receptive/expressive language, and when asked what she observed about how that impacts the Student, the witness testified the Student had to be given time to stop and think, to process what he hears, then give a response. The witness could not recall the severity of the receptive/expressive language issues.<sup>52</sup>

When asked how she understood a refusal by the Student as opposed to a language receptive/expressive language delay, something the Student did not understand, the witness testified she watched the Student's body movement, shaking his head, crossing his arms over, there were different times the Student would respond and then he would say he did not want to. The witness agreed she had experienced times where the Student is hitting or screaming or yelling and not using words, and when asked if she could tell when that occurred whether the Student does not want to do something, if he was doing that on purpose, or because he did not understand, the witness testified she was not sure, that it could be any of those things. When asked how she figured out when to put on the sheet that the Student refuses, the witness said it was when she had tried multiple times and used multiple ways to get the Student to show you things.<sup>53</sup> As to the Student's goals and objectives of written language, the witness testified the Student worked one-to-one on writing, and that she took the three averages for the objectives, 11%, 27% and 22%, to

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<sup>49</sup> Vol. I, p. 71, line 25, through p.73, line 22

<sup>50</sup> Vol. I, p. 73, line 23, through p. 75, line 12

<sup>51</sup> Vol. I, p. 77, line 8, through p. 80, line 5

<sup>52</sup> Vol. I, p. 81, line 12, through p. 82, line 11

<sup>53</sup> Vol. I, p. 84, line 3, through p 85, line 22

come up with the 20% mastery.<sup>54</sup>

The witness testified she did not use Phonics First in math for the Student, and said she had no set curriculum. The witness agreed that if the Student could count to 20 items when he came into school, that would be an appropriate goal.<sup>55</sup>

When asked what the Student should be able to do when he gets through with Kindergarten, all his goals he had reading, the witness testified the Student should be able to identify upper case, lower case letters, and their sounds, and be able to copy sentences in writing, using correct letter formation and anchoring letters to the line, with hand-over-hand if needed, and writing three sentence stories. The witness also said the Student should be able to learn a certain number of sight words, also called red words, but she did not remember the number.<sup>56</sup>

The witness testified Phonics First is taught in first, second and third grades. When asked about Arkansas law requiring a parent be provided with a reading level at least twice yearly, the witness said she was not sure, and said she did not provide parents with a reading level. The witness testified she was not sure what reading program they test children with in this school, and that she did not use DIBELS, STAR, MAP, any of those in self-contained, she did not have that. Looking at an interim grade report dated 9-13, the witness testified the Student received a satisfactory in reading, he was working on progress, that the 3-31-20 grade card was satisfactory, but everyone in the class received a satisfactory.<sup>57</sup>

The witness testified she could not remember if they used a curriculum to teach social skills.<sup>58</sup> Looking at the parent's binder as to the Student's sixth goal in the kindergarten IEP, saying social skills, which talks about engaging in turn-taking and playing cooperatively, when asked to explain what she was teaching there, the witness testified that when you look at the objective, the Student engaging in turn-taking with an adult or a peer at 75% success level by the end of the school, that means when you are sitting at a table and they are playing an activity, doing a game, the Student is able to wait his turn and that relates over with questions, and then the Student will play cooperatively with others in a small group, and this is when you are working in stations and centers set up around the room, and you are with the Student as you are teaching him how to play, to wait his turn and you are showing examples. When asked for an example of what she is teaching turn-taking, the witness testified when you are doing turn taking, if you are sitting at a table and playing a game that is up there, as this also relates to learning his letters and his words,

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<sup>54</sup> Vol. I, p. 85, line 23, through p. 88, line 7

<sup>55</sup> Vol. I, p. 88, line 13, through p. 89, line 9

<sup>56</sup> Vol. I, p. 89, line 19, through p. 94, line 6

<sup>57</sup> Vol. I, p. 96, line 25, through p.101, line 12

<sup>58</sup> Vol. I, p. 106, line 16, through p.107, line 1

they have a game to play with it, it has upper case letters, and they go down around and you will read “I have ‘A’” “Who has ‘D’?” Then you will play, it is your turn to play the game, you put your card up. The witness also testified that if they are playing a math game that’s coming through, you have to wait to take your turn, it is your turn to roll the dice, count how many spots are on the die, move that many places, then you have to wait until the next person has their turn, then the next person, then it is your turn to join back in. The witness testified that when you are playing cooperatively with others, if they go in to the block station and you are building with blocks, you are there beside the Student saying to the Student “Let’s see. What can you build with blocks?” Then you start building, and if the Student joins in, if he wants to go into one that someone has already started, then you ask them to come in and play, and then you sit down and build together and take turns.<sup>59</sup>

When asked if she ever used a social skills curriculum, such as Skill Streaming, the witness testified she was not familiar with that, and said she was familiar with the social skills, basic, but was not sure if that is a curriculum. When asked what data she kept to see how the Student was doing, the witness testified you get a plus that’s through as you are looking how many times you have come in to work with that activity, and if a “yes” or “no” were you successful. The witness testified as to how the Student has done on that skill according to her data, the witness testified where the Student is looking at following the directions that are coming in, they were at 29%, and when you look at being able to engage in cleaning up, he was at 18% out of the 75%, so overall he is at 24%, not even close to mastery.<sup>60</sup>

On activities of daily living she taught, when asked why the Student needed to learn these activities of daily living, the witness said these are skills that are following through, it is listed with daily activities, but also falls in as you look for your personal skills that are coming in, that you are able to listen, follow directions, to comply with those directions, being able to participate in group, and as you look at goal number two, it is cleaning up after you have finished, whether you are eating, whether he has done his work that is there, as you cannot just walk of and leave a task on the floor, you have to clean it up.<sup>61</sup>

When asked about the Student’s ability to do the one-step directions, the witness testified overall it was 36% for the Student.<sup>62</sup>

When asking about transitioning and whether the Student was capable of successfully transitioning without getting upset, the witness testified yes, he was able to do that, the chore.

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<sup>59</sup> Vol. I, p. 107, line 7, through p. 109, line 17

<sup>60</sup> Vol. I, p. 109, line 18, through p. 111, p. 19

<sup>61</sup> Vol. I, p. 111, line 20m, through p. 12, line 11

<sup>62</sup> Vol. I, p. 112, lines 12-16

When asked what she would be doing to teach that, the witness testified what you have coming through with transition, the Student has a time set to let him know he has five minutes left, and it is time to clean up and move to the other activity, whether it is cleaning up what he is working on, he has a place in the room to put his things to come back to finish later, and the choice the Student has to make is he can stop and either put it up, or go ahead and he can leave it here and come back later, you are done with it, or you want to come back and continue working. When asked what she was teaching the Student in order to make that transition, the witness testified the Student assumed by example that comes in that it is there, he has a certain place to put it and it is left alone, and you show him “we are going to set this here,” and you do short, little steps. “We are going to leave it here. Now we are going to come back.” Then he can come back and it is there, so he learns to see his things are there waiting for him.<sup>63</sup> The witness testified, when asked if between tasks and activities that included going to the playground, that the activities would include where the Student is going through, whether he is going to his therapy, if he is going to PE, music, library, art.<sup>64</sup>

Asked about the Student’s problem with transitioning back to her room, the witness testified it was also leaving the room, and it would be any place to leave, where the Student is at one spot, he wants to remain there, whether he was out on the playground, or in therapy. When asked what she was teaching him how to make that transition, the witness said as you are playing, working with him, you are engaged with him, and you are showing him, we are out there, we are doing this now, we are going to look back at our time, and when the hands, as he watches, you have a timer on your phone that can be set so the Student has a visual he is able to see, when this moves up here, it is time that we have to stop and we are going to come in, that it is just repetition.<sup>65</sup>

When asked whether the Student went to General Ed, the witness said they attempted, that the Student would refuse to leave the room, that he was not consistent, and when asked about the Student’s interaction with non-disabled peers, the witness said they would start out when he came in of the morning, put his things up, then walk with the para to the classroom, but it was not consistent, that then they came through with recess time, activity times, that they attempted recess at lunch, he was with just the General Ed teacher, Ms. Hamlin, that they would transition from the room out to recess where Ms. Hamlin’s class was on the playground, but the witness said she did not know if the Student played with any of the children.<sup>66</sup>

The witness, when asked when the Student is being taught the goals and objectives, testified it was during small group, math, reading, or writing, that is only 15 minutes, but it is throughout the

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<sup>63</sup> Vol. I, p., 112, line 17, through p. 115, line 5

<sup>64</sup> Vol. I, p. 115, lines 6-10

<sup>65</sup> Vol. I, p. 115, line 11, through p. 116, line 17

<sup>66</sup> Vol. I, p. 117, line 8, through p. 119, line 11

day, there are times scheduled that it is consistently, and in a self-contained classroom you are moving from one, you have times that are set for them to work, but they were also working with him at the time that he is receptive to it and is able to comply. The witness testified the reading block was 25 minutes up until his days were reduced, you also had it pulled at story time every morning during circle time, that calls for listening. As to the 60 minutes daily of reading on the IEP, he witness testified, when asked where she was doing the Phonics First curriculum, what time that was, that the Student's time for his individual was from 12:40 to 1:05 when he worked one-on-one with the witness. After the lunch break, the witness testified that when she went home to get the workbook she was using, she discovered it was called Recipe for Reading, that the District uses Phonics First, but there are parts of Phonics First, you have to be ready so you can move on to the program, and the curriculum she uses is Recipe for Reading with supplement from the other. The witness testified she could not remember the name of the company who makes Recipe for Reading, but she was not sure if it is evidence-based. The witness testified she did not have a Phonics First workbook in her room, and she was not sure if Recipe for Reading has a test. The witness testified Recipe for Reading is used to teach letters of the alphabet and the formation, you use different sensories that are through, you are making activities that go along with that to help as they are remembering and recalling the letter. When asked if she had workbooks that she follows, the witness said she had some worksheets, but not workbooks for the students. When asked if she knew, according to what they have put out there, that particular program provided sequence charts designed to track and report individual students' progress as they move through the Recipe for Reading curriculum, the witness testified she did not have those. The witness testified she did not have sequencing charts to track children's progress. When asked what she had to show there the Student is as far as reading progress at the time of this hearing, the witness testified she had data. The witness agreed she used the program Recipe for Reading, which is an intervention program for struggling readers. When asked why, if she did not know her readers were struggling, she would choose that program for the Student, the witness testified there are parts from the ones that she used to try to help, and the Student is working being able to trace the letter, and that is why in the section when you are looking at some, you are able to trace over, and it has the letters that help him with hand and eye coordination, his fine motor skills. The witness agreed the Student already knew how to write his letters.<sup>67</sup>

Looking at the Beginning Reading Skills Assessment with 8-23 on it, the witness testified that was her writing, that was the page she pulled out so she would have letters for the Student to identify, and the three check marks were the upper case letters "C," "X" and "O" that the Student identified out of 26 letters at the start of school. The witness also testified the Student could identify three lower case letters.<sup>68</sup>

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<sup>67</sup> Vol. I, p. 120, line 7, through p. 122, line 14, and  
Vol. I, p. 126, line 8, through p. 130, line 11, and  
Vol. I, p. 133, line 8, through p. 134, line 21

<sup>68</sup> Vol. I, p. 134, line 22, through p. 136, line 12

Going back to the goals and objectives on the Student's IEP in reading, the witness testified she had a 76 on identifying or naming the upper case letters, and on January 7<sup>th</sup> he identified 24 out of 26, 92% of the upper case letters, and when he came back from Christmas he identified 92% of the upper case letters, and on 2-20 he identified 21 out of 26 letter sounds, 80%. When asked about the Student going from 92 to a 76 of being able to identify and state, the witness said there are multiple ways this is checked, and her explanation of the loss of recognition for the Student was being able to follow directions and listen through where you are able to answer and work with things without having different behaviors that would occur that prevented him from answering. When asked if she would agree that, without speaking at all, the Student could show the witness whether he recognized letters, the witness stated it is getting the Student to the ready state where he would answer and do those and not move off them, as you had to build relationship in for him to answer and respond. The witness testified the Student identified with shapes. The witness agreed that looking at what was furnished showed the Student's progress went down from January to March, 92% down to 76%, and she attributed that to behaviors, being able to listen and respond to what she was asking.<sup>69</sup>

Looking at a checklist the witness testified was pulled by the para working with him one-to-one, the witness then testified that she did work with the Student one-to-one, that they had different cards that are out, there was one day, and then multiple times. When questioned as to there being no grades on any of her sheets, the witness testified they had smiles that they have it right, and that she got to the 76% by taking the number the Student answered and dividing it by how many letters that were there.<sup>70</sup>

When asked if all the data the witness had been looked at, the witness said she thought so. When asked about the Student's goal number four, being able to identify or name beginning sounds in words, he would be able to produce the appropriate sounds for letters with 75% accuracy, and on her sheet she had him identifying 21 of 26 times for 81% of the time, but looking at her number four she had he could only do 50%, she explained that was with consistency. The witness testified her sheets show what the Student can do when he is listening to you. The witness testified she showed the Student could follow three-step directions, and one of the goals was to follow three-step directions, that was when the Student chooses to, that it is looking for consistency. The witness agreed the Student recognizes 18 of 21 numbers in math, so that is 86%, and said as far as she knew, he can count from one to twenty.<sup>71</sup>

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<sup>69</sup> Vol. I, p. 136, line 13, through p.143, line 12

<sup>70</sup> Vol. I, p. 143, line 19, through p. 145, line 4

<sup>71</sup> Vol. I, p. 145, line 9, through p. 148, line 9



The witness agreed there was not an assessment for Recipe for Reading.<sup>72</sup>

Looking at the Notice of Conference for the transition conference held 6-14-19 for the Student, the witness testified she did not recall if she knew anything about the Student when she came to that conference. The witness testified she was familiar with the District evaluations that were done, and said she did not recall if she saw the 5-23-19 psychological evaluation prior to the meeting. The witness testified she did not see the May 10<sup>th</sup> OT evaluation prior to the meeting, nor did she see the speech evaluation done 4-15-19 prior to the meeting. The witness testified she had been to many of these transition conferences over the years, but could not remember how many, only that it was more than ten, and confirmed they have to have someone there to interpret evaluation results when a transition conference is held, and that Ms. Stone had the ability to interpret the report, but then said she wanted to change her answer, saying of the professional in attendance at the meeting, the speech therapist was not present, the occupational therapist was not there.

Going over Mr. Ruble's psycho educational evaluation, when asked what information she gathered that helped her decide what services were needed on the Student's IEP, the witness testified that when you look at the Reynolds Intelligence Assessment, his score from composite was 60, placed it in the low, that when you looked at achievement under the Kaufman Test of Educational Achievement, reading composite was also 61, for low, math was 78, below average, written language was 67, low, he has a nonverbal IQ of 72, below average, and based on his IQ it showed that the Student was in the low functioning range, and that each child is different with autism on the spectrum.<sup>73</sup>

The witness agreed that when we look at learning disabilities, we look for a discrepancy between IQ and achievement, and in this case when we look at the Student's math, his math score is actually higher than his nonverbal IQ. The witness testified that is a strength.<sup>74</sup> When asked if she used the Student's behaviors to say he needed to be in the self-contained environment, or was it all coming out of academics, the witness testified she did not have anything with behavior except what Mom had told them when they were looking at placement.<sup>75</sup> When asked if she thought that the Student's IQ was a reason for placement in self-contained, the witness' response was yes, that as you are looking at lower IQ, then he is able to have more one-on-one help.<sup>76</sup>

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<sup>72</sup> Vol. I, p. 148, lines 14-22

<sup>73</sup> Vol. I, p. 160, line 18, through p.162, line 1

<sup>74</sup> Vol. I, p. 162, line 24, through p. 163, line 10

<sup>75</sup> Vol. I, p. 170, lines 15-24

<sup>76</sup> Vol. I, p. 171, lines 5-12

When asked about the default setting for any child that is identified under IDEA, the witness answered for the least restrictive environment to be placed, you would look at the setting you feel would best meet the child to have the least restrictive, and when asked if reading was taught in the regular kindergarten class, the witness responded it was, but she was not sure what was required by way of knowing letters or numbers to go in to kindergarten.<sup>77</sup>

When asked why she had though the Student needed a self-contained classroom, the witness replied it was from looking at the report and noticing the scores were lower, and since he had already been receiving academics in another school setting, The Community School, he already had exposure to curriculum. The witness testified she knew the Student had attended The Community School every day and stayed all day, but she did not know he had been in a regular classroom with 15 other children, but that she learned from the Mother that day that the Student was changed to a different setting that was a smaller group, so academically the reason she thought the Student needed to be in self-contained was because they were looking at his IQ and his low achievement scores, the same for math as it was in the below average range, and that being in self-contained rather than the Resource room could be a reason to give the Student more individual attention he needed, but agreed that could be gotten in the Resource room. As to writing, written expression, the witness testified those scores were at 67, also low, while on functional academics and on the conceptual domain in communication and functional academics, the Student scored average according to the documents. As to the notation that the Student exhibited behaviors that hurt others when he is frustrated or upset, the witness testified they did discuss that, that she saw Mother's report the Student disliked school, struggled with expression, emotions, anger, frustrating, hitting, pinching, did not get along with his friends, cried easily, got extremely upset when disappointed, overactive and had temper problems. The witness testified that was a concern to her, that she taught in the self-contained classroom. When asked how that was addressed in the self-contained classroom in the Student's IEP, the witness testified that is where you were working cooperatively, being able to work with him. Looking at the minutes from The Community School, the Special Ed services for the Student for gross motor, fine motor, communication and self-help, where the Student was getting 255 minutes of direction instruction, or 85 minutes 3 times a day, the witness testified as to the least restrictive environment considerations, the behavior intervention strategies, how they require a degree of structure that cannot be implemented was not checked. The witness testified she did not recall if they talked about aids or supports that could be provided for the Student in the regular kindergarten class.<sup>78</sup>

Looking at the Student's IEP, page 32, the justification for the least restrictive environment, the witness agreed the ones about behavior were not checked, and said she felt it was just an oversight since the parent had brought up the behaviors and they discussed those. When asked if it was an oversight, then why did she not check that the Student needed placement outside of the General Ed classroom, or that his behavior significantly impeded his or the learning of others, why she

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<sup>77</sup> Vol. I, p. 172, line 6, through p. 173, line 12

<sup>78</sup> Vol. I, p. 174, line 25, through p. 180, line 18

did not check “yes” there, and when she had discovered the oversight, the witness testified she could not answer that.<sup>79</sup>

The witness agreed that on the IEP for the Student she had to answer the questions about autism, and every question was answered “yes,” and it said “The student demonstrates resistance to environmental change or changes in routine, which was also checked “yes,” which is part of his disability. When asked if she expected to change and would she be able to change behavior that is disability related, such as having resistance to change in routine, the witness testified she was not sure. The witness also testified the Student’s disability actually impacts his social interaction, and that his developmental disability significantly affects his verbal and non-verbal communications, which is part of the autism, and she remembered talking about how he would not say anything.<sup>80</sup>

As to the Present Levels of Performance used to write the IEP, the witness testified she was the person who made the revisions documentation on page two, on page three on 9-17, second revision, the third revision 11-5, and the fourth revision on page five, on 2-11. As to the Present Levels of Performance, when the witness was asked how she arrived at the Student’s reading, math and written expression goals, the witness testified it is based on looking through the evaluation that is listed with the Student’s scores. The witness said with the Student’s achievement scores, it also puts in to show in those academic areas, and when asked how a score is taken, just an achievement score, what it says about letters, vocabulary, identification and things like that, how did they know where to start with the Student, the witness testified they look at the data presented so they know the scores, and also take into account what the Student had been working on, and the Committee listed to what the Student was able to do, and then there is a starting point to move forward. When asked to identify in the present levels what she was told as far as reading or math or written expression, the witness testified the fifth bullet, per the results of the Student’s recent educational evaluation, has the scores, that he scored low in word recognition, and reading comprehension and written expression were below average range, that visual style, which is visual and auditory learning styles, both were in the below average, and adaptive skills were below average. When asked to translate that to the reading goals and objectives, the witness testified that based on the Student’s scores you would start at the basic, the beginning, being able to write the letter and make the letter formation, that you have to be able to understand the letter before you are able to move to the next phase, which is to put sounds to blends and blends into words. The witness testified that even though the Student scored higher than his IQ in math, 78 is still low, which would make you know he did not know his numbers when you look at the scores. When asked why no curriculum-based testing was done on the Student to see where his deficits were specifically in reading, in math or in written expression, the witness testified that when the test comes back and an academic evaluation has been done, the academic evaluation section breaks it down. When asked about having any information or

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<sup>79</sup> Vol. I, p. 181, line 17, through p. 182, line 18

<sup>80</sup> Vol. I, p. 183, line 8, through p. 184, line 25

evaluation about the Student's skill level he could do in pre-K, the witness testified she could not recall, but agreed it is important to know what the Student is doing, what he can do, when he came in. The witness testified the Student did not read independently, did not know all the letters of the alphabet, and she had that information, and according to the test given the Student demonstrated no behaviors observed, nor did the report give any information about programming.<sup>81</sup>

When asked if there was supposed to be a teacher or some staff from the prep-K at the evaluation programming conference to help with the Student's IEP, the witness testified she was not sure.<sup>82</sup>

As to the 6-24 meeting when the IEP was developed, the witness agreed the Consideration of Special Factors are things that are supposed to be done in the regular classroom, and that the Student got no time in the regular classroom for reading, and said he did not go there to listen to announcements or anything like that consistently, but said she did not recall whether the mother asked at that meeting that the Student be placed in the kindergarten class and be given an aide.<sup>83</sup>

When asked if she recalled giving the Student an aide eventually when he was in the self-contained classroom, the witness testified she did, and when asked the reason for that there instead of giving him an aide in the regular kindergarten class, the witness testified the aide was to help with behaviors so the Student could function as a student so he could be able to move out, to participate, that it was a support in the classroom to help him participate more in their small groups and be able to function in their classroom successful. The witness testified that Behaviors Plans are implemented in the General Ed and Special Ed settings both, and she had other children on Behavior Plans, that she had another autistic student on a Behavior Plan, but then said the kindergarten student was not autistic, that he was speech-impaired.<sup>84</sup>

Looking at her student roster at the start of the school, that the witness testified was a tentative one, listing the students in the room, which listed their disabilities and their General Ed teachers, the witness testified that was the documentation to follow up to keep track with annual reviews that are coming, when they receive OT, PT, speech and when their three-year evaluations came up.<sup>85</sup>

The witness testified of the ten students, there were six on a reduced day before the Student, so

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<sup>81</sup> Vol. I, p. 185, line 1, through p. 191, line 1

<sup>82</sup> Vol. I, p. 191, lines 20-24

<sup>83</sup> Vol. I, p. 192, line 7, through p. 193, line 3

<sup>84</sup> Vol. I, p. 193, line 6, through p. 194, line 18

<sup>85</sup> Vol. I, p. 195, lines 9-22

when the Student was placed on a reduced day, that would be seven out of the ten students, which was 70%.

