

**ARKANSAS DEPARTMENT OF EDUCATION
Special Education Unit**

IN RE:

XXXXXXXX,

Parent on behalf of **XXXXXXXXXXXXX**, Student

PETITIONER

VS.

CASE NO. H-20-34

CASE NO. H-21-23

RUSSELLVILLE SCHOOL DISTRICT

RESPONDENT

HEARING OFFICER'S FINAL DECISION AND ORDER

ISSUES PRESENTED:

- A. Whether, as alleged in ADE H-20-34, the Russellville School District (hereinafter "District" or "Respondent") denied XXXXXXXX (hereinafter "Student") a free, appropriate, public education (hereinafter "FAPE") between September 24, 2019 and March 17, 2020, in violation of certain procedural and substantive requirements of the Individuals with Disabilities in Education Act of 2004, 20 U.S.C. §§ 1400-1485, as amended (hereinafter referred to as "IDEA"), by: (1) preventing Parent from meaningfully participating in the decision-making process regarding the provision of FAPE to Student (specifically, failing to secure attendance of Student's classroom teacher at the resolution conference for ADE H-20-09, failing to comply with Parent's request to examine records until the night prior to the resolution conference for ADE H-20-09, withholding information from Parent regarding the alleged seclusion and restraint of Student, and denying Parent access to Student's classroom teacher and

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other District employees); (2) failing to adhere to the IDEA's stay put provision by continuing to educate Student in the alternative learning environment (hereinafter ALE); (3) failing to provide individualized educational programs (hereinafter IEPs) for the relevant time period that were reasonably calculated to enable Student to make progress appropriate in light of his circumstances; and (4) failing to educate Student in the least restrictive environment.¹

B. Whether, as alleged in ADE H-21-23, District substantively violated the IDEA between March 18, 2020, and December 7, 2020, by failing to provide IEPs that were reasonably calculated to enable Student to make progress appropriate in light of his circumstances. Additionally, it must be determined whether Parent is entitled to tuition reimbursement for Student's placement at Compass Academy.²

PROCEDURAL HISTORY:

On June 10, 2020, the Arkansas Department of Education (hereinafter referred to as "Department") received a written request from Parent to initiate due process hearing procedures on behalf of Student (ADE H-20-34). The specific issues raised by Parent in ADE H-20-34 are stated in paragraph A of the "Issues Presented" section above. On February 1, 2021, Parent filed an additional request to initiate due process hearing procedures (ADE H-21-23). The specific issues raised by Parent in ADE H-21-23 are stated in paragraph B of the "Issues Presented" section above.³

¹ See ADE H-20-34 Due Process Complaint.

² See ADE H-21-23 Due Process Complaint.

³ See Due Process Complaints in ADE H-20-34 and ADE H-21-23.

ADE H-20-34 and ADE H-21-23 were the second and third due process complaints filed by Parent against District. The first due process request filed by Parent was ADE H-20-09, which was filed nearly nine months earlier on September 23, 2019 (hereinafter “Hearing #1 or ADE H-20-09”). This Hearing Officer issued a Final Decision and Order on March 10, 2020, in Hearing #1, finding for Parent. District was ordered to contact a BCBA to conduct a full behavioral evaluation of Student and design a program to address Student’s behavioral issues going forward. In addition, District was ordered to revise Student’s IEP to change Student’s placement from the ALE to a classroom appropriate for him in light of his individual circumstances. Finally, District was ordered to provide Student with a 1:1 paraprofessional during school hours.

In response to Parent’s requests for hearing in ADE H-20-34 (hereinafter Hearing #2 or ADE H-20-34) and ADE H-21-23 (hereinafter Hearing #3 or ADE H-21-23), the Department assigned the cases to an impartial hearing officer. These cases, while initially scheduled as separate hearings, were ultimately consolidated at the request of the parties.⁴ All in all, after numerous continuances, some of which pertained to medical issues cited by District’s counsel, and all of which constituted good cause, testimony was heard in consolidated ADE H-20-34 and ADE H-21-23 on November 11, 2020, November 12, 2020,

⁴ On March 8, 2021, following the conclusion of testimony in ADE H-20-34, but prior to the deadline for issuing a decision, counsel for both parties filed a Joint Motion to Consolidate ADE H-21-23 with ADE H-20-34. Specifically, the parties stated that the evidence and testimony presented in H-20-34 was relevant to the issues raised in H-21-23. As such, counsel for both parties requested that the administrative record in ADE H-20-34 be reopened and that the timeline be extended so that ADE H-21-23 could be consolidated therewith. On March 8, 2021, this Hearing Officer orally granted the Joint Motion to Consolidate and issued a written order at a later date to memorialize this decision. The effect of this decision was that ADE H-20-34 was suspended and the record was reopened. Thereafter, the matter was continued to May 18, 2021, so that additional witnesses with information relevant to the claims raised in ADE H-21-23 could testify.

November 13, 2020, February 2, 2021, February 3, 2021, February 4, 2021, May 19, 2021, May 20, 2021, May 21, 2021, and May 25, 2021. The consolidated due process hearing was closed.

For clarity, this Hearing Officer referenced ADE H-20-09, ADE H-20-34, and ADE H-21-23 as Hearing #1, Hearing #2, and Hearing #3, respectively, throughout the consolidated proceedings addressed in this decision. This same nomenclature is used in this decision as well. Parent and District stipulated and agreed that all witness testimony and admitted exhibits in Hearing #1, ADE H-20-09, would be incorporated into the record for Hearing #2, ADE H-20-34, and Hearing #3, ADE H-21-23. The following witnesses testified in the consolidated hearing pertaining to ADE H-20-34 and ADE H-21-23: Barbara McShane, Brad Beatty, Dr. Mark Gotcher, Bridgett Smith, Josh Edgin, Amy Barley, Becky McVay, Jennifer Nash, Dr. Brittany Turner, Kyla Warnick, Courtney Williams, Mallory Moix, and Parent.⁵

Having been given jurisdiction and authority to conduct the hearing pursuant to Public Law 108-446, as amended, and Arkansas Code Annotated §§ 6-41-202 through 6-41-223, Danna J. Young, J.D., Hearing Officer for the Arkansas Department of Education, conducted an open impartial hearing. Parent was represented by Theresa Caldwell (Little Rock, Arkansas) and District was represented by Sharon Streett (Little Rock, Arkansas).