Looking again at what the witness testified was a tentative schedule, she testified, when asked to point out the 60 minutes per day the Student got in math, when those occurred on the schedule, that she did not have a math time that was scheduled, and that schedule did not indicate the Student had a time they worked and did math skills, when you are working during circle time of a morning, but math was throughout the day and that did not have it listed.<sup>86</sup>

The witness agreed that on maybe the third day of school she was the one who gave the Notice of Conference and a Notice of Action for an 8-16 meeting, and testified it was about behaviors the Student had displayed at school. The witness denied she asked the parent to waive notice of the conference and come right away, but said there was an urgency, and agreed that on the top of the Notice of Action it said “Due to the parent waiving the 14-day notice to hold the conference on 8-16.” The witness testified that when this was held, she had already sent notices, talking to the mom to advise her of the behaviors, and that the witness wanted to act quickly, as a committee, to get things in place to assist the Student. The witness testified when she asked the Mom about that, the Mom said she was of work and would be able to attend. When asked what type of behaviors she was suddenly faced with that she did not know about, the witness testified the Student was hitting, although the witness admitted those were behaviors the parent had disclosed at the June meeting.<sup>87</sup>

Discussing office referrals, listed from pages 191 through 213 of the parent’s exhibit book, the witness admitted she made an office referral the very first day of school, that the “staff assault” was when the Student hit her with his closed fist and then started kicking, and that he hurt her. The witness testified the mother told her about what happens when the Student gets frustrated. The witness testified there was another staff assault, on Ms. Guinn, a para in the room, that the Student hit her on the arm and left a red mark. When asked about page 193 showing the Student had one every day, and what kind of transition, if any, such as coming to the school with his parent and meeting her and getting an idea of where the classroom was and how to work things around, transitioning, was done with the Student, the witness testified not before school started. The witness testified there was a parents’ night, with lots of noise, and that crowds bother the Student, that he gets over-stimulated and covers his ears, crawls under the desk and sometimes hits.<sup>88</sup>

When looking at a picture of the Student in the classroom sitting at his desk with his arms folded and his head down, the witness testified that was time called Brain Gym, something they were

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<sup>86</sup> Vol. I, p. 200, line 18, through p. 202, line 21

<sup>87</sup> Vol. I, p. 203, line 5, through p.205, line 24

<sup>88</sup> Vol. I, p. 205, line 25, through p. 209, line 7

putting in place for the Student, which was activities for movement, and he chose not to participate, but it showed other students imitating what they saw on the Brain Gym screen, where you have to stand up.<sup>89</sup>

Looking at another picture, the Student with a pencil, and a girl beside him, the witness testified that was working in small groups, and the witness was shown working with someone where there were three at the table, and agreed there was an aide with a little girl who could not hold her pencil, who was the other kindergarten student. The witness agreed the Student could hold his pencil correctly. The witness testified as to a picture of the Student sitting on a para's lap, they were looking with the story book time on the big screen so the Student is able to listen and watch different stories being read, with participation. The witness testified another picture showed the Student standing at the board drawing a character, that he was asked to write his name, but he chose to draw.

The witness testified she did not recall the date when she moved the Student's desk by the white board, but it was moved over to the side because he did not like to have anyone behind him, that it gave him a place where he was able to put his items, as he did not want to put his things into his cubby box. The witness testified she was not sure if he was afraid someone might get close to his things, but the Student wanted his things left out where he could see them on his table, and he hit. another student who came close to his things.<sup>90</sup>

The witness testified as to a picture of the Student, besides drawing, come to the board, and as to another picture she took to let the parent know how things looked so if the Student came in, she could talk to him before he walked in, he would be able to see he had a special place just for him.<sup>91</sup>

Going back to the 8-16 conference and Notice of Action, the witness testified that, as stated in the Explanation of Action, that they were going to be talking about the Student's behaviors and see about giving a referral for Methodist Family Counseling to follow up from them. When asked for things implemented in her classroom with the Student after that, as a result of the conference, what changes were made in the classroom, the witness testified she had a quiet area she fixed for him to go, for anyone to go in and they needed a moment to calm down where it was quiet, but the IEP was not changed then. The witness agreed a referral was given to the parent for counseling through Methodist Family, she was to follow up and call and get an appointment, and the school obtained a consent for the FBA.<sup>92</sup>

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<sup>89</sup> Vol. I, p. 209, line 8, through p. 210, line 24

<sup>90</sup> Vol. I, p. 212, line 22, through p. 213, line 18

<sup>91</sup> Vol. I, p. 213, line 24, through p. 214, line 7

<sup>92</sup> Vol. I, p. 219, line 16, through p. 221, line 7

The witness testified she remembered testifying that neither the speech nor the occupational therapist attended the 6-24 meeting to explain their evaluations, and while saying that she invited them to the 9-17 conference, the witness testified the Notice of Action from the 9-17 IEP meeting did not say anything about them discussing their evaluations, that they were in to discuss therapy observations. The witness testified at that meeting they went over the FBA and created a Behavior Intervention Plan and added that to the IEP. When asked to explain the committee deciding then to use a sensory diet in which the Student would be engaged in activity input every 30-45 minutes, the witness testified it involved the Student leaving the room, and as you walked down the hall you would do sensory input, you might stomp three times down the hall and you stop and push hard on the wall, then you could run from this spot to the next, it was to give the Student movement, and also input on the larger joints of what he needed. Asked when the committee agreed to start the shorter days, as it was “agreed to continue” with the Student arriving at 8:20 and leaving at 2:30, the witness testified that during their discussion, the parent had been coming up because afternoons were rough and she was picking up the Student to see if that made his days go better, if he could make it through without disruptive behaviors, and it was making a difference, the Student was not so tired, as in the afternoon there were more behaviors displaying from 10:30 on.<sup>93</sup>

The witness agreed that when the Student’s time at school was reduced, you would think he would have less time to display behaviors, and that his math time was cut in half. The witness testified the Student did not like circle time, but with the placement of his desk in close proximity, he is able to participate and hear what is coming, that he might not actively get up and follow directions, but was able to listen to that they were doing.<sup>94</sup>

The witness testified they were trying to put in place where every 30-45 minutes the Student would be going out of the classroom walking down the hall, that it was just a few seconds he was out, when he would walk, that the sensory diet was that he would be engaged in active input every 30-45 minutes, including walking the hall, walking to other areas, yoga, deep breathing techniques, that it was going to be split with the time in or outside the classroom, and the yoga techniques, the deep breathing, those were going on continuously throughout the day. The witness testified, as to how often daily the Student was going out of the classroom, that those times depended, that they attempted multiple times. The witness testified she could not recall how many times a day the Student left her classroom for sensory walks, but said it was more than one, that the walks were not complete 30 minutes, and the time varied. The witness testified that time was structured if the Student would go.<sup>95</sup>

The witness testified, looking at an email from Roxanne Riddle (the school principal) to Regina

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<sup>93</sup> Vol. I, p. 221, line 8, through p. 225, line 4

<sup>94</sup> Vol. I, p. 226, line 3, through p. 227, line 8

<sup>95</sup> Vol. I, p. 227, line 9, through p. 229, line 6

Snow (the witness) dated September 10, 2019, which said the principal noticed the Student was scheduled from 2:30 p.m. to 3 p.m., but he left school at 2:30, talking about therapy time. The witness testified that was not from the committee deciding to reduce, it was when his mom was coming to pick him up because she was off work, as they were having behaviors displayed.<sup>96</sup>

Looking at another office referral written by the witness, she testified she wrote it because another para in the room, Vickie Brown, was assaulted by the Student, that she was bringing lunch in for another student, and the Student saw the form and jumped up and grabbed it out of her hand, yelling he wanted Forky, that he was told to stop, they redirected him to the chair, then he ran behind Ms. Vickie, grabbed her arm, squeezed it and yelled for her to give it to him, and then he threw the trash can, and the witness considered that staff assault.<sup>97</sup>

Looking at a 9-10 referral, which the witness testified was written by Ms. Adams, the assistant principal, when she came to the room, as to the Student biting his teacher (the witness) and throwing Legos around the room. When asked if the assistant principal or the principal assigns discipline, or if the witness did that, the witness testified she does not do that. Looking at another referral the witness had written, stating the Student kicked and struck another student on her ankle, causing her to fall down and cry, the witness testified the reason she made that referral was it was contact with another student, and you do that when there is harm to other students. Looking at another referral the witness made, as to the Student walking by a student who was lying down on the bean bag, and stomping that other student's foot, then running back over and grabbing the dolls from another student, the witness testified the Student went to the light table, they were trying to redirect him, and looking through he went from one to another. When asked why the witness called that a staff assault, the witness testified that on the side it was written that the Student punched Ms. Vicki with a closed fist in her stomach. The witness agreed that this started after the 9-17 Behavior Plan and FBA.<sup>98</sup> Looking at the FBA dated 9-5-19, as to behaviors listed under "Extreme," when the witness was asked if the behaviors were disability-related, she responded yes.<sup>99</sup>

When asked what she thought the Student was trying to communicate with his disability-related behaviors in her classroom, the witness testified she could not tell. When asked if the Student ever did something exhibiting these behaviors when she thought he was just trying to get her attention, the witness testified yes. When asked for an example, the witness said when the Student was asked to come to the table and you are working and he was asked to do something, if he did not want to, he would throw his things over, not wanting to use what was there, when he would pick up something at his table and throw it across the room and then look at you, that would

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<sup>96</sup> Vol. I, p. 229, line 20, through p. 231, line 11

<sup>97</sup> Vol. I, p. 231, line 16, through p. 232, line 15

<sup>98</sup> Vol. I, p. 232, line 18, through p. 234, line 19

<sup>99</sup> Vol. I, p. 234, line 20, through p. 235, line 24



be getting your attention. When asked what she did responsive to that, the witness testified they would go to the Student and tell him they would pick this up together, that we are not throwing things, so you role model, you show him how you are picking things up and problem solve.<sup>100</sup>

The witness testified she could not predict when the Student would become physically aggressive and hit. The witness agreed she saw what the mother had said about what the Student would do when he was frustrated or upset, behaviors that hurt others, so we could predict, if he is going to become frustrated or upset, he is going to start maybe hitting. The witness testified you could not predict what would make the Student frustrated or upset. The witness said that at times, for instance, when the Student was over-stimulated, like loud noises, that could make him start hitting. When asked if the Student would get frustrated when he did not know how to do something or did not understand what he was being told, the witness testified at times, and a lot of times when he got frustrated he would just close his hands and make facial gestures. When asked if the Student ever had temper tantrums in her room, the witness testified he showed displays, displayed emotions, and when he did not get his way, the behavior depended on what was coming out, that he would either throw things, or yell.<sup>101</sup>

Referring to the Behavior Plan, and how she was supposed to interact with the Student when he exhibited these behaviors, the witness testified you get him to take a deep breath, slow down, take a break, remove from that area, step away from that situation before it escalates, that would be the first step, redirection. The witness then said you would remove from one area to another, attempt to go to the sensory room, which is next door beside her, that has a swing as it is a calm-down space, and you have balls there, there were several things to access to help you. Talking about how she would get the Student across the hall if he is frustrated and angry, how to stop and get him across the hall, the witness testified they would say his name, and indicate Stop, that he was great with signs, as they had practiced this, “Stop, take a deep breath,” and you use a calming breath as you are talking to him, “Now, let’s calm down a second. Let’s try to put it in words so I can help you.” Then, if he does not have words, ask “How about you coming with me just for a minute? Take my hand, let’s come over here.” Then you can redirect. The witness said redirection was successful at first. The witness testified they worked with the sensory walks also, as it was breaking up whatever is occurring.<sup>102</sup>

When asked if the Behavior Plan worked after the plan was implemented to reduce his school day, the witness testified yes, but said she did not recall for how long, and when asked if it worked for a month, she said she was not sure.

Looking at the Student’s Kindergarten IEP, which listed 57 minutes for functional skills, yet there

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<sup>100</sup> Vol. I, p. 236, line 5, through p. 237, line 24

<sup>101</sup> Vol. I, p. 237, line 25, through p. 240, line

<sup>102</sup> Vol. I, p. 240, line 15, through p. 243, line 4

were no goals and objectives for functional skills, the witness said that was because those are listed under social skills, and also with adaptive. The witness said functional skills is not a subject in Kindergarten, but it is a subject in her self-contained classroom.<sup>103</sup>

Discussing FISH, the Functional Independent Skills Handbook, the witness testified that is an assessment based on observations, if a student is able to do certain behaviors independently, and it is for children who are extremely developmentally delayed. The witness agreed severe developmental delay is a medical diagnostic term, and that she does it for everyone in her class, that she has two intellectually impaired students, a nonverbal autistic student and two medically fragile students, the medically fragile children also being developmentally delayed severely. The witness testified when planning the Student's IEP and saying he needed the functional skills she put in his IEP, she had no information, she had not given him the FISH assessment, but testified she did assess the Student in September. The witness said she could not recall if she shared that with anyone like the parent, or an IEP meeting. When asked if she had anything about the Student's functional skills on his IEP in June when it was planned, the witness said she received information from discussing with Community School when they came to the meeting, but then admitted they did not come to the meeting in June. Asked what she relied on in the June meeting to determine the Student's need for the functional skills to be provided in her self-contained classroom, the witness testified that on page 96 of the psycho evaluation, the committee reviewed those as they talked about each domain, in the practical domain was self-care and home living, and with community, and the Student's score from observations had been 80, but the Student was struggling with picking up his things, the Student's mother talked about that in the meeting. The witness agreed that on functional academics deficits, cognitive abilities and skills related to learning at school, that can also have a direct application in one's life, the teacher had scored the Student at 9 and his mother had scored the Student at a 10, and that as far as the Student's ability to learn and understand what is going on at school, that was in the average range.<sup>104</sup>

When asked how she came up with 90 minutes of occupational therapy needed on the June IEP for the Student, the witness testified the minutes for any of the therapies that are related are based on the therapists. Then looking at the OT evaluation she would have had that day, though there was not an OT there, the witness read therefrom that the Student's deficits interfere with his ability to function within a classroom setting and indicated an educational necessity for OT intervention, so it was recommended the Student receive OT four times weekly for 30 minute sessions to address the Treatment Plan set out. The witness agreed that 4 weekly 30 minute sessions would be 120 minutes, not 90 minutes.<sup>105</sup>

The witness testified she taught social skills as a subject in her self-contained classroom, saying it was part of their work together, and agreed that functional skills and social skills are part of her

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<sup>103</sup> Vol. II, p. 5, line 21, through p. 6, line 15, through p. 7, line 8

<sup>104</sup> Vol. II, p. 7, line 9, through p. 19, line 4

<sup>105</sup> Vol. II, p. 31, line 23, through p. 32, line 21

classroom, as well as daily living skills. Looking at a 2-page document titled Behavior Interventions/Responses, the witness testified it was prepared after the Student started school, and the document indicating that it was developed 9-17-19, and the witness said it showed things they were trying to help with the Student, that Ms. Riddle typed it up for the witness and made the chart, but it was based on what they were doing in the classroom. When asked about a visual schedule since none were in the records, the witness testified the visual schedule the Student had was on the board behind him on the wall so he was able to put the pictures that were up, those were listed showing what was coming next. When asked if she provided the behavior interventions used to Mr. Ruble when he did the Functional Behavior Assessment, the witness testified she as not sure he was given the actual document, but that he was aware that they had been trying different things in the classroom trying to help the Student. When asked if the document was ever presented in an IEP meeting attended by the parent, the witness testified she believed it was in the September 17<sup>th</sup> meeting, and, if so, Mr. Ruble would have been able to look at it and discuss it. The witness testified she did not recall when the table was moved to the edge of the room so no one was behind the Student. As to the effectiveness of the Behavior Intervention Plan, the witness testified the prevention strategies were effective some of the time. Then, after being questioned further, the witness took back her testimony about the two pages being shared with the IEP team 9-17, but said it was shared with the parent. Thereafter, the witness testified the document was shared with the IEP team, but not the complete document, nor did she know dates. The witness recalled reviewing the Behavior Intervention Plan on 10-1, and knew that around November 8<sup>th</sup> it was decided the Student would go to three hours per day, or three and a half hours daily. The witness testified she could not recall the dates if the IEP team ever got the two pages of interventions that had been tried before the Student's day was reduced to more than half the time. When asked about having considered other behavioral supports or things in the Behavior Plan before cutting the Student's day and his instructional time to more than half, the witness testified that at the conference held 10-25 the committee discussed the behaviors the Student was displaying in school, in the classroom, the therapies, and other school settings, they discussed that he was working for desired behavior, what had been given, the interventions that had been tried, and talked about the sensory walks and having the para work one-to-one with the Student. The witness said the meeting was stopped because of the Student having a behavior, then the meeting resumed 11-6. The witness testified that in October, after the first nine weeks, she had already decided to cut the Student's day in half. The witness agreed the Student's mother wanted to come in and observe the Student in the classroom, but also said the mother wanted to assist, which meant an FBI background check, and that the mother did not want the half days.<sup>106</sup>

When asked if the District suggested alternatively besides taking the Student out of school, or putting him out of school for a half day, what was offered instead, the witness testified they were looking for the Student to receive extra counseling to come in to assist, also with their counselors at the school. When asked where that information was located in the Options Considered and Reasons Rejected sheets, the witness testified it was stated under the Notice of Action, they were

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<sup>106</sup> Vol. II, p. 34, line 4, through 53, line 16

looking for Mr. Lacy to be able to come in during the school day and have his therapy at a time during school when he was there, then they went on to discuss interventions that had been tried and the success rate.<sup>107</sup>

Discussing the Student's shortened school day, the witness agreed the student's math had already been cut in half, to 30 minutes, so that did not change, and his reading was cut to 30 minutes, in half, his writing was cut to 20 minutes, and social skills was 27 and the functional skills was 27. When asked how that was calculated, the witness testified they looked at the time the Student was at school for the number of minutes attended daily or weekly, then reduced the amount of time the Student was in OT and speech, neither of which was reduced, and they looked at the time, they deducted the time he was in speech and OT from the minutes of school attendance weekly, the amount of time he would be in the Special Ed classroom, that time was taken and divided among the areas. The witness agreed three hours would be 210 minutes—3 times 60, add 30, and the Student attended from 8 a.m. to 11:30 a.m. The witness testified the Student brought his lunch and ate throughout the day there, as if he does not want to leave the classroom it would bring on a behavior. The witness testified the Student was getting 180 minutes a week, 90 of speech and 90 of OT, and dividing that by five days would be 170 minutes daily in therapy and everything and he had about 40 minutes left to do other things, and he did have a recess.<sup>108</sup>

When asked if the Student had a structured schedule, one of the things required in his Behavior Plan, the witness said yes, that it was in the room, and it was September 18th when the Student's time was reduced by 70 minutes a day. Discussing what the Student's schedule was for the 3 ½ hours daily, the witness testified he worked on his math, reading, writing and social skills between therapies coming in on different days.<sup>109</sup>

The witness testified that neither the IEP team, the parent nor Mr. Ruble ever received a copy of her written narrative notes as to the Student's behaviors, that they were conveyed orally, then later the witness said she could not remember if she made a copy and gave it to Mr. Ruble. The witness testified her narrative notes stopped when she had a para who came in and started documentation.<sup>110</sup>

The witness testified that the aide hired for the Student was Madison Shanks, who is related to the witness. Looking at narrative the aide did, the witness testified the aide was monitoring the Student's behavior coming in and then wrote her documentation on the back of the forms. As to Mr. Ruble having given her the sheets to track behaviors and whether they were working, the witness said they had a record to look to see if the behaviors were increasing or decreasing, and

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<sup>107</sup> Vol. II, p. 53, line 17, through p. 54, line 16

<sup>108</sup> Vol. II, p. 55, line 11, through p. 59, line 4

<sup>109</sup> Vol. II, p. 59, line 5, through p. 62, line 15

<sup>110</sup> Vol. II, p. 64, line 8, through p. 67, line 14

on the back of the page, with the antecedent and consequences, that was what the narrative was that was written on the back. The witness testified there was a behavior of not following directions about coloring, and the consequence was redirection. When asked about physical aggression vs. not following directions as a behavior they were trying to get rid of, the witness testified the behaviors brought on others. The witness testified biting was one of the aggressive behaviors, as well as throwing things, he scratched, he ran into people, he stomped on people's feet, but could not recall who monitored or tracked those behaviors. The witness testified as to the Behavior Plan for the Student being physically or verbally aggressive, but said office referrals were made after 9-17 for physical aggressive behaviors because the strategies were not working. First the witness said she had not filed a complaint about the Student to the Juvenile Court, then when shown her signature said she did. The witness also testified as to the Student being aggressive with another student who was hurt. The witness agreed that if the Student did not do under the Behavior Plan, he got no reward, got no reinforcer, and was referred to the office. The witness agreed that 24 office referrals on the Student sounded correct, that the Student threw chairs and kicked and got an out-of-school suspension, that he hit, kicked and pinched teachers and ran from the building, and that she had noted excessive aggression/physical aggression, and said that in October the Behavior Plan was not working.

Looking at functional behavior sheets for when the Student's schedule was abbreviated, the witness testified the Student arrived at 8:00 and left at 11:30, that he was to have 30 minutes of reading, 30 minutes of math, 20 minutes of writing, then 27 minutes for social skills and functional skills. The witness testified she did work with the Student one-on-one, but it was not documented, and explaining why the Student's schedule was not consistent, the witness testified, as to whether or not the Student was getting all his minutes, when asked if there was anything to indicate he was getting his minutes, that not setting in a 30-minute block or a 20-minute block, but he had it throughout the day, it was addressed, that they are just stating the Student is going his work and starts for the day at 9:15, then finishes that part at 9:33, then he went to speech, then came back from speech. Looking at page 400, which is 11-18, shortly after the shortened school day that was half days was started, the witness testified it said at 8:55 the Student was working on lower case letters, with the aide, because she was writing down and working with the Student. The witness agreed that then the Student was noted did not write in lower case much, he wrote sight words only to letter Gg, then decided he did not want to work and tried to color on his work, so if we consider that reading, it would only be five minutes, and he went to speech five minutes later, at 9:00.<sup>111</sup>

When noted that there was social skills group activity at 10:45, but nothing about math that day, the witness testified they start through at 8:20, the Student has his binder that they work with, it is a review as you are looking at your numbers. When asked if she remembered the question asked, about the time on the Student's IEP for writing or math, the witness testified it was not documented on there. When looking at 506 on 2-19, if there was any indication as to reading, writing or math the witness had been giving the Student Special Ed services, the witness testified

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<sup>111</sup> Vol. II, p. 85, line 19, through p. 94, line 10

when you look at 9:45, when it talks about the Student's morning work, at 9:00 he started his morning work, it was her teaching him and him listening to her teach other children both. When asked how that was documented that she was working with the Student, the witness testified it was not documented on there. The witness testified she worked with the Student periodically throughout the day different times, and she also starts out, when you come in with a schedule and we are looking at the first, we are talking with numbers, if we were matching and doing patterns, A/B pattern, then she would go over and sit down by the Student and they would work with blocks to do his patterns, that when it is counting, you would ask do you have more blue or more white, but it was not documented on there.<sup>112</sup>

Referring to page 506, where it was noted that at 10:25 Officer Wildman came in to check on the Student and he panicked, and when asked why the Officer would come in the classroom to check on the Student, the witness testified it was not just the Student, that the Officer comes into the school and goes into all the classrooms. It was pointed out that the document said the Officer came in to check on the Student, and the witness was asked how often Officer Wildman came in, and the witness testified he came in daily in all the classrooms, he just stopped in. When asked how the Officer knew the Student at that point, the witness testified that when the Student is being dropped off mornings, when his mom is leaving and the para is down to pick him up, hearing "Good morning" and the Student's name. The witness agreed there was no indication of any of the Student's math or reading or writing there. Noting this was the day after the incident where the Student kicked Officer Wildman on 2-18, and asking if maybe that was why he was coming in to check on the Student, the witness replied no.<sup>113</sup>

Looking at 513 and 514, the date of 2-25, the witness was asked to point out where the Student was getting reading, math or writing on those two pages, the witness testified you would notice it starts out with the Student's behaviors that morning and for him to be ready to listen, that he was refusing to do work, he was laying his head down, that at 8:40 he was jumping up making a tornado, so they were trying to get him to come in but he was not receptive to it, and there was no reading, writing or math minutes documented in this day. Looking at 514, the same day, noting the Student was told to share and he started to hit, that he hit twice and ran over and threw his stuffed animal away and dumped a bunch of blocks everywhere, but stopped because Ms. Riddle was notified, the witness testified that Ms. Riddle was called when the Student starts displaying severe disruptive behaviors in the room. Looking at the note saying 10:15 to 10:20, Ms. Riddle and Ms. Adams, who the witness testified was the assistant principal, that the Student got under his desk when they came into the room, the witness testified the Student liked to go under his desk. Looking at page 346, with a 10-23-19 date, as to the Student matching his ABC's, that he did well and it took about 15 minutes, when asked about recess time daily, the witness relied she thought it is 9:35 to 10:00, that it is 40 minutes in recess and her time might be off, and when asked the same question, did she see any reading, math or writing, the witness

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<sup>112</sup> Vol. II, p. 94, line 11, through p. 96, line 6

<sup>113</sup> Vol. II, p. 96, line 7, through p. 97, line 16

testified it is talking with his planets, he was counting and also writing with those, that matching the ABC's is reading, that was ten minutes there, it says he finished his planets, and the witness said it is with the counting, that's with the 11, he was finishing those up, placing them in, it was science and math. When discussing on the Student's IEP he is to get 30 minutes of math daily, and that science was not on there, and did she have any other times for reading, math or writing she could find on these two pages, the witness testified not that was documented. Looking at page 476, on 1-29-20, noting the Student could count backwards and forwards on his numbers, but that this says on 8:45 he counted his blocks one to forty by himself, when asked the same question, if that would be five minutes of math, the witness replied it said the Student was working. The witness agreed that there was work on math problems again at 10:30 on his tablet, so maybe another 20 minutes, for 25 minutes. When asked about reading, the witness testified when you look at 8:25 where he is working on sorting the colors into groups, identifying the color words, as you sort them you are placing them on the cards that would have the colors out with it. The witness testified the color words are like with sight words, you need to look at the word that they recognize that is red. When asked if she was having the aide document, how the witness would reconcile the Student being able to do a 100% to 40 all by himself put he could only do that at 33%, the witness testified it was based on consistency, and it is based on checkpoints, but she did not have that data at the hearing even though the parent's counsel had asked for data to support the witness' goals and objectives and progress, nor did the witness turn any of that in to the district's counsel either.<sup>114</sup>

When asked if she talked to anyone at The Community School or learn from the Mother that the Student had attended The Community School pre-school from 8:20 to 3:10 every day, the witness testified she had. When asked to what did she attribute the Student's ability to attend a pre-school with 15 other students in the class and his inability to attend a full day of school in kindergarten, the witness testified that the school setting, they were first told it was in a small group, then it went down to a one-to-one, so she attributed it to over-stimulating, that her room was over-stimulating. The witness testified things were removed from the room where it was not as busy, not as active, and the Student was given a place designated for him when he started to feel overwhelmed, that he knew he had a spot he could go to where he did not see anyone else. The witness testified then that why she thought he could attend the other school and not kindergarten all day, was possibly different environments, that he had a one-on-one who stayed with him and he was in a small group of one to possibly two students. When asked if she ever spoke to a behavior consultant, maybe from her Co-op, to come in and give her recommendations on what she could do in her classroom, the witness testified she did not.<sup>115</sup>

When asked if she knew, or had she ever made a CIRCUIT referral, the witness replied yes, and agreed she knew how to put one in for children with behavior problems, but when asked if she ever put in a CIRCUIT referral, the witness replied no. When asked if there was any reason why

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<sup>114</sup> Vol. II, p. 97, line 18, through p.105, line 16

<sup>115</sup> Vol. II, p. 105, line 17, through p.107, line 24

she did not put in a CIRCUIT referral, the witness replied they were working through at school with what was in-house that she would hear from the therapists that were available, and also looking with the Student's counseling, as he was already in counseling.<sup>116</sup>

Asked about the district having a chart in their book about office referrals on page 509 in the district book, the witness testified she did not have anything to do with it, and had not seen it until this hearing. When asked about it listing referrals, but did not talk about behaviors, and when the Student's time was cut in half, would she expect his acting-out behaviors to be cut in half, the witness replied yes, and that he was able to participate in group, he had less aggression coming toward students. Looking at page 298, starting with October 3<sup>rd</sup>, the date of the first FBA she did, and the data there, the witness agreed that although the Student's day was cut in half, his behaviors were not cut in half, and testified they were still addressing those and working on appropriate responses with redirecting, role modeling and acting together.<sup>117</sup>

As to the Behavior Observation Forms, the witness testified those forms and notes were meant and designed to document behaviors, not necessarily intended to document the academic work the Student was doing, so any academic work that was documented on the behavior forms was incidental to the behavior pieces that were documented. The witness also agreed there was lots of academic work not documented on the behavior forms that was taking place in the classroom. Looking at page 537, the witness testified Officer Wildman asked her to write down what occurred in the classroom, and she wrote the statement down for him as to the behavior. Looking at page 185 in the parent's book, the witness testified she remembered testifying about those behavior interventions and responses to the behaviors that were developed by the team, and this was a running document that grew as the team identified more problem behaviors and responses to those, so the document on pages 185 and 186 was smaller when they started out, it was ongoing and stated various things that were tried. The witness testified this document was meant to complement the Behavior Intervention Plan the team developed, that they were trying to continue to find other things that might be more successful.<sup>118</sup>

As to the OT the Student received, and the IEP for the Student listing 90 minutes of OT services per week, when asked why she believed 90 minutes as appropriate, the witness testified there were goals in the classroom they were working on, they were trying to keep the Student where he was working in the room where he was still getting needs met, and also he would be pulled out going to OT three times weekly, so they looked at that tentative schedule in the book yesterday, and the Student obviously has speech therapy as a related service, then he received counseling, so he had the various academic subjects he is involved in and the functional and social skills, so the 90 minutes was the number the IEP team decided to include so everything would fit together

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<sup>116</sup> Vol. II, p. 107, line 25, through p. 108, line 16

<sup>117</sup> Vol. II, p. 108, line 20, through p. 111, line 24

<sup>118</sup> Vol. II, p. 112, line 7, through p. 115, line 5



and all the different things could be provided to the Student.<sup>119</sup>

As to the implementation of a shortened school day for the Student in November, 8:00 to 11:30, when asked to explain why the team believed that appropriate, the witness testified that as they looked at the student's behaviors and the difficulty he was struggling with, and when did those increase, it was always after 10:30, and they wanted the Student to feel successful, so if he was able to have a reduced day, be able to show success for himself, it would help him feel successful. The witness testified the mother stated she was noticing behaviors getting better at home, that he was following directions, listening, and that the witness attributed that to his not being over-stimulated, that he was not so tired and acting out.<sup>120</sup>

Testifying as to the differences in the environment between a pre-K program such as The Community School and her classroom at Heber Springs Elementary School, the witness said from what she understood, the Student was in a small room, he was not in with 15 students, that he displayed behaviors and they had to reduce it down, that he had been to a one-to-three, and reduced to a one-to-one, and they also had expressed concerns they had of the Student leaving the playground, where he would run off and not come back when called, and that brings in safety concerns. The witness testified that when the Student came in to school, they looked at the time of different settings of him being in a classroom with the full kindergarten classroom that is with 20 students, and the committee decided that would be over-stimulating, even as they were looking to come into Resource, for the Student to attend Resource for those times. The witness testified the committee decided it would be best for the Student to go into the self-contained room where his needs could be met better. The witness testified that at the March 2019 meeting there was a representative of The Community School present, and that person and the mother both talked about the behaviors the student had shown at the pre-K program, that he would strike out and other behaviors. The witness also testified that the team in that March 2019 transition conference reviewed the social history form the mother had completed, and she had listed significant behaviors.<sup>121</sup>

The witness was asked about having done any classroom-based assessments, and on page 94 talking about the Student's teacher providing information for the classroom-based assessment, the witness testified this refers to the documentation they received from The Community School, which was the Confidential Psycho educational Evaluation dated June 5 2019 that the committee asked to have completed before the transition to school, so the information that was given was from the teachers at The Community School. The witness agreed the initial IEP was developed in June of 2019 after the team reviewed this evaluation.<sup>122</sup>

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<sup>119</sup> Vol. II, p. 115, line 6, through p. 116, line 18

<sup>120</sup> Vol. II, p. 116, line 24, through p. 118, line 8

<sup>121</sup> Vol. II, p. 118, line 9, through p. 121, line 5

<sup>122</sup> Vol. II, p. 121, line 6, through p.123, line 16

When asked if all the Student's work is contained in the evidence books, the witness testified no, it was not, and that she looked at all the Student's work in order to rate his progress on goals in the IEP documents, that some of the work the Student did was not in the books because it was sent home to the mother, and also a lot of the Student's work was working games at the table, whether matching words, letters, shapes, numbers, colors, counting, using manipulatives that are out there, so it was concrete objects she was unable to put in.<sup>123</sup>

As to the reading curriculum she used, the witness testified that Recipe for Reading is evidence-based, and it is a variety of what she is pulling from to use for the kids to meet their different needs they have coming in. The witness testified it is not used in other classrooms to her knowledge.<sup>124</sup>

As to the Notice of Action from the June 24, 2019 IEP meeting, and her sense and the team's sense about the least restrictive environment for the Student at the beginning of the kindergarten school year, the witness testified that Ms. Stone is the Resource and the witness was self-contained, that Ms. Eskew is the kindergarten teacher and she was the kindergarten representative at the meeting, and the team's decision was the Student would be better situated in the self-contained as opposed to Resource or General Ed. The witness testified that when the committee was looking first at placement in the regular classroom with Resource guided through, they were looking at the sizes in there, and from what they knew from The Community School, the Student displayed difficulty when in large group setting, that he needed a smaller group, that kindergarten class sizes run up to 20, and when you go into Resource you are only pulled out for Resource for the amount of minutes you would receive services with reading, writing or math, and when you looked at those amount of times he would be out working with a smaller group of eight to ten with Resource versus staying with 20 in the classroom and all the different movement going on in a kindergarten class, and with the Student being over-stimulated, the committee decided the other option was working in the self-contained, smaller class the witness had, where he would also be receiving instruction in reading, writing and math at his level. The witness testified the committee also looked at safety issues about the Student wanting to run off from the playground, and all were in agreement self-contained would allow him to be at school in a safer zone and meet his needs, and the mother was in agreement. When asked if the mother was shy or bashful about stating her positions on various things the IEP team was discussing, the witness testified no, that the mother had things she wanted to bring up and she was able to address that.<sup>125</sup>

The witness testified as to the number of students she regularly had, that the tentative schedule had 11, but two had been moved to different settings, that she had two students who only came

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<sup>123</sup> Vol. II, p. 123, line 17, through p. 124, line 20

<sup>124</sup> Vol. II, p. 124, line 20, through p. 125, line 7

<sup>125</sup> Vol. II, p. 125, line 8, through p. 129, line 15

in for social skills so they are not there full time, they are there for 30 minutes at two different times, then there is another student with health issues who is in and out going to the nurse and also receiving different therapies, so as the therapies that are coming in, the witness' numbers vary back and forth since they are being pulled out, going to either speech, OT, PT, so the witness had basically seven students regularly assigned to her classroom, including one of the seven who had a serious medical problem that was frequently going to the nurse, and that student would be in the classroom maybe a quarter of the time. The witness testified there were five aides, but not at all times, they are with the different students, and the student who is medically fragile, the aide is constantly with her. The witness testified she had two other students who have a one-on-one, and another aide in the classroom to assist and be able to transport students as they went to recess, lunch, walking to activities. The witness testified that left two aides for the remaining four students, plus the witness, so the Student was getting a lot of attention.<sup>126</sup>

Talking about where the Student was at the end of this school year, which was in March because of the pandemic, taking that into account as well as the Student's behaviors and the shortened school day, the witness testified that mid-March versus mid-August when they started, when they started trying to get the Student to engage and come to activities, he would refuse, you still continued teaching and he was there listening. The witness testified she knew he has receptive and expressive, but he is able to hear and is exposed to everything going on in the room; then he would pull aside and she would work with him to start in, and when they had the para from what the instruction was going and carried it out. The witness testified that when the Student first started, they had a lot of behaviors as he did not want to follow directions, that she tried multiple avenues there, but if the Student did not want to do those, he had the tendency to pick them up and throw, scream and yell and not come to the table to work, so instead of having him come to the work table, she or one of the paras would go to him and work with him. The witness testified that was why she was stating earlier that it all flows together, he might be building blocks, but he would be counting and comparing, and toward the end of school he was getting to where he would come to the table and stand beside the witness at the table or pull up a chair and sit down, he was coming in closer. Asked about the Student's progress from the beginning of school to mid-March when the school was shut down, the witness testified coming in the Student identified only three letters, and at the end he was naming 20 consistently, not missing them, that looking at math he was able to identify the numbers at the first, that writing he could write his numbers one to ten and not transpose them, that at the first the Student could only write his name, and toward the end he was not only writing stories when he would draw his picture, he was writing his words, which is the pre-beginning of writing what he drew to make his words in, that he was also getting where he would copy sentences that were up, as you were teaching sentence structure, that you have a capital letter, you are doing spacing and punctuation at the end; he struggled with case but he was getting the format and staying on the line. The witness testified that with functional skills, when he first came in, the Student would just throw his things toward his desk, and at the end he was always putting his belongings, he had a special place to put his things up, and toward the end he was putting his bag on his bag in the desk and he kept his lunch box on top so he could eat as he

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<sup>126</sup> Vol. II, p. 129, line 16, through p. 133, line 2

needed. The witness testified that the Student was getting to where he was completing and doing the work he was asked as well as transitioning as he was coming and going. The witness testified the Student had a rough time at the start, but toward the end he was doing much better in the classroom. The witness testified she did not believe there were any supports and interventions that were not tried to help the Student.<sup>127</sup>

As to the Student's behaviors, when asked to compare where the Student was in mid-March compared to where he was when the IEP team made the decision in November to shorten the school day from 8:00 to 11:30, the witness testified that toward the end the Student was able to self-regulate himself, he was getting much better, when before he would just lash out.<sup>128</sup>

Again looking at pages 185 and 186 in the parent's book, Behavior Intervention/Responses, the witness testified those were presented when the Behavior Plan was reviewed on October 1<sup>st</sup>. Looking at the Notice of Action on page 63 in the parent's book, where it said the committee had discussed reducing the Student's school day 8:20 to 2:30, and at least on September 18<sup>th</sup> it was reduced, the witness testified as to behaviors gone over there was an ongoing Goggle document that is on page 185 that was submitted with the Notice of Action. The witness again testified as to interventions she and the others who worked with the Student used for his benefit. The witness agreed that the only thing that happened after October 21<sup>st</sup> as on November 7<sup>th</sup> or 4<sup>th</sup>, a few days after the Student was moved to half days.<sup>129</sup>

The witness testified, as to why the committee did not accept the recommendation of the OT as to minutes, that they looked at the minutes the Student was receiving and what could be incorporated that is done in the classroom. Asked what she understood about the relationship of OT to autistic children and behavior, the witness testified that with OT, they work to help the child as they struggle with different behaviors to give them different strategies they are using, too, as well as what you are working with, the muscle development that is coming in, that what the therapist does with the Student can help in the classroom with behavior, with the sensory input they use, and discussed what they implemented for the Student. The witness testified at times there were problems with the Student transitioning out of her room. The witness testified that when she said there were six aides in her room, she is counted as the sixth. The witness testified that the same people come in and out of her classroom, as well as Ms. Riddle, the assistant principal and the police officer periodically. When asked if she saw that as impacting the Student, the witness testified that with it being in the school environment, it also helps the Student get adjusted to different people coming in, whether he goes into OT, out to speech, where he has one set of therapists coming in to pick up other students.<sup>130</sup>

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<sup>127</sup> Vol. II, p. 133, line 3, through p. 142, line 13

<sup>128</sup> Vol. II, p. 142, line 14, through p.144, line 14

<sup>129</sup> Vol. II, p. 146, line 3, through p. 153, line 10

<sup>130</sup> Vol. II, p. 153, line 17, through p. 156, line 18

The witness testified she understood the parent was part of the IEP team, and equal participant. When asked how she explained to the parent the child needed less OT than was recommended, the witness testified it was explained that it would also be used in the classroom. The witness testified she believed she explained that since there was not an OT there, that she was recommending less OT than the therapist was recommending. When asked if she knew the parent has to take the Student to OT because he was not getting the recommended amount of time, the witness testified the parent stated that afterwards, and that she had a choice and took him after school.<sup>131</sup>