Both parties were offered the opportunity to provide post-hearing briefs in lieu of closing statements and both submitted briefs.⁶

⁵ See generally ADE H-20-34 and ADE H-21-21 transcripts.

⁶ See Post-Hearing Briefs of Petitioner and Respondent. District's post-hearing brief was filed approximately eight hours late and, as a result, counsel for Petitioner objected to this Hearing Officer considering the contents of the untimely-filed brief. It is noted, however, that District's counsel emailed this Hearing Officer on the date that briefs were due and provided notice that she was having internet issues and was unable to electronically send her brief by

FINDINGS OF FACT:

At the time that Hearing #2, ADE H-20-34, and Hearing #3, ADE H-21-23, were filed, Student was enrolled in District and was attending school at Sequoyah Elementary. During the pendency of Hearing #1, ADE H-20-09, Student was in kindergarten (2019-2020 school year). At the time that the two hearings covered in this decision were filed, Student was entering or attending the first grade (2020-2021 school year). Parent testified that Student had many health issues as an infant and was developmentally delayed in many respects. Student was largely nonverbal until he was three years old and, even now, has difficulty expressing himself verbally when he is upset.⁷ Student has a history of behavioral issues, with behaviors to include hitting, kicking, attacking other children, arguing excessively, throwing items, temper tantrums, and resisting authority.⁸ On March 20, 2018, Student was diagnosed with unspecified disruptive, impulse control, and conduct disorder and unspecified symptoms and signs involving the nervous system.⁹ More recently, in August 2019, Student was diagnosed with Autism Spectrum Disorder and Attention Deficit Hyperactivity Disorder (hereinafter “ADHD”).¹⁰

During the 2018-2019 school year, Parent declined three to five-year-old services from the district and instead enrolled Student in Pediatrics Plus Developmental Preschool

the stated deadline. In addition, District’s post-hearing brief was submitted early in the morning following receipt of this notification. Finally, counsel for District has appeared before this Hearing Officer several times and untimely filings have not occurred. For these reasons, this Hearing Officer considered District’s post-hearing brief, despite the late submission.

⁷ ADE H-20-09 Hrg. Tr., Vol. II, pp. 246, 250-51.

⁸ ADE H-20-09 Ex. Vol. I, p. 60.

⁹ *Id.* at p. 61.

¹⁰ *Id.* at p. 107.

(hereinafter “Peds Plus”).¹¹ While attending Peds Plus, Student was evaluated on June 6, 2018, for speech deficits. Student had previously been discharged from speech therapy services prior to entering preschool at Peds Plus. Student was administered the Clinical Evaluation of Language Fundamentals Preschool – Second Edition (CELF-P2), the Goldman Fristoe Test of Articulation – (GFTA-3), and the Clinical Assessment of Articulation and Phonology – Second Edition (CAAP-2).¹² Student was also given oral peripheral and hearing exams and was informally assessed for voice and fluency.¹³ The results of these tests indicated that Student presented with a mild delay for language development and a severe delay for articulation skills.¹⁴ As a result of this evaluation, it was recommended, and Student did in fact receive, ninety minutes of speech therapy (hereinafter “ST”) weekly.¹⁵

In addition, on May 2, 2018, Student was evaluated for occupational therapy (hereinafter “OT”). Student was administered the Peabody Developmental Motor Scales – 2 (PDMS-2 fine motor section), the Sensory Processing Measure – Preschool (SPM-P), and the Pediatric Evaluation of Disability Inventory (PEDI).¹⁶ In addition, he was clinically observed by the occupational therapist conducting the evaluation.¹⁷ It was determined that Student had difficulty processing sensory information, which resulted in difficulty “modulating responses to input.” As a result, Student engaged in seeking behaviors that ultimately

¹¹ *Id.* at p. 34; Ex. Vol. II, p. 361.

¹² ADE H-20-09 Ex. Vol. II, pp. 72-78.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at p. 65.

¹⁷ *Id.*

interfered with his ability to function and learn in the classroom. Student was found eligible for OT services in the amount of 135 minutes per week.¹⁸

From a behavioral standpoint, Student engaged in inappropriate behaviors while at Peds Plus, specifically exhibiting aggressive behaviors such as hitting others and throwing objects.¹⁹ He also struggled with transitions between activities. Peds Plus developed a BIP to address student's inappropriate behaviors and minimize Student's angry outbursts.²⁰ By the time that Student left Peds Plus, he was on the lowest level of the behavioral program offered by the facility, and Parent reported that Student's aggressive behaviors has been significantly reduced.²¹

In the spring of 2019, Peds Plus developed a plan to transition Student from preschool to kindergarten at District. A special education referral dated February 28, 2019, indicated that Student had developmental delays and was receiving services at Peds Plus for "fine motor, sensory, and communication deficits," noting that these deficits affected Student's abilities in the classroom.²² The special education referral also stated that Student's language skills at that time were "average."²³

A Notice of Conference dated February 28, 2019, and scheduling a meeting for March 14, 2019, was sent to Parent by District.²⁴ The purpose of this meeting was to consider the Peds Plus special education referral and, also, to conduct an existing data review.²⁵ Parent

¹⁸ ADE H-20-09 Ex. Vol. II, pp. 65-71.

¹⁹ ADE H-20-09 Ex. Vol. I, p. 56.

²⁰ ADE H-20-09 Hrg. Tr., Vol. IV, pp. 201-02.

²¹ *Id.*

²² ADE H-20-09 Ex. Vol. I, pp. 35-37; Ex. Vol. II, p. 8.

²³ ADE H-20-09 Ex. Vol. I, p. 37.

²⁴ *Id.* at p. 38.

²⁵ *Id.*

provided a social history for District to review which included information about Student's aggressive behaviors. Specifically, Parent noted on the social history that Student was "quick to anger" and would hit, yell, and throw objects when he was angry.²⁶ The referral conference was held, as scheduled, on March 14, 2019, and Parent, as well as individuals from Peds Plus and District attended the meeting.²⁷ Regarding Student's behavior, there were varying opinions discussed at the meeting. Parent reported that Student's behavior continued to be aggressive, while the Peds Plus staff member that was present in the meeting indicated that there had been an improvement in Student's behavioral issues.²⁸ In addition to discussing Student's behavioral issues, the team reviewed a developmental evaluation conducted by Peds Plus and a psychological evaluation conducted by Dr. Kim Dielman.²⁹

The Peds Plus developmental evaluation was conducted on February 5, 2019, approximately three weeks prior to the referral conference. This evaluation indicated that student had a 38% delay with regard to adaptive skills, a 25% delay with regard to personal social and communication skills, between a 27% and 30% delay on various motor skills, and a 24% delay with regard to cognitive skills.³⁰ The psychological evaluation performed by Dr. Kim Dielman was dated March 20, 2018.³¹ This report indicated that, as of the date of evaluation, Student had a history of aggressive behavior toward others, did not like to share, typically preferred to play alone, and became easily frustrated.³² It was further noted that

²⁶ *Id.* at p. 47.

²⁷ ADE H-20-09 Ex. Vol. II, pp. 22-24.

²⁸ *Id.* at p. 13.

²⁹ *Id.* at pp. 22-24, 85-90, 62-63.

³⁰ *Id.* at p. 86.

³¹ *Id.* at pp. 62-63.

³² *Id.*

Student was sensitive to noise and textures, and that he was able to obtain sensory input by hitting others, throwing objects, and kicking others.³³ Dr. Dielman diagnosed Student with unspecified disruptive, impulse control, and conduct disorder, and also noted that Student exhibited many characteristics of sensory processing disorder.³⁴ She noted that children with sensory processing disorder “crave” input and love activities such as jumping, bumping and crashing activities, and deep pressure touch.³⁵ In Dr. Dielman’s opinion, Student did not meet the criteria for Autism because he was able to engage socially if he chose to do so and enjoyed at times playing with other peers.³⁶

A Notice of Action dated March 14, 2019, states that Parent and District agreed that additional testing was needed to determine whether Student was eligible for special education services with District.³⁷ Parent signed consent for additional evaluations at the meeting.³⁸

Following March 14, 2019, District began the process of conducting necessary evaluations. District first obtained Student’s audiological evaluation and swallow study from Student’s primary care physician, Dr. Robin Kirby, as well as records from Student’s gastroenterologist, Dr. Van Lanthum.³⁹ Dr. Kirby’s report was dated November 19, 2018 and indicated that Student’s body systems were within normal limits.⁴⁰ In addition, Dr. Kirby

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at p. 13; Ex. Vol. I, p. 42.

³⁸ ADE H-20-09 Ex. Vol. II, p. 13.

³⁹ *Id.* at pp. 81-83.

⁴⁰ *Id.*

indicated that, developmentally, Student had social and speech language skills within normal limits and fine and gross motors skills below normal limits.⁴¹

On April 14, 2019, Parent completed a medical history form for Student, indicating that Student suffered from numerous conditions, including asthma, impulse control issues, sensory processing disorder, and oppositional defiant disorder.⁴² Parent further indicated that Student was undergoing additional testing for other conditions.⁴³ Parent reported that Student took several medications including Zantac, Zyrtec, Singulair, Hydroxyzine, and Albuterol.⁴⁴ Parent stated on the medical history form that Student had undergone a laryngeal cleft repair approximately a year earlier, and that Student no longer required the use of thickened liquids.⁴⁵

District obtained numerous documents and evaluations from Peds Plus, including a document entitled “Classroom Treatment Plan Objectives,” as well as speech and OT evaluations.⁴⁶ Regarding evaluation of Student for speech, District’s speech language pathologist reviewed Student’s June 6, 2018, speech evaluation from Peds Plus. Thereafter, on April 5, 2019, she administered two language assessments to Student, specifically the Arizona Articulation Proficiency Scale – Third, which was administered to determine whether Student had articulation deficits, and the Oral and Written Language Scales – Second, which was administered to determine if Student had listening comprehension and

⁴¹ *Id.*

⁴² *Id.* at p. 15.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at p. 64.

⁴⁶ *Id.* at pp. 88, 72-80.

oral expression deficits.⁴⁷ In addition, District’s speech therapist conducted an oral peripheral examination, assessed fluency and voice, and observed Student from a behavioral perspective.⁴⁸ District’s speech evaluation indicated that Student had age appropriate articulation, and that Student’s language skills were within normal limits. In addition, the evaluation indicated that Student’s oral mechanism was adequate, and his voice and fluency was average.⁴⁹

The speech evaluation provided data collected entitled “Curriculum/Classroom Based Assessment.” In the category of language, the report indicated that Student was unable to speak in complete sentences, answer questions appropriately, ask clear and relevant questions to gain information, use appropriate grammar for age, use vocabulary appropriate for age, understand new curriculum vocabulary, and use appropriate social language.⁵⁰ Of the ten observable behaviors on the language portion of the checklist, Student was observed to do only three skills.⁵¹ Regarding the category of articulation, the report indicates that Student omitted sounds, substituted sounds, failed to speak at a rate that others could understand, and failed to speak with good nasal quality.⁵²