The witness testified that the Student had problems at recess all along, that they learned that at the transition conference from The Community School, which was where you decide to test and what tests need to be given. The witness testified they understood at the transition conference the Student had behaviors, and they went through with his psycho evaluation test that was given. The witness could not remember if they did any testing to program for maybe the Student's behaviors. The witness testified they had the James L. Dennis report, saying at age four the Student continued in speech, OT and PT, and attended all day, five days a week. The witness testified that according to the mother, the Student was transitioned from a class of 15 to 3, with improvements then, and then he was transferred to a smaller group and did better. The witness further testified the Student displayed sensory sensitivities, was easily over-stimulated by large groups and noise, and at a birthday party he hid under the table when the group sang to him, that he had done that in her classroom also at times and she thought he was over-stimulated. The witness agreed the Student's mother had stated the Student was basically nonverbal at ages three and four, but he moved to one word and two and three-word sentences, and now at five he is still making progress. The witness agreed the progress was because of speech therapy. Looking at page 105, and what it said about sensory issues can affect the willingness to try something new, that smell, appearance, taste or any other number of sensory perceptions could trigger a fear or avoidant response, the witness testified she did not observe that with smell, with taste. The witness testified she observed that with avoidance, and when asked if she thought avoidance was related to the Student's disability or he just did not want to come to the table, the witness testified it was also his disability. The witness also testified, as to children with communication weaknesses being likely to have disruptive behaviors or shut down at times of increased stress, that she saw that. As to the document saying the more stress the children feel, the harder it is for them to use words or make appropriate cognitively considered choices rather than simply react behaviorally, the witness testified that means when the Student is in the moment and he is stressed out, he loses all reason, it is just reaction, so he would have bigger behaviors, but if you are able to redirect, they can help the Student not go on, but once it escalates and he is coming to the top, he has to have a place to come back down and then you give him time.<sup>132</sup>

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<sup>131</sup> Vol. II, p. 157, line 4, through p.158, line 14

<sup>132</sup> Vol. II, p. 158, line 15, through p. 165, line 4

Looking at the school district's psychological evaluation starting on page 91 and running to page 97, the witness was asked what in the evaluation made her think the Student needed to be in self-contained classroom, the witness testified not everything was based on behavior, that was part of what the Student was dealing with needing the smaller classroom, but they also looked over his IQ testing, his educational achievement he had, then reviewed over to the last to talk about his processing and sequencing, the adaptive behavior that was used with his behavior, that they looked at everything there and it was taken into consideration where he showed success in smaller groups. The witness testified the autism diagnosis came from the one with Dennis Developmental. The witness testified you would look to see the prior structure, as when going from a pre-school setting into a public school setting, there are different categories listed for services and you look for the best placement to help them be successful. The witness explained when asked what she meant by different categories, that when they come into school age, the one that is non-pervasive development and developmentally delay, those are categories a child can be serviced under in public school, and everyone who is getting Special Ed services before they get to kindergarten in school are under the developmental delay category, developmental disability category, with that and with speech, and one of the 13 categories has to be found when they come to school. The witness testified that autism is a medical disability under the IDEA. When asked why she looked at placement first, instead of the services the Student needs first, the witness testified it all goes in together, that you look to see what is being received and what is needed. The witness testified the Student was not impaired mentally, he is low. The witness testified there were no services the Student needed that he could not get in the regular kindergarten class. When asked about needed supports had he been placed in the regular kindergarten class, the witness replied looking for smaller one-to-one and the smaller group setting, and he would be able to have a para if he was in a regular classroom if the committee decided. Asked about the tape for the Student around his desk in her classroom, could that be an accommodation in the regular classroom, the witness testified yes. Asked if the Student could have a visual schedule in a regular classroom, the witness replied yes if he was able to follow it. Asked if he could be given a headset to block out noise, the witness replied yes, if he would wear them, and the witness stated he would also get to go to OT and speech therapy when needed. Asked if she had any current data to indicate the Student required a smaller group setting, the witness testified they looked at his behavior. Asked what data that was current at the time of the conference in June that indicated the Student needed a small group setting, the witness testified that would be the Dennis Developmental (although that was two years old) documentation and also input from The Community School who had stated what was there at the previous meeting. The witness testified that had the Student been placed in a regular classroom, a Behavior Plan could have been done as another support.<sup>133</sup>

#### Witness Roxanne Riddle

The witness Roxanne Riddle testified the reading curriculum used in Ms. Snow's classroom is a research or evidence-based program or curriculum. She further testified The Community

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<sup>133</sup> Vol. II, p. 165, line 17, through p. 175, line 21

School, the pre-school the Student attended, was not affiliated with the District. As to the Student's placement in Ms. Snow's self-contained classroom, the witness testified there were fewer students there than in the General Ed or Resource classroom, and there were more aides in the self-contained classroom than in the Resource classroom.<sup>134</sup>

The witness testified, looking at the Notice of Action from the June 24, 2019 IEP meeting where the initial IEP was developed for the Student, that the reason for rejection of a less restrictive setting was due to behavior and safety concerns, and that it was the consensus of everyone, including the mother.<sup>135</sup> The witness testified when the Student began school in August of 2019, the district staff had never observed any of the Student's behaviors. The witness testified that to the best of her knowledge, the Student did not come to the district with an FBA or a Behavior Plan from The Community School.<sup>136</sup>

As to the discussions in October, 2019 about consideration of shortening the Student's school day even more than it had been earlier, it was never a permanent decision, that the goal of a shortened day is to build the child's tolerance, that they always want them to be on a full day.<sup>137</sup>

As to the meetings in October and November, when there was discussion at IEP meetings as to a shortened school day, the witness testified the mother stated she was initially concerned, but that after talking to another parent whose child as on a shortened school day, she was on board, and that she also said it interfered with her work schedule, but she would work it out.<sup>138</sup> The witness testified that in her experience as an educator, it was not unusual for a shortened school day to be implemented on a short-term, temporary basis.<sup>139</sup>

Looking at the chart the parent's attorney did using behavior data, the witness testified she did remember looking at the day prior, and at the top there was a week number, then it listed a number of behaviors. The witness testified the most serious behavior for an educator was hitting and kicking, and looking at the hitting and kicking from October 3 through November 8, there were 18 behaviors in the one month before the shortened day and 26 in the three and a half months after the shortened school day, so the Student's behaviors were cut into about a third, maybe a

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<sup>134</sup> Vol. III, p. 25, line 9, through p. 7, line 6

<sup>135</sup> Vol. III, p. 7, line 7, through p. 8, line 2

<sup>136</sup> Vol. III, p. 8, lines 6-14

<sup>137</sup> Vol. III, p. 8, lines 15-23

<sup>138</sup> Vol. III, p. 8, line 24, through p. 9, line 11

<sup>139</sup> Vol. III, p. 9, lines 12-15

quarter, that she saw a significant reduction in the serious behaviors.<sup>140</sup>

Going back to the district book pages as to the Notice of Action from the IEP meeting in February, the witness agreed that meeting was to discuss the reduced day, and her recollection of that meeting was that everyone agreed the Student was much happier and content, less stressed at that point and doing much better in class in terms of behaviors, that everyone wanted to keep it the same, and the mother was fine with that also, the Explanation of Action citing that based on the Student's performance, the schedule would be the same for now and in the Student's best interests for him to be successful, his behaviors being fewer and less significant.<sup>141</sup>

As to discussion of the Student's academics at the February 2020 IEP meeting, the witness testified, after reviewing the Notice of Action form, that it looked like in the Student's therapies he was able to participate more, meaning he would get more content and show improvement in those areas, the OT and speech, and the witness would expect that to be the same case as to academic areas, in that if the behaviors are reduced he can attend the academics.<sup>142</sup>

As to the chart on behaviors, the witness testified the Student had an average of three behaviors a week, and that while the Student's school day was cut in half, his behaviors were not cut in half. As to the juvenile delinquency crime, third degree battery, the witness look at the citation and testified it said battery, third degree, and disorderly conduct and was dated February 18<sup>th</sup>. The witness that hitting and kicking by the Student had occurred before and the Student had not gotten a ticket, nor had a FINS petition been filed before, but if Officer Wildman had been there and he had been kicked, a ticket probably could have been written earlier. The witness testified a child can be charged with an act of delinquency before age ten, but the judge will change it to a FINS petition.<sup>143</sup>

Looking back at the Notice of Action 11-6 as to the shortened school day, the witness testified the 9-18-19 meeting was the first time the Student was placed on a shortened school day, 8:30-2:30, cutting 70 minutes off his time, and October 1<sup>st</sup> the committee was to meet to discuss the Behavior Intervention Plan and sensory walk to see if adjustments needed to be made, that they review every 90 days, but normally they review before then and it was not unusual to meet earlier than what you had to. The witness testified the 2-11 meeting purpose was to review the reduced school day, and the behavior was 2-18, so they would not have known about the behavior at that meeting. The witness said the Student was still exhibiting behaviors, but they were less.<sup>144</sup> The

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<sup>140</sup> Vol. III, p. 9, line 16, through p. 12, line 4

<sup>141</sup> Vol. III, p. 12, line 5, through p.14, line 14, line 6

<sup>142</sup> Vol. III, p. 14, line 7, through p. 15, line 1

<sup>143</sup> Vol. III, p. 15, line 17, through p. 20, line 5

<sup>144</sup> Vol. III, p. 21, line 10, through p. 27, line 2



witness testified they would have gone over the Behavior Plan on 2-11. Looking at the subtotal column, the witness agreed it showed when it first began, it was 34, 7, 5, 2, and when back from Christmas they started with 36, 19, 27, 3 and 7, and when asked if she could see the behaviors were not getting better, the witness testified they expect behaviors to regress a bit after a break like Christmas.<sup>145</sup> The witness testified that probably the Student had not been reviewed since the 11<sup>th</sup> but they probably would have scheduled another had they not been closed, that she knew they would have had a 90-day and she knew his annual review was coming up, which she was not sure was before or after the 90 days.

#### Witness Lacey Bray

The witness Lacey Bray testified she was the Student's school-based speech therapist this year. The witness testified she hld a Bachelors degree from UCA in 1993, a Masters degree in speech/language pathology from UCA in 1995, is state certified and ASHA certified, their national organization and has a Certificate of Clinical Competence and has worked as a speech therapist since 1995, being in a school since 1997, and working for District since 2015. The witness testified she divided up the caseload with the other full-time speech therapist there between K-12.

The witness testified she was the Student's therapist, that he was evaluated last June for transition from The Community School by a Ms. Mayfield. The witness testified she had seen Ms. Mayfield's evaluation and used it for her therapy with the Student. The witness testified that, based on the evaluation of the Student for speech and language dated 4-15-19, the Student exhibited severe deficits in receptive and expressive language, which is communication, organizing, vocabulary, grammar and being able to express himself in different situations. The witness testified receptive and expressive language deficits would impair the Student in the classroom as to the way he comprehends and understands information, and with the Student's OT and sensory deficits also, when you combine those together, he has a hard time comprehending complex information, following directions, what he is supposed to do, and that will impact how he understands his academics, if he can understand what he needs to learn for kindergarten skills. The witness testified expressive language is how the Student expresses himself, and deficits there will impact whether he can coordinate his thoughts to process them to express what he feels and wants and needs, which will affect his communications. As to what is seen as "severe," the witness testified that based on the Student's standard scores, his listening comprehension on the Oral and Written Language Scales was 58, while anything between 85 and 105 is within normal limits. The witness testified the Student's oral expression was a 68 based on the assessment, and his composite score was 61, falling within the severe range also. The witness testified two language assessments are given to compare, and she gave the Student the Test of Language Development, and those scores were commensurate with the first one, scores in the 50's and 60's, which indicated severe. When asked if this was all because of the Student's autism, the witness

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<sup>145</sup> Vol. III, p. 27, line 3, through p. 29, line 16

testified it can be, that there are children with language delays, but autism definitely is a communication disorder affecting communication skills, expressive/receptive along with pragmatics and social skills. The witness testified that for a child in the severe range, like the Student here, what she would usually recommend as far as speech therapy, it would be 3-4 times a week for 30 minute sessions, what she recommended in this case.<sup>146</sup>

As to the Student's speech goals on the IEP developed at the transition conference based on the committee decision and the evaluation results, the witness testified she had never reviewed the report with the mother. The witness testified she was not at the transition conference, and agreed no speech therapist was shown invited on the Notice of Conference. The witness testified she had some children on speech-only IEP's, and on those she acts as a Special Ed teacher so on those meetings is required to explain her evaluation and results to the parents. The witness testified they propose goals and objectives for students and write them up ahead of time, and when the committee meets they will determine if appropriate or not, and if the parent agrees to them and the SPED teacher is able to at least read through the report with the parent, and they go over those in addition to the Resource goals, so those would be the ones used in IEP's.<sup>147</sup>

The witness testified that if she was not invited to the IEP meeting and did not conduct the evaluation, she would not have known to prepare goals, and that the therapist who did the evaluation wrote the initial goals for the transition conference, that it is done in conjunction with the evaluation. The witness testified that they do not usually do a list of proposed goals and objectives attached to the evaluation.<sup>148</sup>

When asked to discuss how the Student's speech therapy sessions went, and whether he had any kind of problems transitioning to some kind of speech therapy room, the witness testified he generally participated pretty well, she thought there were three sessions where he was throwing chairs, but the other 60-plus sessions he was able to be redirected or was great and participated well, and that he had some problems in the beginning with transition, leaving speech and going back to his classroom, and she recalled there were a couple of times in September he did not want to go, he wanted to stay with her.<sup>149</sup> The witness testified she did individual therapy with the Student, and described her therapy room as a small room with a table, bookshelves, games and bean bags.<sup>150</sup> The witness testified she would go to the Student's classroom to get him, and he never refused to go with her. The witness testified she thought the Student enjoyed his speech therapy for the most part, and he made such good progress this year, that he had 8 objectives and

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<sup>146</sup> Vol. III, p. 33, line 23, through p. 40, line 14

<sup>147</sup> Vol. III, p. 40, line 22, through p. 43, line 23

<sup>148</sup> Vol. III, p. 43, line 24, through p. 44, line 23

<sup>149</sup> Vol. III, p. 44, line 24, through p. 46, line 5

<sup>150</sup> Vol. III, p. 46, lines 6-14

mastered 7 to this point.<sup>151</sup>

The witness testified the Student's receptive language is better than expressive based on her experience with him, that he is better able to comprehend than he can express how he feels, wants or needs, and when he is stressed, because of his expressive language delay, he is more apt not use words, as it is difficult for him to find the right words, difficult for him to process what he needs to say. The witness said the Student has to know a word to say it, and he is at about 49% now with that task. The witness testified that identifying objects giving their function, the Student just met that goal, doing three sessions in a row with 95% that he has choices to point to, and that is receptive also. As to the three expressive language goals, the witness testified she would propose continuation with categories, labeling and then naming them, without pictures, to work on pragmatic expression, not only how he feels in situations, but how he thinks other feel, just in daily situations he might run into at school or home, so he can express that.<sup>152</sup>

As far as behaviors with her, the witness testified she experienced that only twice, once when he was throwing things, and once when he kicked her and knocked all the books off the bookshelves.<sup>153</sup> Looking at her speech logs, the witness testified the Student's reduced time schedule in September did not reduce her speech time, but they had to find a new spot for him mornings because he left at 2:30.<sup>154</sup>

The witness agreed that as to the Student's difficulty with transitions, there was an indication it had to do with his autism.<sup>155</sup> The witness testified the Student exhibited his letting her know transitions bothered him by getting angry and throwing chairs, Kleenex boxes, ripping books off bookshelves, tearing books in half. The witness testified that the Student's behavior was much better in the morning, that afternoons were hard for him, that he was tired and ready to go home, and it seemed to her that triggered some of the behaviors in the afternoon.<sup>156</sup>

#### Witness Alan Ruble

The witness Alan Ruble testified his relationship with the Student was that the witness did a psycho educational evaluation and was involved in various meetings and the behavior assessment, that he is a full time employee of the school and works with the district doing all the psycho

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<sup>151</sup> Vol. III, p. 47, lines 3-23

<sup>152</sup> Vol. III, p. 53, line 5, through p.57, line 14

<sup>153</sup> Vol. III, p. 59, line 9, through p. 60, line 10

<sup>154</sup> Vol. III, p. 61, line 13, through p. 63, line 3

<sup>155</sup> Vol. III, P. 67, lines 15-23

<sup>156</sup> Vol. III, p. 72, line 25, through p. 73, line 11

educational evaluations for pre-K through 12, and is coordinator o the mental health, the mental health provided at the school or district being Methodist Counseling. The witness testified Methodist Counseling is contracted to provide not only emergency, crisis assistance, but mental health services as well. The witness testified if a child is referred, it goes through the school counselors at each individual campus and then he forwards it on and tracks it to make sure they get in as quickly as possible.<sup>157</sup> The witness testified toward the beginning of school he sent a referral to Methodist Counseling for the Student, but the witness testified he did not know what kind of therapy it was.<sup>158</sup> The witness testified he believed the school is required to use evidence-based practices with children when making recommendations for programming.<sup>159</sup>

The witness testified he has a Masters degree in counseling psychology from UCA, licensed as a psychological examiner, independent, which means he does not require supervision from a psychologist, he is licenses by the Psychology Board, but not licensed by the Department of Ed as a school psychology specialist. The witness testified he has been testing children his whole career, 25 years, and has been employed by Heber Springs for four years at the school, and before that he was at Arch Ford Co-op working mental health services for their alternative education program, then began doing psych evaluations for Arch Ford, and was also doing evaluations for Heber Springs for a year. The witness testified that before that he was Director of the Methodist Counseling Clinic at Heber Springs, an outpatient clinic.<sup>160</sup>

When asked if he had contact with the therapist for the Student who came to the school, the witness testified he did, that he got calls from teachers and saying, see on campus, and they needed help, and there was a meeting, and the witness would bring him in, that the witness made sure he was invited to and came to the meetings, and the witness would talk to him.<sup>161</sup>

The witness testified that he is not automatically invited to IEP meetings when he does the testing, and he attends when he is asked. Looking at his Psycho educational Evaluation done on the Student May 23, 2019, the witness said he was asked to determine whether or not his educational placement, it was part of the pre-K transition, and he did that at The Community School. The witness testified he had not done a lot of transition conferences, as he was not invited, and also because of his time constraints.<sup>162</sup>

The witness testified he had a working knowledge of the IDEA, and since it is written down he

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<sup>157</sup> Vol. III, p. 76, line 23, through p. 79, line 2

<sup>158</sup> Vol. III, p. 79, line 3, through p. 80, line 2

<sup>159</sup> Vol. III, p. 81, lines 3-8

<sup>160</sup> Vol. III, p. 81, line 13, through p. 84, line 10

<sup>161</sup> Vol. III, p. 87, line 8, through p. 88, line 4

<sup>162</sup> Vol. III, p. 90, line 19, through p. 94, line 11

can refer to it, and can ask others if he needs to know something. As to certain tests he does for certain disabilities, the witness said the Arkansas Department of Ed has criteria what is required and what is suggested. The witness testified after he got the file and knew the Student was autistic, it was the same as testing anyone, that you must establish rapport, make sure they are comfortable so you get accurate results. The witness agreed an achievement test, it would be accurate to say that the Department of Ed requires that on every child with a disability, but when doing an IQ test, nothing is required by the District, that he gets to choose, and testified that for the Student he gave the RIAS-2, the Reynolds. The witness testified the tests are all standardized and then compared all to each other is how they determine validity and reliability, that he did not think they are statistically different.<sup>163</sup>

As to the IQ test, the witness, when asked if he noticed or knew at the time that the Student had receptive and expressive language deficits, testified that he did not at the time. When asked if that would be important when giving an IQ test if the child has communication issues, would that impact the IQ score, the witness responded it could impact the outcome of the IQ, as it has to do with language and being able to not only receive it and process it and give it back to you. The witness testified as to having any way to know if the child is understanding the communication, it would be by interacting with the child. The witness testified the child can take as much time as needed, the test is not timed, and they can also come back if they did not know an answer or they can change an answer. The witness also said he could repeat the question, but if the child still does not answer, it goes down as a zero. The witness testified that when so many in a row are missed, he would go on to the next test. The witness testified the Student's verbal index score of 58 was in the very low range, the percentile rank of that is 0.3%. The witness testified the nonverbal is gestures only, so that is testing the receptive language, and compared to the other score the Student did much better, but the composite score is a combination of the verbal and nonverbal. The witness testified that IQ is so important because it is a good indicator of educational success and how performance will be. The witness said the Student's letter/word recognition, his reading aloud, was a percentile rank of .5, which is quite low, and it was only four-tenths of a point above if he had not answered any questions. The witness testified when he saw the Student's nonverbal IQ at 72, that was in the below-average range, as average is 90 to 110.<sup>164</sup>

When asked about what he gained from the Student's ABES testing, the witness testified the teacher said the Student attends more successfully when close to the source of sound, requires eye contact to listen successfully, which means you must have the Student's attention and that could be the autism, it could be something else, and listening does not have to do with whether the Student can process that. When asked about the teacher observing the Student had difficulty, perseverates, does the same things over and over, difficulty changing activities, and transitions, fails to demonstrate logical thinking, the witness testified that the Student's autism could possibly