The District’s speech language pathologist did not recommend direct speech-language therapy, noting that articulation and language abilities were within normal limits.⁵³ She stated, however, that the classroom assessment completed by Student’s teacher showed

⁴⁷ ADE H-20-09 Ex. Vol. II, pp. 95-101.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ ADE H-20-09 Ex. Vol. I, p. 87.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at p. 88.

that Student did not consistently demonstrate his language abilities in the academic setting.⁵⁴ It was also noted that there were “behavioral concerns” which could impact Student’s speech.⁵⁵ Finally, the report noted that continued monitoring should be implemented.⁵⁶

Regarding evaluation of Student for OT, District’s occupational therapist reviewed prior OT evaluations and also observed Student at Pediatrics Plus. She further spoke with Student’s occupational therapist, who indicated that Student would likely continue to need occupational therapy at school.⁵⁷ District’s occupational therapist conducted an evaluation on April 5, 2019.⁵⁸ District administered one assessment, specifically the Developmental Test of Visual-Motor Integration (VMI), to assess Student’s visual motor integration.⁵⁹ Test results indicated that Student had mildly delayed visual motor integration, mildly delayed motor coordination skills, and normal visual perceptual skills as compared to his chronological age.⁶⁰ The evaluation report also stated the following: “Examination of all instruments administered indicates an overall functioning level of 4 years 6 months for visual motor abilities and 4 years 4 months for visual perceptual abilities and 4 years 0 months for visual motor coordination as compared to [Student’s] chronological age of 5 years 4 months.”⁶¹ The District’s occupational therapist considered the results of the VMI, as well as the results of the May 2, 2018 Peds Plus OT evaluation, and recommended 60 minutes per week of OT. In

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ ADE H-20-09 Ex. Vol. II, p. 91.

⁵⁸ *Id.* at p. 92.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

addition, eleven goals were provided for Student.⁶² The goals address sensory modulation, tactile awareness, handwriting skills, visual motor skills, fine motor skills, fine motor precision, visual perception skills, and eye-hand coordination.⁶³

On May 3, 2019, District's school psychologist completed a School Psychological report regarding Student. As part of this evaluation, Student was administered the Wide Range Achievement Test – 4 (WRAT-4) and scored in the borderline range for the category of word reading (2nd percentile), in the deficit range for the category of spelling (1st percentile), and the low average range for math computation (19th percentile).⁶⁴ Student was unable to complete the Reynolds Intellectual Assessment Scale but was able to respond to the Wechsler Nonverbal Scale of Ability. Student's IQ pursuant to the Wechsler is 81, which is in the low average range. It was noted that Student scored lowest on the portion of the test that was timed and called for Student's constant attention.⁶⁵

Student's teacher from Peds Plus also completed an Adaptive Behavior Evaluation Scale, and Student scored in the range of low average regarding overall adaptive behavior.⁶⁶ Student's conceptual domain quotient, which describes Student's communication skills, was in the average range. Student's social domain, which consists of social, leisure, and self-direction, as well as Student's practical domain, which describes self-care, health, safety, home living, and community, were in the low average range.⁶⁷

⁶² *Id.* at pp. 93-94.

⁶³ *Id.* at p. 94.

⁶⁴ *Id.* at pp. 114-16; Ex. Vol. I, p. 73.

⁶⁵ *Id.*

⁶⁶ ADE H-20-09 Ex. Vol. I, p. 39.

⁶⁷ ADE H-20-09 Ex. Vol. II, pp. 117-119.

Based on the evaluations that were considered and, also, conducted by District, it was determined that Student qualified for special education services pursuant to the category of Other Health Impairment.⁶⁸

Student was reevaluated by Peds Plus for speech services on May 31, 2019.⁶⁹ The reevaluation report noted that Student had mastered four objectives since the previous evaluation a year earlier, and that Student had made significant progress toward some of the other goals and objectives.⁷⁰ Student's articulation skills were improved, but it was found that Student had a moderate-severe delay in his language development. It was recommended that Student continue receiving 90 minutes of ST per week.⁷¹ In addition, Student was reevaluated for OT services by Ped Plus on April 24, 2019.⁷² It was noted that, since evaluation one year earlier, Student had accomplished 8 of 15 goals, but that Student still had areas of need to include fine motor coordination, social functioning, and sensory processing.⁷³ The recommendation based on this OT reevaluation was for Student to continue receiving 135 minutes per week of OT.⁷⁴ Neither of these reevaluations were available to District on March 14, 2019 or, subsequently, on May 20, 2019, when Student's IEP team was meeting in preparation of Student's transition to District.

On May 6, 2019, a Notice of Conference was sent to Parent scheduling a meeting to consider initial eligibility for special education services for Student, as well as to conduct an

⁶⁸ *Id.*

⁶⁹ ADE H-20-09 Ex. Vol. I, pp. 133-35.

⁷⁰ *Id.* at p. 133.

⁷¹ *Id.* at p. 134.

⁷² *Id.* at pp. 145-47.

⁷³ *Id.*

⁷⁴ *Id.*

evaluation and transition conference.⁷⁵ A second Notice of Conference referencing this same meeting date was sent to Parent on May 13, 2019.⁷⁶ At the May 20, 2019 conference, Parent, a special education teacher, a general education teacher, the local education agency representative, the District's school psychologist, the District's speech language pathologist, and the District's nurse were present.⁷⁷

During the meeting, the team discussed the OT, speech, and psychoeducational evaluations that were conducted by District. Regarding OT, it was noted that Student's scores on the VMI did not qualify him for OT services; however, District's occupational therapist used the 2018 Peds Plus evaluation and the recommendation of Student's Ped Plus occupational therapist to qualify Student for services. It was recommended that Student receive 60 minutes per week of OT for the purpose of addressing sensory and fine motor issues that Student was having.⁷⁸

In addition, the team discussed Student's speech evaluations. District's speech language pathologist explained the results of District's speech evaluation and why, in her opinion, Student did not qualify for speech therapy services. She noted that Student's speech-language skills were not "anticipated to interfere with his [Student's] educational performance."⁷⁹

District's school psychologist explained the psychoeducational evaluation that she conducted. She recommended identifying student under the Other Health Impairment

⁷⁵ ADE H-20-09 Ex. Vol. II, p. 16.

⁷⁶ *Id.* at p. 18.

⁷⁷ *Id.* at p. 21; Ex. Vol. I, p. 101.

⁷⁸ ADE H-20-09 Ex. Vol. II, pp. 91-92.

⁷⁹ ADE H-20-09 Ex. Vol. I, p. 101.

category based on the diagnoses appearing in the psychological report prepared by Dr. Dielman on March 20, 2018. She further explained the continuum of placements and accommodations that she recommended for Student.⁸⁰ The team subsequently discussed programming for Student and decided that he should receive 30 minutes per day direct instruction for reading, and 30 minutes per day direct instruction for writing.⁸¹

Parent raised the issue of Student's behavioral issues at the meeting. Parent relayed to the team some of the behaviors that Student had exhibited in the past. Student's classroom teacher recalled Parent discussing that Student ran out of his previous daycare and into traffic and that Student had aggressive tendencies and would harm other children and adults. Parent asked that Student be placed in a small classroom and have a 1:1 aide.⁸² Parent also offered the team a behavior plan which consisted of info that she obtained from various sources on the internet. The school psychologist acknowledged Parent's concerns and, thereafter, it was determined that District and Parent would meet again prior to the start of school to discuss behavioral concerns relating to the classroom.⁸³ In the interim, certain items from Parent's suggested behavior plan were added to Student's IEP, including giving Student the option to go to a safe place, a visual schedule, noise reduction headphones, and access

⁸⁰ ADE H-20-09 Ex. Vol. II, p. 120.

⁸¹ *Id.* at p. 36.

⁸² *Id.* at p. 168.

⁸³ *Id.* at p. 104.

to sensory items.⁸⁴ It was also noted that Student would be evaluated by Dennis Development Center in June 2019.⁸⁵

Student's May 20, 2019 IEP indicated a duration of services from August 14, 2019 to May 27, 2020. The form box labeled "parent/guardian input" included a notation which stated that parent brought numerous items for consideration and felt comfortable about the placement decisions made for Student.⁸⁶ The IEP included a statement of Student's present level of academic achievement and functional performance, which included the results of all evaluations considered by District.⁸⁷ In addition to a visual schedule, noise reduction headphones, and access to sensory items, Student's IEP included other supplementary aids, program modifications, and accommodations. Specifically, Student's IEP provided to Student the following additional accommodations: (1) reduced assignments; (2) extra time for completing assignments; (3) preferential seating; (4) frequent feedback; (5) frequent opportunities for breaks; and (6) transition warnings.⁸⁸

Student's May 20, 2019 IEP contained two goals, both specific to English language arts.⁸⁹ The first goal provided that Student would improve written expression through and increased ability to write letters and words with 80% accuracy when given materials and instruction. This goal included four objectives which focused on writing uppercase letters, writing lowercase letters, using a combination of drawing, labeling, and written words to

⁸⁴ ADE H-20-09 Ex. Vol. II, pp. 128-29.

⁸⁵ *Id.*

⁸⁶ ADE H-20-09 Ex. Vol. I, p. 17.

⁸⁷ *Id.* at p. 18.

⁸⁸ *Id.* at p. 21.

⁸⁹ *Id.* at pp. 24-27.

compose a written message, and reference and sort pictures of contact to answer questions.⁹⁰ Student's second goal provided that Student would follow instructions and demonstrate knowledge of phonics and grade level word analysis in decoding words.⁹¹ The second goal also included four objectives which focused on identifying alphabet letter sounds, isolating and producing initial, medial, and final sounds in words, and demonstrating mastery of grade appropriate sight words.⁹²

Student's IEP also included a form addressing least restrictive environment considerations. The IEP team noted on this form that Student would not participate 100% of the time with non-disabled peers because: (1) Student's acquisition of academic/developmental skills could not be addressed by modifying the general curriculum; (2) small group instruction was necessary for Student to acquire skills specified in his IEP; (3) behavior intervention strategies could not be implemented in a large group setting; (4) the Student's behavior significantly impeded his ability to learn; and (5) additional individualized instruction was required for Student to learn.⁹³ Thereafter it was noted that Student would spend 82% of his time in the general education setting.⁹⁴

Finally, the May 20, 2019 IEP provided for special education services in the academic areas of reading and writing. Specifically, Student was to receive 150 minutes per week of direct instruction in reading, and 150 minutes per week of direct instruction in writing. This

⁹⁰ *Id.*

⁹¹ *Id.* at p. 26.

⁹² *Id.*

⁹³ *Id.* at p. 29.

⁹⁴ *Id.*

was in addition to the OT services that were determined appropriate by the team, specifically 60 minutes per week.⁹⁵

District and Parent did not meet again prior to the start of the school year. On June 6, 2019, Student was evaluated by UAMS Dennis Developmental Center (hereinafter “DDC”).⁹⁶ This report noted that Student exhibited “aggressive behaviors, atypical use of toys (spinning or lining up or stacking), delayed self-care skills, delayed sleep onset . . .” and that student had a poor attention span, preference for solitary play, and engaged in repetitive sounds and noises.⁹⁷ It was noted that Student mostly uses complete sentences, but also that he often utilizes short phrases.⁹⁸ The results of Student’s physical examination indicated that Student was hyperactive, inattentive, impulsive, had inconsistent eye contact and response to his own name, engaged in “back and forth conversation about topics of his choice,” demonstrated articulation errors, and intruded into others’ personal space.⁹⁹

DDC determined that Student met the criteria for ADHD, combined type. The DDC report further stated that Student “has some symptoms [] suggestive of Autism Spectrum Disorder” but noted that further evaluation was warranted.¹⁰⁰ It was recommended that Student be considered for special education eligibility pursuant to the category of OHI and that the following classroom modifications be considered: (1) preferential seating; (2) frequent prompts and cues; (3) use of multiple modalities when presenting directions,

⁹⁵ ADE H-20-09 Ex Vol. I, p. 28.