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<sup>163</sup> Vol. III, p. 94, line 22, through p. 98, line 18

<sup>164</sup> Vol. I, p. 99, line 5, through p. 123, line 12

affect that, as with the Student's expressive/receptive language, and his difficulty changing activities and routine, and that it could also be anxiety, a lot of different things.<sup>165</sup>

The witness testified as to the Student's speaking difficulties, another part of the subtest of the Student's classroom-based assessment, like listening, thinking, speaking, reading, writing, spelling and math were also, the witness testified as to the Student's classroom-based assessment of his behaviors, that the teacher needs to know to make appropriate programming and placement for addressing learning needs, but none of the behaviors like hitting, biting, yelling, they were not predicted in the classroom-based assessment.<sup>166</sup>

The witness testified that from testing it showed the Student was below the 25<sup>th</sup> percentile on the visual motor skills test, which is below average, the way things process between going in, seeing them, to coming out in some way, which could affect the Student's ability to function with motor control and being able to process information and get it out physically somehow. The witness testified the Student was also below average range in intersensory integration, problems with integration of visual perception, written perception and visual reasoning, as well as learning strategies, difficulty being able to remember what he hears, to be able to write that down and the ability to write down information he sees, that he could have difficulty with being able to process, sequence, recall from memory what he hears and/or sees and successfully do something with that. The witness testified the Student's reading would be impacted, his memory could be affected, you could give him instruction and him not be able to know by the time he figures out what he was going to do, he has lost it. When asked if the Student's low scores and problems could be attributed to autism, the witness testified it was a possibility.<sup>167</sup>

The witness testified the Student was below average as to self-care, and that ties in with an overall look at child's overall functioning, so it was important to look at all the child's environment, home and school, as it all interacts, and if the school and the parent are seeing the same thing, the Student consistently demonstrating lack of skills, it shows the testing was correct, but if they are seeing inconsistent things, it could mean the test was not understood on how to answer or the child is not acting the same in these different areas.<sup>168</sup>

When asked about his recommendations, the witness testified as to there being none about programming, that he was not told that, that he was not comfortable making those, that it is a committee decision as everyone has the information from their perspective and they all have

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<sup>165</sup> Vol. III, p. 127, line 5, through p. 132, line 2

<sup>166</sup> Vol. III, p. 132, line 11, through p. 135, line 1

<sup>167</sup> Vol. III, p. 136, line 16, through p.147, line 12

<sup>168</sup> Vol. III, p. 149, line 151, line 2

different skills and expertise.<sup>169</sup>

The witness testified he had been to an IEP meeting when one was developed, and that one of the things required to have is information about the child's present levels of academic and functional performance. Looking at his report on the Student, the witness testified the Student's levels of academic achievement and functioning performance were in the below-average range.<sup>170</sup>

The witness testified that if you go with the Dennis Developmental report and the other information they had as far as looking at the Student's history to where when the witness saw him in pre-school to even when he saw the Student during the school year, he made great progress. Asked if he was sitting in the IEP meeting, discussing his report, what he would provide as to the Student's functional needs, the witness testified the speech/language issues were related service issues, support would be needed for communication needs.<sup>171</sup>

When asked if Special Ed needs are determined based on an IQ score, the witness testified that is a factor, and educational needs are not determined based on achievement alone, that the other factors in his report would be looked at also. The witness testified you take into account as much information as you can for the child's best academic placement, and that although he sat in on different IEP meetings, he does not determine academic placement, it is a committed decision.<sup>172</sup> When asked about the Student's educational and social history listing behaviors of the Student by the mother, and that he disliked school, and knowing the child is coming into school with behaviors, if he would predict supports would be needed to handle the child's behaviors at school, the witness responded yes, and also agreed he would expect the Student to exhibit behaviors when frustrated. However, the witness testified he did not give the IEP team any other information regarding behavior supports. Despite the educational and social history as to behaviors of the Student by the mother, the witness testified he did not think the Student would need a Behavior Plan when he entered school.<sup>173</sup>

The witness testified he did not know why if he thought the Student needed supports, he did not express that in his report or at least put in his report some of the behavioral supports he would recommend. The witness testified he could have made suggestions about behavior supports.<sup>174</sup> Asked about the Functional Behavior Assessment the witness did of the Student, the witness

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<sup>169</sup> Vol. III, p. 152, line 16, through p. 153, line 9

<sup>170</sup> Vol. III, p. 153, line 10, through p. 154, p. 9

<sup>171</sup> Vol. III, p. 155, line 6, through p. 157, line 8

<sup>172</sup> Vol. III, p. 158, line 14, through p. 161, line 8

<sup>173</sup> Vol. III, p. 164, line 6, through p. 166, line 3

<sup>174</sup> Vol. III, p. 167, line 21, through p. 168, line 16

testified he typically prepares by talking to the teacher and staff involved with the child, gives them rating scales to fill out, then he observes the child as much as he can. The witness went on to say that he tries to figure out what the function of the behavior is so that interventions and supports can be addressed to reduce and/or increase other behaviors to reduce the aggression and increase prosocial skills.<sup>175</sup> The witness testified he did not have behavior sheets, as he did not see any of the behaviors by the Student.<sup>176</sup>

The witness testified that a reinforcer could either increase or decrease a behavior, and it needs to be fairly significant and frequent at the moment to address the behaviors that you want, and the Student would get reinforcers if he engaged in the good behavior, and the reinforcer would be withheld if a behavior is exhibited. The witness testified that when the Student has so many behaviors, it becomes difficult to address them, difficult for everyone involved.<sup>177</sup> When asked if the function of the Student's aggressive behaviors was to escape and go home early, would it be expected the behaviors would increase, the witness responded yes, and that if bad behavior is reinforced, more and more bad behavior will be seen. The witness agreed that it what was seen, that by the time November 11<sup>th</sup> came, the Student's day was cut in half, all because of his behaviors.<sup>178</sup> The witness testified he remember the mother crying out of concern for her child at most of the IEP meetings.<sup>179</sup>

When asked about the purpose of the FBA being to look at the Student's behavior and Behavior Plan, and wasn't he saying it is disability-related behavior, the witness testified he did not formulate it that way in his head, that he did not think like that, and when asked what he thought was the cause, the witness replied he did not know what he thought back then, as he was actually thinking about what he was thinking about now, but did not know what he thought about the Student back then.<sup>180</sup>

The witness testified that around September 17<sup>th</sup> they started implementing the Behavior Plan, but he did not personally keep any data. As to another IEP meeting on the 22<sup>nd</sup>, the Notice of Action reflecting that Scott Lacy said he knew the Student was learning at school as it is reflected during therapy sessions, and the document reflecting the committee was looking at a shortened school day when the principal was notified the Student was displaying aggressive behaviors, so that meeting was cut short as the Student was sent home, the witness testified he did not recall

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<sup>175</sup> Vol. III, p. 177, line 10, through p. 179, line 13

<sup>176</sup> Vol. III, p. 187, lines 17-20

<sup>177</sup> Vol. III, p. 195, line 1, through p. 200, line 4

<sup>178</sup> Vol. III, p. 200, line 7, through p. 202, line 6

<sup>179</sup> Vol. III, p. 202, lines 14-24

<sup>180</sup> Vol. III, p. 203, line 17, through p. 204, line 10



expressing an opinion on reducing the Student's school days in half.<sup>181</sup> When asked to what he would attribute the fact the Student could go all day in pre-school in a class of 14 students and then come to kindergarten and some nine weeks after school starts cannot even attend school all day, the witness said he did not know, it could be a lot of things.<sup>182</sup>

Looking at the Notice of Action 10-2-19, reflecting that the committee had discussed shortening the Student's school day further, but rejected the idea due to improved behavior, when the witness was asked to assume the Student enjoyed his speech therapy and had no physical aggressive behaviors except when getting ready to transition back to the classroom, and wouldn't that tell us the Student likes speech therapy, the witness responded it could, yes. So, when asked if the Student tried to avoid or escape the classroom, wouldn't the Student continue the physically aggressive behaviors, the witness agreed possibly, yes, that is what he would do.<sup>183</sup> Looking at the functional behavior sheets chart of behaviors, with the 250 pages of records in the back documenting behaviors, aggressive and otherwise, the witness agreed those were different behaviors than were on the Behavior Plan, and said he did not recall every seeing any of these documents.<sup>184</sup> When shown narrative behaviors of the Student from 8-23 through 10-9, the witness testified he did not recall seeing them, and testified that as far as data, the teacher did not provide the witness with any behavior data other than discussion.<sup>185</sup>

#### Witness Brooke Bise (Via ZOOM)

The witness Brooke Bise testified she was the occupational therapist for the Student, that she evaluated him for his transition OT evaluation, transitioning into District from The Community School. The witness said she had a copy of the Student's evaluation, but did not have a copy of the Student's OT progress notes, that they were at the clinic. The parent's counsel then emailed the progress notes to the witness. The witness testified she graduated from UCA in 1999 with a degree in occupational therapy and had worked in the public school system since then, that she did some PRN work in other settings, but mostly all her experience has been in the school setting, and she is a registered occupational therapist. The witness said the UCA program went to the Masters program the year after she graduated, and she was the last year it was not.<sup>186</sup>

The witness testified she was from Sense-Able Kidz, that was who she was working for when she

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<sup>181</sup> Vol. III, p. 205, line 17

<sup>182</sup> Vol. III, p. 208, lines 3-18

<sup>183</sup> Vol. III, p. 208, line 24, through p. 210, line 8

<sup>184</sup> Vol. III, p. 210, line 9, through p.211, line 12

<sup>185</sup> Vol. III, p. 211, line 16, through p. 212, line 12

<sup>186</sup> Vol. III, p. 218, line 17, through p. 221, line 10

did the evaluation on the Student May 10, 2019. The witness testified she left in September, so at that time the Student was on her caseload, and looking at the daily notes she saw that Emily Brown saw the Student twice, that Heather Carroll was the lead occupational therapist at Heber that works for Sense-Able Kidz, that there was also a Hannah Freeman, and a Peggy Mann who came in after the witness left, that there was also Kristen Williams, Tally Reed, but the witness did not know who.

Looking at her report, the witness testified she used two different assessments and also did simple observations throughout the evaluation. The witness reviewed her report since it had been a little over a year, and stated it reflected the Student was easily distracted during the evaluation, that he required frequent breaks but would always re-engage after a short break, that he was very impulsive throughout and required frequent redirection throughout, but did appear to put forth great effort to complete the tasks presented; that the Student had average muscle tone and upper extremity strength for his age and range of motion was within functional limits. Discussing where she talked about tracking, making contact with an object, the witness testified they always check visual tracking as that plays into the reading and math skills, and there are lots of academic skills you have to be able to track visually, that when you track an object, you want your head to be still and to follow the object with just your eyes, and lots of children, particularly at this age, cannot dissociate the head movement from the eye movement. The witness testified she listed the Student's tracking as "slow/effort," but that his ocular motor skills were difficult to accurately assess as he was unable to dissociate eye and head movement, which is a developmental delay, but she did not know what the Student's tracking is now. The witness testified the Student displayed a good tripod grasp of his pencil, he was right-handed, and she got to see a lot more writing because that was something the Student wanted to do. The witness further stated from her report that the Student moved his arm more than his fingers when writing, but that is common at that age.<sup>187</sup>

Discussing the normal-referenced testing and standardized assessments she did, the witness testified all the Student's scores for Sensory Processing were greater than 65 except for one, the balance and motion. Talking about difficulty with visual, auditory, tactile and proprioceptive processing and how each of those impact the Student and what problems might surface, the witness testified that all those fall under the sensory processing umbrella, which she guessed the teacher noticed on the form throughout the last school year. The witness testified as to social participation, the Student is distracted by lots of visual things, same thing as hearing, does noise bother him, loud noise, does the wind outside bother him, if it is affecting his not actual hearing but sensory of the ears. The witness further explained that body awareness is being where you are in space, can he keep his stuff together in his space or is his stuff scattered everywhere; planning and ideas, motor planning, can he complete a task without having to be able to sequence, not having to think of each individual task to complete the overall one, or does he need it broken down into different pieces to complete it. Discussing proprioceptive processing, the witness explained that is knowing where you are in a space, and while every child is different as to how

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<sup>187</sup> Vol. III, p. 225, line 6, through p. 229, line 15

the need for that might be shown, it is trial and error for each child, some might have a weighted vest or compression vest, just various things, and you can do joint compressions to a child, deep pressure through the shoulders, just different things, and if a child needs that, they might rub all the way down the hall or twirl or bang into the wall to get that input themselves, whether it is hitting, pushing the desk, pushing on a chair, jumping gives proprioceptive input. They could also hit and push people. The witness testified you cannot predict whether that input was needed. The witness agreed that the younger a child is, the more sensory needs and needs for OT they might have. The witness testified her professional opinion and recommendation was based on the significance of the Student's sensory processing scores and talking to his former teacher about his transition difficulty, and it was going to be a new environment with new people. The therapist testified she would expect at least the same difficulty, or even greater, at the new school. The note that the Student disliked going outside, the witness testified that was based on what she was told by the Student's teacher since they had difficulty with that at The Community School. The witness testified when she had therapy sessions with the Student, he was always excited when she came in, and most of her treatment was done in the room, though he did go once or twice with her to the therapy room, and he was always ready to and easily transitioned to the OT room, but had difficulty transitioning back.<sup>188</sup> The witness testified she had a good rapport with the Student, even when they stayed in the classroom and worked on activities and skills there. The witness testified they worked mostly on fine motor tasks, motor strengthening tasks.<sup>189</sup>

The witness testified the Student did well on the fine motor precision, fine motor integration, which is controlling the accuracy of the pencil tip, then fine motor integration and manual dexterity, which is fine motor tasks with speed, and he did really well with those fine motor tasks on the evaluation.

The witness testified the Student was below average in the manual dexterity, the upper limb coordination is ball skills, and then they did manual coordination, and all those tests are timed. The witness testified if sensory needs are not met, we will not be able to do other things, and to her sensory input trumps it all, that you must focus on the sensory and meet those needs before he is going to be able to sit down and do handwriting and cutting and those type of tasks. The witness testified he has to be engaged to be ready to complete a task, and that if he is screaming or yelling or running around the room, he is not at a ready state.<sup>190</sup>

The witness testified she collaborated with Ms. Snow, and she liked the deep pressure they talked about and different types of input that can be done in the classroom, and while the witness was only there a few short weeks, she testified she knew there was difficulty with the Student, but since each child is different, they just tried to explore different avenues to see what was and was

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<sup>188</sup> Vol. III, p. 229, line 16, through p. 238, line 6

<sup>189</sup> Vol. III, p. 238, lines 7, through p. 239, line 3

<sup>190</sup> Vol. III, p. 239, line 4, through p. 242, line 14

not working, and she was not aware of the hitting and biting, nor did she know how much of that had gone on before she left. The witness testified the Student had a space he could go if he chose, but he was not isolated, and lots of times he did engage. The witness testified that the taping off an area around the Student's desk because he was afraid other students would get his things was after she left, but it was a good visual for him and others. The witness said she was speaking to Ms. Snow every time she was in the classroom, and that was one thing they talked about, making a space for the Student when he needed to be able to calm, or if he felt over-stimulated, he would know he could go there for his safe space. The witness testified they also talked about seat pushups, or chair pushups or wall pushups, different options that were safe for the Student and others, but he could still get input.<sup>191</sup>

As to the recommendation the Student have OT four times a week for 30 minutes, the witness testified she was not invited to the IEP meeting where the Student's IEP was developed. The witness testified that when school started in August and they were making schedules, she was informed that the IEP team said just 90 minutes, three times a week at 30 minutes each. The witness testified on the last page of her report she wrote goals and objectives for a year. Looking at the OT logs, the witness testified those are done each time a child is seen, and on the left column are the goals, and they put the date, time, units the child is seen, and address the goals worked on. Looking at the August 21<sup>st</sup> log, where there as a fill-in therapist for the witness, no problems were set out as to transitioning, and the witness testified it would be accurate to say that the Student looked forward to his occupational therapy.<sup>192</sup>

Looking at the 8-22 through 8-28, where it said the Student in self-contained classroom traced shapes and colored design with approximately 70% accuracy, copied picture design by drawing on separate page with approximately 70% accuracy and good three point and distal movement, that sometimes instead of trying to write in each individual goal, it was more of a narrative of what occurred in the treatment session versus just checking in the boxes of goals addressed. The witness testified on 8-28 there was the therapy room, as the note at the bottom said "To and from therapy room with visual timer," which was something they used for transitions and helped the Student know when it is time to go. When asked how long they try to teach a skill before deciding it does not work, the witness testified you have to give an adequate amount of time, and it depends on what skill is or what tactic you are using, and just like that, one day it works, another day it is harder.<sup>193</sup>

Testifying as to her 9-10 treatments in the classroom, where she said "Difficulty before," the witness said that was session, that Mom was called, and she also wrote that she left room with

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<sup>191</sup> Vol. III, p. 242, line 21, through p. 246, line 1

<sup>192</sup> Vol. III, p. 247, line 18, through p. 250, line 8

<sup>193</sup> Vol. III, p. 250, line 9, through p. 254, line 6

minimum difficulty separating, engaged with therapist in various tasks with appropriate behavior and motor planning with approximately 80% accuracy. As to her last session, 9-11, the witness testified she was talking about tactile input, which is under the sensory umbrella, so they are trying to meet the Student's sensory needs. The witness said it is standard practice to record each session, the time and where they worked on the goals, and everyone should sign their daily note every day. Looking at the Feb. 2020 log, the witness testified Heather was the lead therapist and supervisor. When asked how to see how the Student was going on his goals and objectives, the witness testified the overall progress was in the logs as to how the Student did daily, and at the end of the school year they do annual reviews, which is where they would give the progress of the goal at the end of the school year.<sup>194</sup>

### Witness Hunter Davis

The witness Hunter Davis testified he did not remember any kind of recollection and did not have a relationship with the Student. The witness testified he is the physical education teacher at Heber Elementary, serving "K" through fifth grade, that kindergarten students had PE with him, depending on the class, once or twice a week. The witness testified he had never had anyone with the self-contained, that he has some that come out that have an aide that come out with them, a one-to-one aide, but he did not have anyone from the self-contained room. The witness testified he thought they go in the morning before he gets there, as he does not get in until second period in the morning, and he thought that most of those go with Coach Johnson in the morning. The witness testified he sees over 700 students a week, that he did not recognize the Student from a picture, and that the more the behavioral problems, the more they stand out to him. The witness testified that Ms. Devon, the counselor, showed him the picture the other day and told him he might be called as a witness, and he said then he had no recollection of him at all. The witness testified he had Ms. Hamlin's kindergarten class he thought from 12:30 until 1:15, and they always have the same basic introduction where they do stretching, things of that nature, some running exercises to get them loose, they play different games with them so they don't get bored, and a lot of times they take them out to let them run around the track. Discussing adaptive PE, where you adapt games to accommodate kids who may not be able to participate at the same level as someone else, the witness testified that he had designed adaptive PE, but did not recall being asked to do that for the Student. The witness testified there are several kids in the self-contained classroom that he might have made an adaptive PE plan for, that there are several kids that come out there that they have to keep noise levels down and things of that nature. The witness testified he did not have a Special Ed degree, and that his interaction mostly is just going to the classroom and picking them up and taking them to his PE building, so he knew for a fact he did not go get the self-contained classroom of Ms. Snow.<sup>195</sup>

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<sup>194</sup> Vol. III, p. 255, line 9, through p. 260, line 15

<sup>195</sup> Vol. III, p. 264, line 4, through p. 270, line 23

### Witness Julie Hamlin

The witness Julie Hamlin testified she is the Student's General Ed teacher, that she has been teaching 13 years, all in kindergarten, has a Bachelors degree of science from Arkansas Tech University and a Masters in reading and literacy from Waldon University.<sup>196</sup> The witness testified she did a screening to get to know what the children know before they start kindergarten, and she would expect them to know their name, to be able to write their name, to know some letters of the alphabet, and that would be on the low end, that some have not been in school before. The witness testified the curriculum she uses is Phonics First and Heggerty. The witness testified that at the beginning of the school year, they go through the 26 letters the first 26 days to get them introduced to letters, then they start Phonics First. The witness testified during the Kindergarten year they do Heggerty assessments, a phonics assessment they just started last year, that the lessons are drills. The witness testified that Heggerty teaches the foundations of phonics, the parts of a word, syllables, beginning sounds, ending sounds, middle sounds, all that, and it is done as a class. The witness said they start Phonics First the fourth or fifth week. The witness said she assessed skills for report cards as to skills, but she did not give the Student a report card, as she is not his teacher, that she is his General Ed teacher, that he is in her class, but that is Ms. Snow's responsibility. As to the grades she gives, the witness testified she gave "R" for needs remediation, needs a little bit more work, and an "M" for mastered the skill, and in the computer printout they have "S"es.<sup>197</sup>