⁹⁶ *Id.* at p. 117.

⁹⁷ *Id.* at p. 118.

⁹⁸ *Id.*

⁹⁹ *Id.* at p. 119.

¹⁰⁰ *Id.*

explanations, and instructional content; (4) division of large tasks into smaller subparts; (5) use of concise instructions; (6) breaks for Student as necessary; (7) modified grading system; and (8) extra test and assignment time.¹⁰¹ In addition, several interventions were recommended including, but not limited to, teaching child to stop and think about behavior, limiting opportunities for unproductive behavior, setting clear behavioral limits, providing child with a schedule on desk, limiting auditory distractions, monitoring the completion of tasks, providing opportunities for purposeful movement around the class, and providing for transitions.¹⁰²

On August 5, 2019, DDC conducted a second evaluation of Student to look specifically at the issue of Autism Spectrum Disorder.¹⁰³ The evaluator noted that student tended to use sentences in the correct way, but had flat intonation, used words and phrases repetitively, talked only about his thoughts, feelings, and interests, and sustained very little reciprocal conversation.¹⁰⁴ In addition, Student showed limited insight into typical social relationships, had inconsistent eye contact, showed minimal pleasure in interacting with examiner, and limited and awkward social interactions.¹⁰⁵ Student was ultimately diagnosed with Autism Spectrum Diagnosis based on his behavioral and development history, direct assessment, and observations of the DDC evaluator.¹⁰⁶ It was recommended that Parent contact District and notify them of this diagnosis so as to allow District to engage in additional programming

¹⁰¹ *Id.*

¹⁰² ADE H-20-09 Ex. Vol. I, p. 120.

¹⁰³ *Id.* at p. 114.

¹⁰⁴ *Id.* at p. 115.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

as necessary.¹⁰⁷ Several other recommendations were made, including ensuring that child was able to comprehend language being used, incorporating use of “social stories” to describe social situations that are difficult and/or confusion for Student, pursuing Applied Behavior Analysis (hereinafter “ABA”) therapy to address maladaptive and atypical behavior, and closely communication between District and Parent.¹⁰⁸

On the same day as this second evaluation, specifically August 5, 2019, DDC provided a letter to Parent which stated that it appeared that Student met the criteria for Autism Spectrum Disorder and that detailed reports would be forthcoming.¹⁰⁹ This letter was provided to Parent on August 7, 2019, and Parent delivered a copy of this letter to the school nurse on this same day.¹¹⁰

District contacted Parent to schedule another IEP meeting on August 8, 2019, and Parent responded to that call the following day.¹¹¹ Parent had undergone knee surgery on August 8, 2019, and indicated that she was unable to meet prior to the start of school on August 14, 2019.¹¹² As a result, Parent did not attend any meetings with District prior to Student beginning school on August 14, 2019. District, however, did hold a meeting on August 9, 2019, without the Parent present. The Record of Access for District shows that seven teachers met on this date, including Student’s kindergarten classroom teachers and other teachers responsible for specialized subjects such as art, library, music, physical

¹⁰⁷ *Id.* at p. 116.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at p. 105.

¹¹⁰ ADE H-20-09 Hrg. Tr., Vol. III, p. 326.

¹¹¹ ADE H-20-09 Hrg. Tr., Vol. I, p. 230.

¹¹² *Id.*

education, and science.¹¹³ Parent learned of this meeting on “Meet the Teacher Night,” specifically on August 12, 2019, when she asked Student’s assigned classroom teachers whether they had been made aware that Student had been diagnosed with Autism Spectrum Disorder and they indicated that District had met to discuss that issue.¹¹⁴

Student began school on August 14, 2019, and two days later, on August 16, 2019, District obtained a signed release from Parent to obtain information about the two evaluations conducted over the summer by DDC. Student began having behavioral difficulties at school three days into the school year, specifically on August 19, 2019. Student’s assigned teacher later wrote a statement outlining issues with Student throughout the first week of school. That statement provided the following information regarding Student’s actions on August 19, 2019:

On Monday, August 19th at 8:15 a.m. (25 minutes after his official placement into my classroom) I observed [Student] kicking two students during our morning meeting time. When Vicki Brimm, my paraprofessional, attempted to pull him away from the two students, he began kicking her. At 8:20 a.m., [Student] attempted to flip a table. Vicki Brimm sat on the top of the table to prevent it from flipping and landing on a nearby student. [Student] then continued to repeatedly and violently kick her legs. When he couldn’t flip the table, he proceeded to run around the classroom throwing items off desks, looking inside of desks for pencil boxes, grabbing them, and emptying them onto the floor. When [Student] began throwing the items at the other students in the classroom, I removed my students from the classroom (room clear) and we went into the hallway while Laura Binz, Principal, was called to remove [Student] from class. [Student] returned to class around 11:30 a.m. At 11:50 a.m. [Student] left the whole group that was on the rug for a math lesson, ran to the calm down center, grabbed a few items, and began throwing them at me. [Student] hit another student with a calm down center item (a pineapple shaped pillow). I warned him that the item would be taken away if he continued to use it to hit friends. He looked at me and immediately hit her again. I took the item and he began angrily knocking items from desks, ripping

¹¹³ ADE H-20-09 Ex. Vol. I, p. 32.

¹¹⁴ ADE H-20-09 Hrg. Tr., Vol. III, p. 335.

students' name tags off the desks where they were taped, and ripping them in half, causing students to cry at seeing their name tags being destroyed. Debbie Keeling entered the classroom to assist and [Student] began violently scratching her hands and arms. We did a room clear to protect the students and [Student] was removed from the classroom.¹¹⁵

The following day, Tuesday, August 20, 2019, Student had additional behavioral issues. Student's classroom teacher described the events of the day as follows:

On Tuesday, August 20th, [Student's] second day with me, at 8:30 a.m. [Student] became restless 2-3 minutes into our morning phonemic awareness lesson, left the rug where the students were sitting, and proceeded around the room knocking chairs onto the floor. Vicki Brimm and I chose to ignore him which caused his violence to escalate when he noticed we were not reacting. He grabbed a handful of recently sharpened pencils and began throwing them at students. Students began to scream and were scared. Vicki Brimm protected the students while I tried to get [Student] to stop throwing pencils and not hurt himself or anyone else. While trying to get to him and take the sharp pencils to keep students safe, [Student] scratched my hand so deeply that it drew blood. He then removed his shoes, threw them at me, and ran out of the classroom. I ran after him concerned that he would run out of our building into the street per his history at the daycare. He was intercepted by Laura Binz at the end of the hallway. I returned to class and she kept [Student] in the office.¹¹⁶

The following day, Wednesday, August 21, 2019, Student's teacher noted the following events:

On Wednesday, August 21st at 9:15 a.m. on Tuesday [Student] was upset because we had to leave the computer lab after our 30-minute session. He crawled under his computer desk refusing to leave. I lined my class up and proceeded to leave. I asked my aide that day (Charlotte Magee) to assist with [Student]. He kicked Charlotte Magee hard in the shin. She was able to get him back to class after several minutes. After returning to class, he was still angry, and he emptied all the contents of the calm down box and began kicking the wooden student lockers repeatedly. Concerned that he would injure himself on the lockers, Laura Binz was called to intervene. She removed him from the classroom. [Student] rejoined the class at recess at 9:50 a.m. At 10:00 a.m. [Student] did not want to line up from recess. In the line, he slapped another

¹¹⁵ ADE H-20-09 Ex. Vol. I, p. 168.

¹¹⁶ *Id.* at pp. 168-69.

student in the back twice before I could get to him causing the student to cry. Laura Binz was called to take [Student]. He was refusing to reenter the building after recess. At 10:30 a.m. [Student] was in the hallway on the floor kicking and screaming with Laura Binz and the school psychologist. Hearing the noise in the hallway, I glanced out of my glass window, noticed it was [Student], and continued my lesson. My students asked if it was [Student], told me that he is scaring them, and asked me not to let him in.¹¹⁷

Again, on Thursday, August 22, 2019, there were additional behavioral incidents.

These were described as follows:

On Thursday, August 22nd, I continued more of the ideas and suggestions offered by the school psychologist. I am also implementing suggestions brought to me by our school counselor, Jennifer Fuller. At this point, [Student] has a visual schedule on his desk outlining our whole school day from breakfast to dismissal. He has a sticker chart taped to his desk that coincides with the visual schedule. For each item on the schedule where [Student] is not violent or physically aggressive towards any teacher or student, he gets a sticker on his chart. I am shortening the amount of work that he must do compared to his peers. I implemented a timer system where [Student] gets to take a two-minute break for every 1 minute of classwork that he does. Additionally, I am giving [Student] more hands-on manipulatives in lieu of the same classwork that his classmates are completing. I have [Student] doing a variety of classroom jobs, including sorting papers, picking up trash, putting folders and papers into students' lockers, and more. Because he doesn't know how to do these jobs, I must do them with him. At 9:30 a.m. the school psychologist visits [Student] and we are passing out papers. All the things that I am implementing have completely taken me away from my other 19 students. Keeping [Student] busy, engaged, and not violent has completely deprived 19 other students of their teacher for this entire day. I have no paraprofessional today and no help. She was pulled to do 2nd grade Heggerty testing in the cafeteria. I have not done anything from my lesson plans today as 100% of my time has been dedicated to [Student] and his full care of resetting timers, explaining his sticker chart and adding stickers to it, working with manipulatives, engaging him in classroom jobs, redirecting him when I see he is getting agitated, etc. I have been informed that the original meeting to discuss [Student's] placement that was on September 4th has been moved up to Monday, August 26th at 8:30 a.m.¹¹⁸

¹¹⁷ *Id.* at Ex. Vol. I, p. 169.

¹¹⁸ *Id.*

Finally, Student's classroom teacher described an unfortunate set of events that occurred on Friday, August 23, 2019. She stated the following:

On the morning of Friday, August 23rd, [Student] became upset at 9:00 a.m. during calendar time and began yelling. My paraprofessional who is scheduled to be in my room from 8:30 – 9:30 a.m. was pulled out to test other students again. There were no other adults in my classroom at that time assisting. [Student] was not yelling any words, just yelling loud noises to cause the class to become distracted and limit my ability to teach. When the student on the rug next to [Student] turned to him, put her fingers on her lips and said "Shhhh," he began violently kicking her. She immediately began screaming and crying. He managed to kick her several times before I could get over to where they were. I got him to stand and began to walk with him towards the classroom door to call for help. When he realized he was going to have to leave the classroom, he threw himself on the ground and started kicking me. He then began to grab items off my bookshelf and throw them at me and the students (books, pencils, and other items). I bent down to take the items and he kicked my arm so badly that I left a bruise and a knot that is very tender to the touch. With this kick, his shoe came off and he started hitting me with it. I kept saying "No! We don't do this at school. This is bad! Do not do that again!" Amid being violently and repeatedly hit, I attempted to block his right leg from kicking me again by swatting it slightly above his knee over the denim shorts that he was wearing. As part of a knee-jerk reaction, I said "Do you want a spanking? You are going to get a spanking." I had no intention of spanking [Student] and in the moment, I am not sure why I said that . . . [Student] continued to hit and kick me. I was trying to hold his arms so that he would stop hurting me. He scratched my left arm and my right knee, drawing blood. This is the point in which Laura Binz entered the classroom. She tried to take him, but after I let go of his hand, he jumped up and ran to the back of the classroom, knocking over pencil caddies, throwing items at my computer nearly knocking it off of my desk, and kicking student desks. She finally managed to get him and remove him from the classroom.¹¹⁹

During the week of August 19-23, 2019, Principal for District communicated with Parent daily, before and after school, about Student's behavioral issues.¹²⁰ A Notice of

¹¹⁹ ADE H-20-09 Ex. Vol. I, pp. 169-70. Student's classroom teacher was disciplined for striking Student following this altercation. The events that followed this altercation, specifically related to the discipline of Student's teacher, are not relevant to this due process hearing.