The witness testified her class goes to PE with Coach Davis sometimes, one to two times a week, and they rotate things like PE, art, library, music, but the Student does not go with her class to any of those activities. The witness explained that when she said she was the Student's General Ed teacher, she meant he was on her roster, he has a spot in her classroom, but Ms. Snow teaches him his skills. When asked if the Student every associated with her class at all, the witness testified yes, whenever they can get him to come to her classroom. The witness could only guess how many times the Student had been in her classroom, saying maybe 10 or 15, as she did not document it, but it was not at the same time, because he did not want to come. The witness said they did not plan, as they did not know when the Student is going to feel like coming to her class, that she knew they often tried, but they would tell her they tried but just didn't make it to her door, so it is just different times. The witness testified she had met the Student, but had never been on the playground when he was there. The witness testified the Student had been to her class with an aide when he did come, but the longest he ever stayed was about five minutes, so he never participated in anything they were doing.<sup>198</sup>

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<sup>196</sup> Vol. III, p. 272, line 13, through p. 273, line 8

<sup>197</sup> Vol. III, p. 273, line 9, through p. 281, line 21

<sup>198</sup> Vol. III, p. 282, line 5, through p. 285, line 12

The witness said she had often met the Student's mother, at IEP meetings and outside. When asked about her class going to the pumpkin patch, the witness testified she was not there this year, but the class did go, and from their picture testified that her class of kindergarten students had on shirts that were alike. When asked about the Student not having a shirt on like the others, and how did the witness keep up with letting the Student's mother know about activities her class was involved in, the witness testified she would personally take the notes down to Ms. Snow's class to go home. The witness testified that the parents did not order the shirts or go somewhere to get them, that they are from her classroom and the students wear them for field trips so they can keep up with the kids. So, the witness testified she was not there, but the student would have gone to her classroom before they got on the bus to go to the field trip to get the shirts.<sup>199</sup>

When asked, aside from the IEP meetings and what she heard there, what efforts were made to try to get the Student to transition to her class for any period of time, the witness testified that she can hear Ms. Shanks trying to get him to go into the room, and that she would go to the hallway and try to make an effort to coax him into her classroom. The witness testified she had no input to add at an IEP meeting since the Student does not come to her class. The witness agreed that her expectation was that she would have a kindergarten student from the self-contained room that may come in an aide and they are going to be included in her classroom, and for activities, music and art, they either line up with her class or they come down the hallway later, or meet them there. The witness testified that as far as parties, maybe Christmas parties or Halloween parties, things like that, kindergarten students from the self-contained room that are signed to her, they do come and participate in those parties if they are able to come and the aide will bring them to her room, and the aide stays the whole time. The witness testified that she did not know the purpose of keeping those children on her roster. The witness testified there were only two kindergarten students in the self-contained classroom, and the Student was the only one assigned to her room, but when she was telling the parent's counsel about all those things, she was telling her in years past those things happened, since that is what she was asked.<sup>200</sup>

The witness testified she would have first found out the Student was in her class from the list they get the week before school starts, right before Open House. The witness testified she first met the Student and his mother in her classroom, but the Student was very upset and screamed, and she believed hit his mom's boyfriend, that you could see the Student was clearly upset and overwhelmed, so the witness told Mom to wait until all the other kids left so he could kind of calm down and go around the classroom and look. The witness testified there were maybe five or six people in the room, that it was not loud to her, and that the hallway was heavily decorated. The witness testified the Student stayed in her classroom and screamed until everyone left, and then he calmed down. The witness testified she then got on his level and talked to him and talked to Mom, but he did not want to have anything to do with the witness at that moment. The witness

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<sup>199</sup> Vol. III, p. 285, line 13, through p. 287, line 11

<sup>200</sup> Vol. III, p. 287, line 15, through p. 297, line 10

testified that whenever the aide could get the Student to her classroom, she would give him paper and he could show her how he made tornadoes, and he would get tissue. The witness testified that while the Student was making tornadoes, the rest of her class were working at their desks. The witness testified she knew they had tried to get the Student to come to parties, but he did not want to come was what she and the aide talked about. When asked about the testing she did throughout the year, the witness agreed she did DIBELS, and testified how many times a year it is done depends on the outcome of it for a kid. The witness also testified they tested for report cards and do Heggerty, and PASSE, that it is new to her and she has not seen it in a bit, but Ms. Alumbaugh said it was a phonemic awareness assessment. When asked if she had ever recommended a child repeat kindergarten, the witness replied she had. Testifying as to academic factors she would use to recommend a child be retained, the witness said it would be if they still cannot write their name, if they know few letters of the alphabet, that they cannot count to ten or twenty, recognize numbers to 20. The witness testified the DIBELS is not reported on the report card, and at the end of the year there is no information that a parent is given that would indicate reading level in kindergarten.<sup>201</sup>

Witness XXXXXXXXXXXX XX (Parent)

The Student's mother testified, as to the Student's developmental delays and speech, that the Student only said two or three words before his second birthday, he would clench his fists all the time, he rarely slept for almost four years, and he was between three and four before he could tell her in 3-4 word sentences what he wanted. The witness testified the Student attended pre-school in 2016 or 2017, and since he was upset with her dropping him off, he began riding the bus, which he did not like since he wanted to have fidget toys out and was not allowed that, but he loved The Community School, where he was moved into a smaller classroom at the start. The witness testified as soon as she received the diagnosis of autism for the Student, she could enroll him in The Community School, and he did well, being age 3 and in a classroom of 3. The witness testified the Student was there 8 hours a day.<sup>202</sup>

The witness testified the Student began Kindergarten at age 5, a month before he turned 6.<sup>203</sup> The witness testified pre-school and Kindergarten were totally opposite, that he had a lot of self-doubt, that he came home asking why kids don't want to play with him, and he was upset when kids said no, telling his mother they called him a bad boy and he would ask if the doctor was going to fix him. The witness said they tried going to parties, but the Student did not want to stay because he said they didn't really like him, so he wants to go home.

The witness testified the Student was having therapy at school in Kindergarten, that it had been

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<sup>201</sup> Vol. III, p. 297, line 11, through p. 308, line 2

<sup>202</sup> Vol. IV, p. 10, line 6, through p. 14, line 19

<sup>203</sup> Vol. IV, p. 8, lines 7-11



recommended right at the end of pre-school. The witness testified it was not ABA therapy, that the pre-school had helped her fill out applications and get doctor referrals, but she never heard back, and there was usually a waiting list, and that she had done that twice while the Student was at The Community School. The witness testified that Marli Hannah, one of The Community School Special Ed teachers, who never had any issues with the Student, went to the transition meeting with the witness to give her input to try to help the Student transition to Kindergarten, and talked about things that might have worked at The Community School. The witness said they also discussed things along the line of taking things away, positive reinforcement, a timer.<sup>204</sup>

The witness testified she thought that at the transition meeting she asked about ABA therapy, and thought they might have offered Scott Lacy from Methodist, so she filled out forms. The witness said she said she would like the Student to be in a regular classroom with a one-on-one aide, but was told they did not do that, so from the beginning the Student was going to be in a self-contained classroom. The witness testified she was not told why, but they said the Student would have more one-on-one interaction in a self-contained and they were worried about the Student's aggressive tendencies and did not want him to hurt other children, so a smaller group would be better. The witness said she did not really understand the self-contained classroom, but it sounded like a good idea, that the way it was explained, she thought the Student would get more one-on-one interaction since they could not provide an aide in the General Ed like she wanted.<sup>205</sup>

Discussing what the Student's skills were when he began Kindergarten, the witness testified he knew all his colors, he could identify numbers up to at least 50, he knew all his shapes, he could identify letters, knew the whole alphabet when you pointed to the letters, but she was not sure he knew the difference between upper and lower case. The witness testified the Student could write his first and last name when he entered Kindergarten, and also that he knew some letter sounds. Looking at the Beginning Reading Skills Assessment, which said the Student was supposed to point to each letter and state the name of each letter, he could only do 3 out of 26, the witness testified she disagreed with that, that she thought he knew a lot more.<sup>206</sup>

Discussing the transition conference, the witness testified she thought they discussed how many minutes of therapy the Student would get each week and how many minutes in Special Ed he would have and how many minutes in General Ed he would have per week, but she did not know how that was determined. The witness did not recall receiving a copy of either a speech or OT evaluation. The witness testified she learned of the recommendation for 30-minute sessions four times a week (120 minutes) after she filed for Due Process, instead of the three days a week for 30 minutes (90 minutes) she had been told the Student would receive.<sup>207</sup>

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<sup>204</sup> Vol. IV, p. 15, line 24, through p.19, line 11

<sup>205</sup> Vol. IV, p. 19, line 16, through p. 20, line 13, through p. 21, line 8

<sup>206</sup> Vol. IV, p. 21, line 9, through p. 24, line 15

<sup>207</sup> Vol. IV, p. 25, line 14, through p. 29, line 24

The witness testified that when the Student was in pre-school, he was getting speech therapy, occupational and physical therapy. The witness testified the Student was not getting physical therapy at The Community School until the last couple of months, and it was 30 minutes three times a week.<sup>208</sup>

The witness testified, as far as the Student's gross motor deficits and why he was getting physical therapy, that it was jumping on one foot, climbing upstairs, he would go two feet at a time instead of alternating feet, things like that, like jump roping or skipping. The witness said the Student is not coordinated, he cannot jump rope or skip, but he has no issues with stairs now. The witness said the Student had insoles in his shoes at The Community School because of balance, and he is still pretty clumsy, maybe because of an imbalance in his feet.<sup>209</sup>

Looking at the Student's IEP, the witness testified it shows in the OT evaluation that the Student was easily distracted, very impulsive and needed frequent breaks to complete the evaluation, that he demonstrated deficits in handwriting, sequencing, ocular motor skills, sensory processing, manual dexterity, attending to tasks, transitions and motor planning. The witness testified she remembered discussing reminder of rules, frequent feedback, providing positive reinforcement or feedback.<sup>210</sup>

The witness testified that about a week before school they went to the Open House to meet the Student's teacher, and it was chaotic inside, which is one of the things that overstimulates the Student, makes him want to shut down and want to go back home. The witness said they went to Ms. Hamlin's class, where the Student did not want to go inside, and she was crying and the Student was crying, but when they went to the self-contained classroom, where there were no decorations, it was quiet, no kids were running up and down, the Student walked right in, found his desk and sat down. The witness said the Student loved riding the bus, but she knew he started having behaviors at school almost immediately, that he squeezed someone's arm, and as early as September 18<sup>th</sup> the Student's school day was reduced. The witness said she thought the Student was not being heard, and that you have to talk to him in a certain, stern tone and use two or three words, then come back later to explain why we don't do that, as he would only look at you for about two seconds, and that she had mentioned that at meetings.<sup>211</sup>

The witness testified the behaviors she was being told about that were going on at school, like kicking or hitting a teacher, squeezing their arm, she had experienced that when the Student was very young, but it had not been a major issue, that every once in a while the Student would try to test her, but they have already overcome that at home. The witness testified different issues were being seen at school than she was seeing at home, that she was not seeing the biting, the hitting,

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<sup>208</sup> Vol. IV, p. 30, line 12, through p. 31, line 15

<sup>209</sup> Vol. IV, p. 31, line 16, through p. 32, line 14

<sup>210</sup> Vol. IV, p. 35, line 23, through p.37, line 5

<sup>211</sup> Vol. IV, p. 40, line 24, through p. 47, line 14

and she thought that was the major communication barrier. The witness testified she asked to go in and observe, even to just peek through the door, to see where the behaviors were coming from or why the school could not de-escalate the situation, but she was shut down, was told it would undermine their authority, that the Student might act differently, better or worse, if she was there.<sup>212</sup>

The witness testified the Student was a very quick learner and loves school, and she tried explaining that, with autism, the tunnel vision thing that sometimes occurs with autism, that she just wanted to help them with the Student. The witness said the Student still liked the bus, but when the bus stopped taking him and his school day was cut to 3 hours and 30 minutes, he was more hesitant about going, but he was excited about speech, and was excited to get coloring sheets she did not have at home. The witness testified the Student's behaviors were pretty constant throughout the school year, it was always something whether he had 3 and a half hours or seven hours and 20 minutes, she was still leaving work at least once a week.<sup>213</sup>

As far as the meetings held where the Student's time in class was restricted, the witness testified it was her idea to cut the bus, as it was a 3-hour long bus ride which made the Student's day longer, and then it was Ms. Riddle's idea to shorten the day, which was only a discussion in the hallway, to which the witness never agreed. The witness said she fought for the Student to stay in school, that she felt he was not being listened to, not being heard.<sup>214</sup> The witness testified she never saw the Functional Behavior Assessment Observation Forms beginning on page 299 until the hearing.<sup>215</sup>

As to the kindergarten children getting a breakdown of what they can do in reading, as far as upper and lower case letters, those kind of things, the witness testified she has never received a report card like that for the Student.<sup>216</sup>

As to what led to the Juvenile Court petition, the witness testified the Student had hit and kicked his aide, and she did not know what the Resource officer did to intervene, but the Student kicked him. The witness testified that when she came in to the main office after being called, she did not go into anyone else's private office to use as a conference room as Ms. Riddle said, that did not happen, that the Student was already in a good mood, and it was explained to her what had happened and the citation was written there in front of everyone, and they were told they would be going to Juvenile Court for third degree battery and disorderly conduct. The witness testified

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<sup>212</sup> Vol. IV, p. 48, line 14, through p. 50, line 10

<sup>213</sup> Vol. IV, p. 50, line 14, through p.52, line 21

<sup>214</sup> Vol. IV, p. 52, line 22, through p. 54, line 8

<sup>215</sup> Vol. IV, p. 55, lines 17-23

<sup>216</sup> Vol. IV, p. 56, lines 18-23

the Student apologized to the aide, but the Resource Officer would not fist-bump the Student, and the Student was afraid he and/or his mother were going to be arrested and he cried all day. The witness testified when he sees a police officer the Student is afraid now, and apparently his behaviors stayed pretty consistent, that he was still being sent home after the citation, even on half days, and is always happy to be home.<sup>217</sup>

The witness testified she was never told about videos made in the classroom. Looking at video 4874, the witness testified the Student was naming the planets in order from the sun, video 3929 was doing a Brain Gym exercise, 3931 the Student looks almost nervous and agitated that everybody is up and dancing, that he was probably on the verge of being overstimulated, and was almost being pressured to get up and do it, that the para was right beside him and kept touching him, which could be bad if he did not want to be touch and did not want to get up and dance, that his hands were in his lap, and that when he gets overstimulated he wants to go to a quiet place, but there was no such place in that room. The witness said you could see if you knew the Student that he was not comfortable in the middle of the classroom with everyone dancing and jumping around him. The witness said that instead of making the Student sit through that, she would remove him, maybe for a sensory walk. Looking at video 4941, the witness testified one of the boys in class was saying the Student was out of control and the teacher was saying all their friends were having to leave, and the Student was tearing up his paper, and that no one stepped in until the three minute mark. The witness said, instead of letting that go on for ten minutes, it could have been easily resolved, that when the Student does that, it is that he is not being heard, he wants something he is not getting, but he has turned over his chair and is having a melt down. The witness said the Student's attention should have been diverted to something else, that the situation was not read. The witness testified that in 4942, the teacher was just recording, trying to grab it out of the Student's hand, and they are not telling the Student what he needs to be doing, they are just recording. Looking at 4943, with the principal sitting on the desk with her phone, the witness testified it looked like the Student wants some sort of attention, and when he is ignored, as was the case, he acts out, that the principal pulled him onto her lap, but that is not what he wanted, that he had a ball, so she would probably have gotten on the floor and rolled the ball, as loving him when he acts out sends the wrong message. The witness testified video 4944 showed the Student climbing up on Ms. Riddle, and the witness though the Student kicked Ms. Riddle's shoe, and the witness said she had to get him that day right after that. The witness said Ms. Riddle told her the Student was doing a Superman run and she just kept letting him do that, and it was harder and harder and then he crawled up in her lap and pulled her hair and it really hurt, so she called the Student's mother. The witness testified you could see from the video that the Student wanted to feel included, he wanted interaction, and everyone was ignoring him and recording him, and you can see his disappointment.

Discussing that the Student had to leave school early around once a week pretty consistently, the witness said she did mention in the beginning, in the transition meetings, and again in the later meetings, about changing the Student to the regular classroom, as there were medically fragile

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<sup>217</sup> Vol. IV, p. 56, line 24, through p. 60, line 4

children present, but she was told by Ms. Riddle, and she thought Ms. Snow, would not, and they were both pretty adamant about the half days. The witness said she felt a lot of people in the room did not understand autism, but the school psychologist, Mr. Ruble, was on the same page with her, and that he did not necessarily agree with the half days and voiced that, that it might be a toss up if it helped or not, and at one of the meetings before the half days he said lets not change anything, that progress was being made and the mom sees changes at home.<sup>218</sup>

The witness testified that after two weeks of no behavior everything blew up again, and they were back on the subject of half days, that she thought the school expected the Student not to have any more behaviors, and that after they finally listened to her about what they did at home, yoga, breathing exercises, they finally started implementing those, taking the Student on sensory walks, and then the behaviors were back and there was a meeting to discuss half days. The witness said it was brought up at almost every meeting. The witness testified they brought in Scott Lacy she thought as a sort of behavioral family counselor, that she sat in with them for a few sessions, but mainly she and Scott just talked about the Student, the school, the meetings and how we did not agree with half days. The witness said Scott's vote on half days was a "no." The witness said she finally gave up, that Mr. Ruble said to try it, as he guessed they had tried everything else.<sup>219</sup> As to after the Student went to half days, and was there ever an IEP meeting to say half days were not successful, the witness testified that was never said, and the behaviors were kind of bad. The witness said the Student did not want to go back to school after Christmas.<sup>220</sup>

When asked about field trips, the witness said they went to the pumpkin patch, but not with the school, they met the school there, and Ms. Snow's class was not there, so she did not know where to go or what to do. The witness said the Student did not have a t-shirt like all the other children, and she guessed she did not get a form to order one, nor did the Student do class pictures, he had a single one at the first of the year, and though he got goodie bags sent home, he would miss class parties. The witness said if the Student could have stayed for class parties, she was never told.<sup>221</sup> As far as activities other children participated in, the witness agreed she had heard the PE coach testify he never saw the Student, and the witness said that she did not think he liked the music room as it was too loud unless they prepared him, and she thought they tried only twice to go to art room, the first time he did not want to go in, and the second time they prepped him and he did go in, but after that she only knew of those two times. The witness testified the Student loved art.<sup>222</sup>

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<sup>218</sup> Vol. IV, p. 148, line 17, through p. 150, line 20

<sup>219</sup> Vol. IV, p. 150, line 21, through p. 154, line 12

<sup>220</sup> Vol. IV, p. 154, line 13, through p. 156, line 1

<sup>221</sup> Vol. IV, p. 156, line, through p. 159, line 11

<sup>222</sup> Vol. IV, p. 159, line 14,  
through p. 160, line 5

The witness testified she did not know how the decision was made that the Student would be in the self-contained classroom, and also said she did not realize what it meant, that not a lot was explained to her. The witness said she tried giving her input, and asked if she could do anything extra, and when they suggested medication, she called the psychiatrist and made an appointment, she tried the discipline they told her about at home, but she did not understand the good of sending the Student home, as taking the Student for a treat when he got sent home seems counter-productive, and once she took their TV's out, bringing one back for good behavior, a reward system implemented.<sup>223</sup>

The witness testified that just about every time she went to pick up the Student teachers or principals made statements in front of the Student that he should not have heard—for example the video with Ms. Riddle in the classroom, and they would give her their side of what happened right in front of the Student, saying they could not control him, look at this, look at what he did, that it was always negative, and we need to schedule a meeting. The witness testified when she asked what she should do, they just shrugged their shoulders, every single one of them, even though she had been begging them to get on the Student's level and she wanted to go and observe, peek in the door, anything, as she did not understand where the behaviors in school were coming from.<sup>224</sup>

When asked about the school's attitude, the witness testified she was afraid she would lose her job, that she always worked two to three jobs, and that Ms. Riddle told her there was a mother who had to put school and college on hold because her child was put on half days, which made the witness afraid, and their attitude was like, "Sorry, you know, like we did what we could." Discussing when the principal threatened her with a lawsuit, the witness said it was after Juvenile Court that Ms. Riddle stopped them and said they needed to see if the Student's behaviors were due to his disability, then have another meeting if the witness wanted to tell people she yelled at her, and started going on about transfer papers, saying at least three times she could go print those out, then asked the witness if she wanted to home school the Student. The witness testified she did not understand where all that was coming from, from a Facebook post, and Ms. Riddle said yes, and said she would talk to her attorney about suing the witness for slander. The witness said there was nothing on the Facebook post unkind about the principal, and maybe it was someone's comment. The witness said the Student was standing behind her, holding her legs the whole time screaming not to let her see him, and when she said this should not be in front of the Student, Ms. Riddle said she thought he already went to class, even though she could clearly see him and had stopped them at the front door. The witness said Ms. Riddle then offered to take the Student to class, but the witness said no, his aide is the only one to come get him, otherwise it changes his routine and sets up for a bad day.<sup>225</sup>

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<sup>223</sup> Vol. IV, p. 160, line 6, through p. 161, line 24

<sup>224</sup> Vol. IV, p. 161, line 25, through p. 163, line 18

<sup>225</sup> Vol. IV, p. 163, line 23, through p. 167, line 4

As to the Juvenile Court matter, since the Student was 10 he was too young to be charged, so a FINS (Family in Need of Services) was filed, the witness said there was nothing the school had asked her to do that she had not done. The witness said they went to the first court date, and that is still pending.<sup>226</sup>

Discussing what she hoped to get from this proceeding, the witness testified she felt the Student was totally deprived of his kindergarten year, that he was set up to fail, he thinks he is broken and wonders why he has no friends, and she can hear him talking to himself in his room, that he says things about himself he would have to have heard at school, that he is a bad boy. The witness said both she and the Student were frustrated, and she relied on the school as professionals. The witness testified the Juvenile Court judge told her not to let the Student miss any school days between then and the next court. The witness testified that what Dr. Barnes testified she recommended for the Student was everything the witness was asking for.

The witness said the Student was in pre-K for about two and a half years before being enrolled in kindergarten, and agreed that it was her understanding the shortened school day was a temporary intervention or modification that would be reviewed every so often or periodically to see if it should be continued or not. The witness testified she had always been vocal about her concerns, but it was not reflected in the documents. The witness testified she saw some academic progress in the Student, but not behaviorally. The witness testified she had no sense that the Student would not be able to tolerate a full day at school, and said she thought he is totally capable.<sup>227</sup>

As to the different interventions and modifications and supports for the Student, some of which the witness said she suggested, such as the breathing, the yoga, and sensory walks being used, the witness testified those helped at first, and maybe some of the other interventions the school came up with, but said they were having meetings sometimes like every two weeks, and she felt a week or two was not enough time for something to take effect, to get the full effect. Testifying as to the Behavior Plan, the witness said she thought some of the interventions did help sometimes. The witness confirmed what she filled and signed as to the Student's social history in March of 2019 and confirmed the Student is overactive. When asked about the behaviors she listed, the witness confirmed it did not say how often or severe the behaviors were as there was no more or less option. However, the witness testified he was doing some of those things at school and at home, and with the Student, within a month he can learn five new words and be able to form a whole new sentence, and that eliminates five behaviors there, just learning a few more words.<sup>228</sup>

As to meetings every two weeks, the witness said that was before the Student's day was shortened

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<sup>226</sup> Vol. IV, p. 167, lines 5-18

<sup>227</sup> Vol. IV, p. 171, line 15, through p. 174, line 8

<sup>228</sup> Vol. IV, p. 174, line 10, through p.178, line 8

to three and a half hours, and she thought after that there was only one meeting, and she knew in February they were going to keep the schedule the same.<sup>229</sup>

WITNESS Sheila Barnes

Dr. Sheila Barnes<sup>230</sup> testified she has about 13 years' experience in the public school classroom, a few years' experience in a juvenile treatment center as a Special Ed teacher, she has taught everything from infant, home-based program to Public Law 99457 in the 70's, and taught pre-school in a school-based program in Oklahoma which was non categorical pre-school for children with disabilities. She testified she has taught learning disabilities at the high school level, taught emotionally disturbed teens with emotional disturbance at the high school level, and has taught in all settings, all disability including blind and visually impaired with her work in early childhood intervention. The witness testified she received her doctorate in educational psychology and took course work in Special Ed and Applied Behavior Analysis, completing her doctorate in 1991, then taught at a university in Oklahoma and was head of the Special Ed program at the University of Oklahoma, then moved to other universities and retired in 2012 to start a private practice in Arkansas. The witness testified her private practice is for autism, and over the years she taught Applied Behavior Analysis and all other Special Ed classes, that when it was categorical, she taught introduction to students with cognitive disabilities, which was called mental retardation then, but she taught methods of learning disabilities. The witness testified she is also a reading specialist, and sometimes at the university she was director of the reading specialist program. The witness testified she is certified in Oklahoma in seven categories of Special Ed out of the 13 IDEA categories, the additional categories being added after she became a professor, that she developed programs to give certification in the new categories, which are not new now, but Other Health Impaired, TBI, Autism, and developed certification programs in those areas at the university. The witness testified that when she retired, she went back and studied for the certification in the Board Certified Behavior Analyst, since when she got her doctorate, there was no Behavior Analyst Board so no certification, BCBA certification at the time. The witness testified she went back and studied 20 something years after she got her doctorate, studied on her own, and is now a Board Certified Behavior Analyst and has had a private practice since 2012. The witness said she also started at Ouachita Baptist University last September and developed a Masters program in Applied Behavior Analysis, and is now in the first summer term, their first term for a Masters in Applied Behavior Analysis at Ouachita Baptist University.<sup>231</sup>

Discussing her work experience, the witness testified when she moved to Arkansas she worked for the Bentonville Public Schools as a school psychologist a few years, assigned to the high school. School psychology specialist, using Oklahoma terms, which in Arkansas is called school

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<sup>229</sup> Vol. IV, p. 178, line 16, through p. 180, line 13

<sup>230</sup> Vol. IV, p. 74, lines 21-23

<sup>231</sup> Vol. IV, p. 75, line 15, through p. 78, line 2



psychology specialist; she did numerous Manifestation Determination and Functional Behavior Assessments, and the Special Ed director asked if she would be the district behavior analyst coordinator, which she did for the remainder of her time in Bentonville. As her private practice grew, she began working fewer days at Bentonville, but then was also asked to work part time at Boston Mountain Co-op, so she was school psychology specialist for one and one half days a week and behavior analyst coordinator for one and one half days a week. The witness testified she has helped school districts in programming for children with autism for several years, which is a big part of what she did as behavior analyst coordinator, and as a BCBA, they work to develop programming for schools who have students with autism, working to develop programming including verbal behavior, social skills, social communications, all the tasks you do academically, and as a behavior analyst in a school district they work with children with behavior problems that may or may not be identified as a student needing Special Education, that student could even just be a General Ed, not even a 504 classification.<sup>232</sup>

The witness testified she had reviewed documents in this case and had an overall understanding of what has gone on in this case. Discussing what the purpose of transition is to kindergarten for a child, the witness testified we want to teach children school is fun and their teacher is a great person, teach them a beginning of following procedures in a school setting, have theme weeks with lots of fun activities, but also teach the basic concepts of written communication, math, reading, all in a fun way.<sup>233</sup>

As to needs and supports of this Student as he came from the pre-school environment, the witness testified that with the diagnosis of autism, knowing the Student was in a specialized pre-school program, one of the first things she would want would be to engage in pairing activities, where the child is learning to trust the adult and develop rapport, which is the first step in getting instructional control, and it appeared from the records in this case that, beginning day one, that was not happening. The witness said what told her that was that the Student was engaging in behaviors from the very first day of school, so at that point she would have removed any kind of demands, as the pairing stage is a no-demand stage and just learning about the child, learning the child's interests, what the reinforcers are, and following the child's lead. The witness said the typical kindergarten teacher is spending that first couple of weeks of school learning about the children in her class—what do they like, what is their family, their favorite food, their favorite thing to do—making that first couple of weeks a really fun experience for the child. When asked about how does pairing occur in a self-contained setting, the witness testified that, depending on the number of children, she always as an early childhood Special Ed teacher, wanted to make sure she had one-on-one time with each child there, and would develop a schedule to have one paired with this group of children, one paired with this group of children, she would have one-on-one time, but also engage in a lot of play activities with the children, particularly in the beginning, sitting in the floor, having the boys, playing together; the paras could sometimes be available to

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<sup>232</sup> Vol. IV, p. 78, line 7, through p. 79, line 21

<sup>233</sup> Vol. IV, p.79, line 22, through p.80, line 21

support if she was going to have the whole group, she would do a lot of activities the child really likes, like music and games and playing together, and having the paras giving lots of coaching and prompting with individual children needing more help, depending on the needs of the children there. The witness said that often in a self-contained classroom there are children with some physical needs who may need more physical guidance just to participate in an activity, and others who have more language needs, so as an early childhood Special Ed teacher, she made sure she had one-on-one time with every single child, as well as small group time and large group time.<sup>234</sup>

As far as why the Student in this case was engaging in behavior the very first day of school, the witness testified either he wanted something or wanted to get out of something, but either way, during pairing you want to make the activity so much fun that the motivation to escape is not there, and you want to give the child access to all the reinforcers, so it is pairing, as you are pairing yourself with reinforcers that are of value to the child and pairing yourself with things that are reinforcing so that the child has approach behavior, the child comes to you and you are the giver of all good things, you are the giver of the iPad, the crayons, the blocks, the candy, whatever, that the teacher and the other adults become the giver of good things so the child is approaching that adult, then you start fading in demands very slowly.<sup>235</sup>

Looking at a video clip on this case, video number one, 3929, the witness testified the Student was not having fun, and you cannot talk a child into something that fun, you have to follow the child's lead, which is the language they use, the child's lead, and she testified you see the Student is not wanting to engage and there is no attempt to follow and find out what is, in fact, of value to him, what does he want to do.<sup>236</sup>

Referring to the Student's IEP, talking about positive behavior interventions, listing reminder of rules, frequent feedback and positive reinforcement, letting the Student know about transitions and discussing ahead of time to avoid meltdowns, having reviewed what the witness reviewed as far as pre-school records about behaviors and such, when asked if she would expect these behavior supports to be sufficient for the Student, the witness testified they would not. The witness testified they are not specific enough as to what the reinforcement is going to be, how often is he going to get it, that there is a lot more detail she would want to see in a child who has a disability that is going to impact his behavior, such as autism.<sup>237</sup>

Reviewing video number five, 4941, when asked if the person she heard talking was assumed to be a teacher, discussing the Student's behavior in response, the witness testified the tone was not very welcoming, encouraging, and saying "We are not going to tear up the book," as the Student

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<sup>234</sup> Vol. IV, p. 80, line 22, through p. 83, line 16

<sup>235</sup> Vol. I, p. 83, line 17, through p. 84, line 18

<sup>236</sup> Vol. IV, p. 84, line 19, through p. 86, line 2

<sup>237</sup> Vol. IV, p. 86, line 23, through p. 87, line 15

is tearing up the book, is not even really accurately describing what is happening, and there was nothing to show she was really interacting with the Student and engaging him. The witness said that while this is probably just an isolated incident, it sounds like the Student has these all throughout the day, incidents of not wanting to engage, and if she is using a tone and she does not have that rapport, the Student is not going to comply, and that the child's motivation to escape is increased. The witness said when you present "This is what you are going to do," "This is what you must do," the child has no motivation to do what is asked. The witness explained the reason a child complies with an instruction is just human behavior—we comply with instruction because we expect there is going to be reinforcement for doing that, so, the tone of voice here does not signal to the Student "If you do this, something good will happen." The witness said we must signal with our tone, with our body language, with everything, that if you comply, something good will happen. The witness said learning history also plays a part, and what the Student needs to learn is "When I do what I am asked, I will get some good stuff and I am going to get it from this person who is this really great person who I like to be with." The witness said this tells us the Student does not have that history of reinforcers, as if he had that history of reinforcement, he would comply. When asked about the teacher saying all their friends were having to leave, then another student saying twice that the Student is out of control, and what impact that would have on the Student, the witness testified that it could have a lot of impact on the Student, that in and of itself, if that is what typically follows the Student's behavior and his behavior continues in the future, it tells her that statement actually is reinforcing the Student's behavior; it is maintaining his behavior, making his behavior occur more in the future, so since we see this long kind of history through this school year, long history for a kindergartner, it tells her what immediately follows his behavior is what has maintained it the next time. The witness said when another child labeled the Student's behavior as out of control, that means the other child has heard that label, as the witness would not call the Student's behavior out of control, but the other child has been that label applied to that particular behavior, that's out of control.<sup>238</sup> The witness said if the Student said "I'm a bad boy," that tells her someone has labeled him as being a bad boy.<sup>239</sup>

Looking at video number six, 4942, the witness testified that based on the Student's age, IQ and testing, what he is hearing every time she says "We are not doing," the Student is hearing "Do this, do this, do this, kick, bite," that she is giving attention to it, but is also telling the Student "Do that," as the negation is a much more difficult concept, so instead of saying "Stay quiet," "Quiet hands," "Sit nice," "Sit in your chair," and then letting the Student know he is going to get reinforced, it is everything the Student is not supposed to do. The witness said that is something she used to teach university students who were going to be Special Ed teachers or early childhood teachers, that you tell the child what to do, not what not to do, so you give instruction that says "Sit nice. Oh I love how you are sitting." Even if you have to contrive a compliance so that he understands, "When I comply with the teacher, I'm going to get this reinforcement." The witness said if a teacher is going to grab him, it will increase his desire to fight against her, so instead of

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<sup>238</sup> Vol. IV, p. 87, line 16, through p. 91, line 8

<sup>239</sup> Vol. IV, p. 91, lines 17-18

seeing the approach behavior, she is actually setting it up to make it more valuable for him to escape her, and he is going to keep doing things, he is going to keep escalating; the more she tries to hold him or get him to stop physically, it will make him fight against her more. The witness said she could not tell what the demand was, it was “Don’t do,” rather than what to do. The witness said the impact that is going to have on the Student’s ability to do what is asked of him is that no one is going to be able to do something when all you are told is what not to do, that telling someone what to do helps guide and teach them, not telling them what not to do.<sup>240</sup>

When asked what them saying they would call the principal, bringing the principal into the mix, tell the Student, the witness testified it tells a lot of things, one that the teacher is not in control, the teacher has to get someone else to come in, which signals what is called a worsening condition, signaling something worse is going to happen, as now the teacher is going to get the principal to come in as well, which is going to increase the motivation to escape; if you have a signal something is going to get worse, you are going to desire getting out of that situation even more. The witness said each video clip shows the Student getting a little bit more aggressive and a little bit more aggressive, escalation of the aggressive behavior, and one thing is leading to more motivation to escape, and part of the behavior is to get out of that situation, get away from that teacher, get out of that room, out of that situation.<sup>241</sup>

Looking at video number seven, 4943, the witness testified the Student seemed to be find, just kind of playing with the ball by himself, which tells her this is a potential reinforcer, that’s part of the function of the behavior, to be able to just play with something by himself, there was no demand, he was just on his own playing with the ball. The witness further stated that could be an indication, that she would have to see a whole sequence, but it could be an indication what the Student was wanting, that the function of the behavior is to escape the attention, the principal was not talking and he was happy, so when they do a functional analysis, they know they have found what the reinforcer is, or what the function is, when it stops the behavior in the moment, so when you get what you want in the moment, it stops the behavior, then it sets you up for next time, it sets us up, then the next time you want that same thing, you are going to engage in that same behavior that gets you what it was that you wanted. The witness stated it looked like what the Student wanted was to be on his own and engage on his own with a toy, and if he was given that ball in speech and was playing with it with the speech therapist, then that would tell her that the Student, the tangible plus the attention that he would want. The witness said she was trying to look at what is it that the Student was trying to get with his behavior, and she knows he has what he was trying to get when the behavior stops, that now he has what he was trying to get, he does not have that need or desire to engage in the behavior.<sup>242</sup>

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<sup>240</sup> Vol. IV, p. 90, p. 20-21, and Vol. IV, p. 91, line 24, through p. 94, line 7

<sup>241</sup> Vol. IV, p. 94, line 8, through p. 95, line 20

<sup>242</sup> Vol. IV, p. 95, line 21, through p. 98, line 17

Looking at video number eight, the witness testified the Student appears to be reinforced by getting one-on-one attention, that being in the room without the other children and not having all of the other children in the room and having one-on-one is reinforcing because his behavior has stopped. The witness explained, when asked if that is reinforcing good or bad behavior, that if that is what followed, and that was the sequence, then every time the Student wants more one-on-one attention, he is going to engage in the inappropriate behavior to get the one-on-one attention, as in the past that is how he got that attention. The witness, when asked about any other observations from that video, testified that she would have expected that if the Student was not getting the attention with the behavior that he had, that he might have escalated to get more interaction, as there was not a lot of talking to him, and that he had approached several times to try to get more attention, so to approach the principal, but she was providing attention to the extent it was not causing the behavior to escalate, so it tells us an intervention that would work for the Student would be an antecedent intervention, or something before the behavior, where the Student gets a lot of one-on-one attention before the behavior, then we could start fading in demands as the attention—particularly from the principal, that he could get attention from the principal if he did a task. So, we could start pulling contingency in, but initially, getting a lot more one-on-one attention in the setting where it is quieter, where there are not other children, as the Student did seem to do really well in that quiet environment.<sup>243</sup>

Asked about the graphs and charts with the Student's behaviors documented, and it looking as if the behaviors neither increased nor decreased when the Student was going less than half the time he was at first in school, and how it could be explained the behaviors were not cut in half, the witness testified that a better measure of the behavior would be a rate, like to take how many times per minute or how many times per hour he engages in the behavior so she could see if that rate actually decreased, as then you can take out accounting for it being half the time, but just the fact the frequency of the behavior did not go down, even though there was less time, tells her the frequency actually went up or stayed the same. So, if the Student engaged in ten incidents in ten hours and he engaged in ten incidents in five hours, the number is ten, but he actually increased the frequency of his behavior.<sup>244</sup>

Looking at the Functional Behavior Assessment Observation Forms, such as on page 299, for example, the witness agreed it does not help to know about the behaviors if we do not look at the antecedent and the consequences, as those are just frequency counts, not ABC, as ABC means you have the antecedent and the consequence, so it is just a "B," just a behavior. The witness also agreed that the only thing these would tell us is the school day has been cut in half and the behaviors should go down by at least half, but they are not, so that tells us that this is not helping. The witness said you want to graph the data, if she is doing a frequency count, she really prefers to do rate so as to know how many times an hour, how many times a day, how many times, and

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<sup>243</sup> Vol. IV, p. 98, line 18, through p. 100, line 14

<sup>244</sup> Vol. IV, p. 100, line 15, through p. 101, line 18

she would want day defined as five hours, and then she would want to graph that and would expect to see a decrease, and if she does not see a decrease, the intervention is not working, and that is just basic treatment design. Any time you have a treatment and it is not making the dependent variable, or what you are trying to change, if it is not resulting in change in the direction you want, your intervention is not working. When asked what it tells the witness if the Student has trouble transitioning from speech, for example, and OT, back to the classroom but not out of the classroom, the witness testified that is a really strong indication the Student does not want to relinquish a preferred environment to go back to a nonpreferred one. The witness said it is not really a transition that is the problem, that a child who has a transition problem does not want to change even to go to a better environment as they don't want to stop what they are doing, so, if the Student is happy to leave the classroom but does not want to leave speech, it tells you that there is a contrast between those two environments and that speech is the preferred one.<sup>245</sup>

Looking at the Functional Behavior Assessment she had reviewed, the witness testified that what struck her about it was it does not appear there was a significant amount of observation, which is one of the problems that will happen with direct observation. The witness said when she says it was not sufficient, she says it because the behavior did not occur. It says the Student was observed two days at different times by the examiner and did not reveal any of the identified behaviors. So, the witness said direct observation may not show the behavior, and particularly if you have someone from the outside coming in to observe, then that often signals that the teacher or whoever was being observed is behaving maybe differently because of the observation taking place, which is called a reactive effect; because the examiner was in the classroom, the teacher was not going to do things that she normally did, which means if the teacher perhaps did change and act all the time the way she did when the examiner was there, we may not have seen the behaviors.<sup>246</sup>

When asked what she does when she cannot personally observe, the witness testified that as a BCBA, she is able to do a functional analysis, that there are three levels of a Functional Behavior Assessment, and the level giving the least amount of information is indirect, surveying, asking questions, which seems to be some of what happened in this case as well. The witness said then direct observations, which is considered from research to be about 63% accurate, so a little better than 50/50 in defining what the function of the behavior is, but a BCBA will do a functional analysis, where they set up test conditions and control conditions and actually determine what the function is by manipulating the variables; they do an alone condition, they do a tangible condition, an attention condition, and they will be able to determine what is the function by directly observing the impact of different variables. The witness said the observer said he interviewed, he used a questionnaire, he used the QABF and then observed on two days, and the witness said they need a much more precise analysis since the hypothesis is not based on actual data. When asked

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<sup>245</sup> Vol. IV, p. 101, line 19, through p. 104, line 3

<sup>246</sup> Vol. IV, p. 104, line 4, through p.105, line 10

to talk about the Intervention Plan done, was there enough information to do the FBA, and with the FBA, to make a Behavior Plan, the witness said you can't not see a behavior and then develop a hypothesis about a behavior not seen, as if you do not see the antecedent and you do not see the consequences, how can you develop a hypothesis about what the antecedents and consequences are; in other words, someone off the street could guess, she could tell you what the Student did and the person could guess, which is called a default. When asked if the Behavior Plan was going to help at all, based on the data or lack thereof gathered, the witness said the Intervention Plan is not specific to the function of the behavior, so if you do not have a function-based intervention, your intervention has a 50/50 chance of working, like chance, but that is not what they want in her field. The witness said they need to be more precise and they want to identify the function of the behavior, and then have an especially designed Intervention Plan to address the function, and they want to identify the replacement behaviors that they are going to reinforce that will give the child exactly what they wanted, or they might do an antecedent intervention. So, if he wants attention and that is what the function is to gain attention, an antecedent intervention would be to give the Student a lot of one-on-one attention, exactly the kind of attention he wants before the behavior, as if you have what you want, you do not need to engage in the behavior. The witness said she was using the term "want," that is what the Student is trying to get from his behavior; all behavior is a function, has a purpose, but it is to get something. If the Student wants to escape and if it is to get out of work, there are lots of antecedent interventions like remove all demands and then start slowing adding demands where he has a choice of maybe two preferred things, two preferred activities that you know he likes both, he makes a choice, he engages in that activity, then you reinforce them, and you are starting to teach that when you make a choice and you do what I ask, you make a choice, then you are going to get reinforced, and you begin with the choices being two easy ones. The witness said there are many different ways to design a Behavior Plan based on the function, there is lots of research, lots of journal articles that have proven methods of what would work for each individual function. Looking at the Student's Behavior Plan, the witness said the objections are not ones stated in terms of what the Student will do; it says "Student will be encourages," and that is a Behavior Plan for the teacher. The witness said when she writes a Behavior Plan, it is going to state what the child will do, and it could address aggressive behavior, but it would be stated the objective will be the Student will have zero incidents of aggression, aggressive behavior defined as hitting, biting, kicking, spitting, over 10 consecutive days or over 20 consecutive days, it is going to be a very precise, measurable goal of what the Student is going to do, and the objectives are what the teacher is doing to do, not what the Student is going to do. The witness said since the strategies do not tie into the Student receiving reinforcement, and, for example, "Will encourage the student to use the opportunity to take a break." But it does not say the Student is going to request a break and when he gets that break, a hundred percent of the time, then I am going to think that out to 80% of the time he gets a break when asked, 70% o the time, so it is not very precise. Again, it says the teacher is going to encourage the Student to use the opportunity to take a break rather than teach him that when he asks for a break, he gets one, and that is assuming the break is what is reinforcing. So, instead of a generic plan, one of the interventions wold be use your words to get what you want 100% of the time, so if what he wants is a break, he asks for it, and gets it. If you want attention, you ask for it and get it. You have to identify what it is and be very specific so everyone knows 100% of the time that he asks for something, he gets it; but he is also, perhaps,

going to need to be taught what asking for a break looks like, so sometimes we might use just a break card so all they have to do is give a card. The purpose of making that break card is not to make it a greater demand, it is to make it an easier task for him to get what he wants so he realizes that when he does this behavior, he gets what he wants. The witness said it is not really very clear in the plan what is supposed to happen.<sup>247</sup>

When asked about reinforcement behaviors, the witness testified the first one, “Teacher will allow” is a replacement behavior for the teacher, not the Student. The witness said “Communication problems,” that is not specific enough, measurable enough, and not specific as to what the Student is going to do. The witness said she would assume maybe they were saying the Student would ask for a break or for attention; however, it would be much more precise to say “The Student will ask for attention,” and that is his replacement behavior, ask for attention; “The Student will ask for a break,” and the replacement in most Behavior Plans for younger children is to learn to use their words, which is called functional communication training, teaching children to make requests.<sup>248</sup>

Discussing how important reinforcers are to children in a Behavior Plan, the witness said the reinforcement is what will cause the behavior to occur in the future, so it is really the key to changing future behavior, and if you see a behavior plan in anyone, it is because in the past it was reinforced, the behavior you see now was reinforced at some point in the past. The witness further said you have to identify what are the reinforcers, what is the value to the Student, what is he trying to get—if it is to escape, then the replacement behavior is give him another way to escape, and if it is attention, the reinforcement he gets attention, which is the purpose of the Functional Behavior Assessment. The witness said it looks like what was maintaining the Student’s behavior was he was getting attention after he engaged in the inappropriate behavior rather than he was getting the attention before the behavior, so you have two options: if it is attention, give lots before the behavior, or say “You can see the principal when you do XYZ.” It is either contingent, as a consequence, or you get it beforehand.<sup>249</sup>

Discussing her experience in the effectiveness of reducing a child’s school day as far as addressing behaviors, the witness testified she had never seen reducing the school day ever change behavior. The witness testified there were many reasons for this, one is simply if you do not have the opportunity to learn the behaviors that you are expected to have in the school environment, if you are not there I cannot teach you, and if she has a child whose behavior is not getting better, she will want to see the child more, not less, that her intervention is not going to be stop treating the child. As an analogy, the witness said if you have a headache and you take half an aspirin and does not help, then you do not cut it to a fourth, that you would increase the dosage, and in

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<sup>247</sup> Vol. IV, p. 105, line 11, through p. 112, line 1

<sup>248</sup> Vol. IV, p. 112, line 14, through p. 113, line 9

<sup>249</sup> Vol. IV, p. 113, line 10, through p. 114, line 22



ABA terms, dosage means how much time is spent in intervention. The witness said another reason that will not work if the home environment is a preferred environment and you have misbehaved and now you are going to be in that home environment more, then depending on the child's cognitive level, does the Student understand that he is home because he misbehaved, then he will misbehave more often to go home—the function is to escape and be home. Further looking at the Plan presented to the IEP team when the decision was to go to half a day, the witness said some of the Behavior Interventions and Responses might be helpful, but they are not helping the Student because they did not work. The witness went on to say that none of the behavior interventions are really evidence-based interventions, which are interventions where an intervention was implemented in a study and the dependent variable would be the behavior; so, in this case she is looking to see what intervention changed the Student's behavior, that an evidence-based intervention is where one is attempted and it changes the behavior, that she would go first to a study, evidence based that has been published, but she can also collect data herself, and that is where we can do a single subject design, we may try an intervention, and if the behavior does not improve where we want, increase or decrease, then we would try a different intervention and she would go to the literature to get some guidance on what intervention to try. The witness testified that a lot of examples of behavior interventions that are evidence-based have to do with different types of reinforcement schedules. An evidence-based intervention would be using differential reinforcement of zero rates of behavior, that would be an evidence-based, there is evidence it works. Response interruption and redirection is an evidence-based intervention that works for vocal stereotype. Depending on what the behavior is, the witness testified she would look up in the Journal of Applied Behavior Analysis, that if she looks up an intervention for severe aggression, she would see published studies on what works for that. The witness explained demand fading, such as when the function of the aggression is to escape, then the evidence-based interventions can include decreasing task demand, giving the child a choice between two fun activities first, then start fading in demands.<sup>250</sup>

When asked what she thought about the school reducing the Student's days so much, and would that cause a problem when he comes back as far as what he needs to stay a full day, the witness testified, using the dosage term, that if your dosage is cut in half, you might regress, not just in half, but might have even more regression, which is pretty typical to see that multiple things are happening—you are not getting the interventions you need, but you have also been reinforced by getting to have school only half a day, so you are going to have more of a history to overcome, and if you are not exposed to reading, math and writing, and you are not exposed to learning to following instructions, those skills will not be developed, and that lag is not an equal lag, so it takes more time to make up for what you missed, and the longer that happens, it more time it will take.

When asked for her recommendations for the Student, the witness testified he needs a Functional Behavior Analysis that includes a Functional Analysis by a Board Certified Behavior Analyst, as the schools's FBA did not lead to a Behavior Support Plan that is based on the function, and that

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<sup>250</sup> Vol. IV, p. 114, line 23, through p. 118, line 21

is not within the scope of practice of OT's or school psych specialists, and the only other profession it is within the scope of practice is a clinical psychologist with training in Applied Behavior Analysis. The witness further said that as far as the educational component, the Student would need intensive instruction in each area that he is not on grade level, intensive instruction that uses principles of teaching and learning, and ABA is not just about behavior, it is not just for children with autism, it is the science of how people learn, and how to use the science of how people learn and how to use that science to develop effective instruction. The witness, when told the Student lost approximately 326.8, so 327 hours rounded off, or the equivalent of 45 days of school instruction, and how and when that could be made up, the witness testified it should be as soon as possible, so since we are at summer, it would be in the summer, as if it is delayed until school starts, there is even more time without having the instruction. The witness said she has done a couple of small studies herself where she found if she can provide intensive one-on-one instruction in reading, they could make gains to not only catch up to grade level but get above it, and in followup studies three years later, those students never lost the gains, even though they did not have ongoing one-on-one instruction. Discussing her recommendation for placement environment, the witness testified based on what she has read, it sounds as if the speech therapist and OT environment were preferred for the Student since he resisted going back and leaving that environment, so she would like to see what the kindergarten class looked like; she said a really good early childhood education is going to have a lot of toys and a lot of one-on-one adult attention, a lot of centers and play and toys and engaging in activities with blocks and developing social skills through having like a housekeeping center. The witness said how long that needs to last with that one-on-one attention is difficult to say, but what makes that decision is not what she would guess would happen, but looking at the data, so when she sees the Student engaging in appropriate behavior and the data shows this environment is changing his behavior, then she can start fading in more demands, she can start having more demands of maybe bringing in more children, that she would like to see how he behaves in a general kindergarten class, and what does that class look like; does it look like an early childhood class or a second grade class.<sup>251</sup>

When asked if she thought the Student would need to repeat kindergarten to catch up, the witness said it would depend on what that kindergarten class looks like, but probably he does just because he has not learned, like a big part of what happens in kindergarten is learning procedures of school, learning to stand in line, walking to the cafeteria, they generally have a tour of the school and have a lot of free time and play time and circle time, so if he has not been exposed to that, then having that experience in kindergarten would be very valuable for him.

When asked if the District did anything right, based on the records she reviewed, the witness testified the Student appeared to enjoy being in OT and speech, and he appeared to enjoy the interaction with the principal, so making that interaction either before the behavior or making that interaction contingent on appropriate behavior would be a potential intervention, and based on the video slip she saw, the witness said they appeared to have good interaction because the Student approached her. The witness said they did some things right, they had a transition meeting at the

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<sup>251</sup> Vol. IV, p. 119, line 23, through p.124, line 4

beginning. The witness testified she was not looking for all the things the District did right, she was looking primarily at the FBA, what interventions did they attempt.<sup>252</sup>

When asked if it is ever appropriate for a building administrator to be involved in a behavior situation, the witness testified that if that is reinforcing for the child, you would want to make that interaction with the principal contingent for following appropriate behavior. The witness agreed that, based on her school environment experience, building administrators are generally customarily involved by teachers when there is a disruption in the classroom caused by a student, and is customary where the Student's behavior may result in discipline due to violation of the student handbook, but testified she teaches schools to change those contingencies, so when she gets involved with schools as a behavior analyst, it is because the Special Ed director has asked for her help or it has been a mediated agreement or ordered by the court, that if the Special Ed director has asked for her help, part of what the witness does is to let teachers know that if you see behavior problems right now, that means you have to change what you are doing—the teacher has to change, the para has to change, the principal has to change, so changing what you do before and after the behavior will be required, or you will see the same behavior. The antecedents and/or consequences have to be changed or you will continue to have the same behavior.<sup>253</sup>

When asked about a shortened school day used as a modification to deal with a behavior issue, the witness testified she had seen it used, but said it is not changing the child's behavior, and understanding the principles of behavior, it actually reinforces the school, as they get to escape the child when you have a child who is very aggressive, that child is adverse to the school personnel. So, sending the child home, shortening the day, reinforces the teacher by giving the teacher escape from the child's behavior, but it does not change the child's behavior.<sup>254</sup>

When asked if she agreed that in a situation where a student is just unable to mentally, physically or emotionally to tolerate a full school day, a shortened school day, on a temporary basis, could be an effective modification or intervention, the witness disagreed, and said she had seen that used by school districts, but not successfully, that it gives the school personnel escape, but she has not seen it change a child's behavior.<sup>255</sup>

When asked what if the child's behavior changes simply because of maturity, he becomes more able to mentally, physically and emotionally tolerate the demands of an increased school day, or a full school day, the witness testified she had not seen that happen either. The witness testified that in her clinic they see children as young as two years of age, and the research shows that intensive early intervention, before the age of six, the number of hours of one-on-one therapy that

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<sup>252</sup> Vol. IV, p. 125, line 3, through p. 126, line 5

<sup>253</sup> Vol. IV, p. 126, line 6, through p. 128, line 5

<sup>254</sup> Vol. IV, p. 128, lines 7-19

<sup>255</sup> Vol. IV, p. 128, line 20, through p. 129, line 10

is recommended is 30 to 40 hours, and that is from decades of research with children with autism, so a shortened school day or less hours of intervention is not recommended, that under age six you want more intervention, not less.<sup>256</sup>

As to the child turning six after the began kindergarten, and not being enrolled in the District until August of 2019 when he began school, the witness said she was aware the District has no personal experience with the child until August of 2019 other than the transition conference in the spring, and said it was her recollection the child was tested in the spring as well, so if he had a psycho educational evaluation by the examiner of the school, then that would have also given an opportunity for observation. The witness said she could not testify as to what the examiner did, but when she was school psychologist and went into pre-school settings to do assessments for transition planning, she actually did observe the child in the pre-school setting where they were placed. When asked if it took a while for a district to learn about a student who is new to the school, the witness testified that is actually what should be happening the first week of school, start with what is called a preference assessment. When we have a child we do not know, we want to determine what things are reinforcing for that child, and with it being a Special Ed classroom, she would expect that even more, that even in a typical kindergarten classroom, the teacher is learning about what the child likes and about the child's family, which is what is typically done the first week or so of school.<sup>257</sup>

As to what the Student's mother provided the District regarding his behavior history during the transition conference, the witness testified she looked at the March 2019 form where the mother had checked problems expressing emotion, anger, frustration, hitting, pinching, getting angry easily, crying easily, getting extremely upset when disappointed, and temper tantrums on a regular basis, and the witness testified she saw a lot of reference to the Student having autism from the Dennis Developmental Center, and that applied Behavior Analysis may be beneficial in regard to the Student's EPSDT program, which is to provide ABA.<sup>258</sup>

When asked if, based on the mother's history of the Student's behaviors, that would indicate the advisability of a smaller setting in kindergarten, such as the self-contained classroom, which has fewer students and more staff, the witness testified she would not necessarily want to put the child in a self-contained class if that had a range of ages and the children had expectations that were not age-appropriate or developmentally appropriate, but she saw nothing in the record to indicate he had been to kindergarten. The witness said she would typically recommend with children who are transitioned from private practice into kindergarten is that they go into the kindergarten classroom and that a therapist goes with them, a therapist from their clinic, but they always want to try the general ed classroom and then provide supports needed there, then if that was not

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<sup>256</sup> Vol. IV, p. 129, line 11, through p. 130, line 2

<sup>257</sup> Vol. IV, p. 131, lines 18-22

<sup>258</sup> Vol. IV, p. 133, line 23, through p.136, line 11

successful they would look at more restrictive options. The witness said she saw nothing to evidence the Student ever having had ABA, and if he has not had that, he may not have had the opportunity to develop any of the skills needed for kindergarten, for self-contained, and he needs that instruction and that intervention. The witness said that with supports, children can do well in a regular kindergarten if it is developmentally appropriate. The witness again said she would have liked to see what the kindergarten looked like. When asked if she saw anything in the records about the Student's parent objecting to the modifications, interventions and supports implemented by the IEP team, the witness said she did not.<sup>259</sup>

The witness explained that ABA is an intensive, one-on-one intervention, and when she has a child like the Student, she starts with that child getting one-on-one in an environment that has toys and activities in which the child will want to engage, about the first ten days the therapist's job is to pair with the child, to play, to find out what the child wants, likes, likes to eat, what reinforces the child, to learn to interact with the child in a way the child is paired with the therapy. To be playful, joyful, and have a tone of voice that is happy sounding. Then to start infusing in or fading in some demands, asking the child to do something, and teaching the child when you do as I ask, you get good things. When asked if this would be recommended before schools starts, the witness said yes, and that her preference would be to start in the clinic setting, but then generalize into the school setting, that this has worked for decades, starting in an environment she can control, then move to other environments, and she may do that across individuals by bringing in the parent or teacher or go to that environment, so the Student starts a combination of generalizing or applying skills he has learned in different settings with different people. The witness said when she has worked with public schools where the pairing has not occurred, she has in some cases recommended the teacher have a substitute so the teacher can be coached by the behavior analyst how to engage playfully and how to watch the child for signs the child is engaging or wanting to escape, one-on-one coaching with the teacher so that they have a paired relationship, as the child often can become very adverse to the teacher and then the teacher is adverse to the child. The witness said this is similar to parent training, you have to coach helping the teacher learn strategies to engage with the child. The witness testified she has implemented these techniques in probably 15 school districts since moving to Arkansas, and thought she worked in the southeastern quadrant of Oklahoma with probably all of the school districts at some point over ten years.<sup>260</sup>

As to her predictions for the Student if he does not get the ABA therapy and the techniques to bring him back into the school environment, the witness testified that if the school continues as it has, the Student will continue as he has, and if he continues with the behaviors he has, he is not going to get exposed to the academic instruction, as his behavior will interfere with academic instruction, so he will not have the education as he does not have the support, and he is not going to learn to read just because he gets older, and he is not going to learn to behave just because he

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<sup>259</sup> Vol. IV, p. 136, line 20, through p.138, line 10

<sup>260</sup> Vol. IV, p. 142, line 11, through p. 143, line 4

gets older. He needs specific, explicit intervention for his behavior as well as direct instruction to develop skills, or he will get further and further behind he will be more motivated to escape and continue to escalate his behaviors because that allows him to stay home.<sup>261</sup>

When asked about some of her patients transitioning into a Regular Ed classrooms with a one-on-one therapist, the witness testified that would either be a registered behavior technician or a behavior technician who has not taken the national certification test.<sup>262</sup>

### Conclusions of Law and Discussion

Current case law holds that “the burden of proof absent a State Statute to the contrary in an administrative hearing challenging a denial of FAPE is properly placed upon the party seeking relief, whether that is the disabled child or the school district.”<sup>263</sup>

FAPE as defined for the purposes of this part are:

- a) To ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment an independent living;
- b) To ensure that the rights of children with disabilities and their parents are protected;
- 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>264</sup> In 1982<sup>265</sup> the U.S.

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<sup>261</sup> Vol. IV, p. 143, line 5, through p. 144, line 4

<sup>262</sup> Vol. IV, p. 144, lines 10-20

<sup>263</sup> Schaffer v. Weast, 44 IDELR 150 (U.S.2005)

<sup>264</sup> 20 U.S.C. 1412(a); 34 C.F.R. 300.300A(a)

<sup>265</sup> *Hendrick Hudson Dist. Bd. Of Educ. V. Rowley,*

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>266</sup> Pursuant to *Rowley*, the first inquiry a Court or Hearing Officer must make is whether the State, i.e., the local educational agency or district, has complied with the procedures and regulations as set out in the IDEA. Therefore, it must determine whether the IEP developed pursuant to the IDEA procedures was reasonably calculated to enable a student to make progress appropriate in the light of the student's circumstances.

Procedural violations are actionable, and an IEP should be set aside, only if (I) the procedural inadequacies compromised the pupil's right to an appropriate education, (ii) seriously hampered the parent's opportunity to participate in the formulation process, or (iii) caused a deprivation of education. Procedural violations are actionable, and an IEP should be set aside, only if (I) the procedural inadequacies compromised the pupil's right to an appropriate education, (ii) seriously hampered the parent's opportunity to participate in the formulation process, or (iii) caused a deprivation of educational benefits.<sup>267</sup>

As argued by the Petitioner, and agreed by the Hearing Officer, numerous procedural violations occurred. There was never an appropriate Behavior Plan adopted for the Student, he was placed in the most restrictive environment without any attempts to look at other options and his school day was shortened without a real basis upon which to judge the effectiveness of the action. Supportive services, Speech Therapy and OT were provided at a lower rate than were recommended by the professionals. As set forth above, which the Respondent disputes, the District did compromise Student's right to an appropriate education and deprive the Student of educational benefits.

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 deny FAPE to the student on account of violation of 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>268</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

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<sup>266</sup> 458 U.S. 176, 206-07 (1982)

<sup>267</sup> *Park Hill Sch. Dist. v. Dass*, 655 F.3d 762, 766 (8<sup>th</sup> Cir. 2011)

<sup>268</sup> *Andrew F. V. Douglas County School District Re-1*, 137 S. Ct. at 1000

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>269</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 not 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>270</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>271</sup> Pursuant to *Endrew*<sup>272</sup>, a districts obligations under the IDEA are satisfied when a child receives FAPE, i.e., personalized instruction with sufficient support services appropriately ambitious, with challenging objectives, to enable the Student to make progress appropriate in the light of the students circumstances. This did not occur for this Student.

### 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 relief sought by Petitioners is Ordered. The Student was not provided FAPE instruction with sufficient support services appropriately ambitious, with challenging objectives, to enable the Student to make progress appropriate in the light of the students circumstances within the District.

### **It is hereby Ordered that the District:**

- 1) Conduct an Evaluation, consultation and development of an appropriate IEP in with placement in the least restrictive environment within thirty days of the issuance of this Order;
- 2) Contract with an BCBA Consultant to conduct a comprehensive Functional Behavior Analysis within thirty days of the issuance of this Order;
- 3) Development of a Behavior Intervention Plan based on the Functional Behavior

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<sup>269</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>270</sup> *Rowley*, 458 U.S. 176, at 203 (1982)

<sup>271</sup> T. F. v. Special School District St. Louis Co., 449F 3<sup>rd</sup> 816, 821(8<sup>th</sup> Cir. 2006)

<sup>272</sup> *Supra*



Analysis within thirty days of the receipt of the Functional Behavior Analysis ;

- 4) Compensatory education in the amount of 350 hours to be provided over the next 15 months for related missed services;
- 5) *Training for Administrators, Teachers, Paraprofessionals and staff with a BCBA;*
- 6) *While Reimbursement for transportation costs for related services was requested there was no evidence and to such amount would be, so none is Ordered.*

**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**

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Michael McCauley  
Due Process Hearing Officer  
July 27, 2020