¹²⁰ ADE H-20-09 Hrg. Tr., Vol. I, p. 111.

Conference was sent to Parent on August 20, 2019, scheduling an IEP meeting for September 3, 2019.¹²¹ The purpose of the meeting was to review existing data, review and revise Student's IEP, and review outside evaluation reports provided by Parent.¹²² Individuals invited to attend this meeting included the director for the District's alternative learning environment, specifically Josh Edgin.¹²³ Parent requested that this meeting be moved to an earlier date and, thereafter, this IEP meeting was moved to August 26, 2019. Prior to this meeting, specifically on August 22, 2019, Parent provided additional evaluations to District, specifically the evaluations conducted by DDC on June 6, 2019, and August 5, 2019.¹²⁴

On August 26, 2019, Student's IEP team met, and Parent was present in the meeting. The team reviewed all new evaluations provided by Parent and declined to change Student's eligibility criteria until additional evaluations were obtained.¹²⁵ Specifically, the IEP team had a partial report from DDC and wanted to wait until they received a copy of the full report before changing eligibility categories.¹²⁶ The team decided that an additional speech evaluation was needed to determine whether Student had pragmatic language deficits.¹²⁷ In addition, Student's behavior over the first few days of school was discussed, and it was determined by the team that an FBA should be conducted.¹²⁸ The IEP team determined that no change to OT was needed, although District's occupational therapist agreed to create a

¹²¹ ADE H-20-09 Ex. Vol. II., p. 121.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ ADE H-20-09 Hrg. Tr., Vol. III, pp. 327-28.

¹²⁵ ADE H-20-09 Ex. Vol. II, p. 128.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

sensory diet and additional recommendations for Student.¹²⁹ The sensory diet included multiple activities for calming and organization, and also specific recommendations for Student's classroom.¹³⁰

Finally, the team made the decision to place Student in the district's alternative learning environment (hereinafter "ALE"), a general education placement with behavioral supports. This required Student to be moved from Dwight Elementary School to Sequoyah Elementary School. The ALE initial referral form completed by the IEP team states that Student runs frequently from authority, hits, kicks, scratches, flips furniture, and throws objects.¹³¹ The initial referral form also stated that the problem behavior began the "first day of school," noting that this same behavior occurred at Peds Plus when Student was in preschool.¹³² Parent requested an FBA, a BIP, a 1:1 aide, and ABA therapy, but ultimately agreed to the ALE when the team indicated that ALE was the best option for Student.¹³³ Although the IEP team agreed that the ALE would be ideal for Student, it did not have authority to place Student in that setting without approval by the ALE team.

On August 27, 2019, Parent met with District officials responsible for operating the ALE. It was noted by the principal at Student's current placement that Student's IQ was too high for the self-contained room at Dwight Elementary.¹³⁴ Parent consented to the ALE.¹³⁵

¹²⁹ *Id.* at pp. 128, 135.

¹³⁰ *Id.* at pp. 135-36.

¹³¹ ADE H-20-09 Ex. Vol. I, p. 197.

¹³² *Id.*

¹³³ ADE H-20-09 Hrg. Tr., Vol. IV, pp. 152-53; Hrg. Tr., Vol. VI, p. 107.

¹³⁴ ADE H-20-09 Hrg. Tr., Vol. IV, p. 152; Hrg. Tr., Vol. VI, p. 110.

¹³⁵ ADE H-20-09 Ex. Vol. I, p. 199.

Student began attending school in the ALE at Sequoyah Elementary on September 4, 2019, and his IEP was implemented in the ALE room.

Student's August 26, 2019 IEP provided that Student was to receive 150 minutes per week of direct instruction in reading, as well as 150 minutes per week direct instruction in writing.¹³⁶ Student's accommodations included the following: reduced assignments, extra time to complete assignments, preferential seating, frequent feedback, frequent breaks, transition warnings, visual schedule, sensory tools, access to noise-cancelling headphones, use of visual timer, scheduled bathroom breaks, and daily communication log with Parent.¹³⁷ Student's August 26, 2019 IEP contained two language arts goals, each with four objectives.¹³⁸ Student's first language arts goal was to improve written expression through an increased ability to write letters, words, and create purposeful labeled illustrations as measured with 80% accuracy by the end of the school year. Student's second goal was to demonstrate knowledge of phonics and grade-level word analysis in decoding words as measured with 80% accuracy by the end of the school year.¹³⁹

Between September 4, 2019, and September 23, 2019, when Parent filed her due process complaint in Hearing #1, Student continued to struggle behaviorally. Student was placed in the time out room, which is within the ALE room, on September 4, 9, and 12, 2019.¹⁴⁰ On September 6, 2019, the District's school psychologist did her first observation

¹³⁶ ADE H-20-34, Ex. Vol. I, p. 7.

¹³⁷ *Id.* at p. 6.

¹³⁸ *Id.* at pp. 8, 10.

¹³⁹ *Id.*

¹⁴⁰ ADE H-20-09 Ex. Vol. I, pp. 204, 207-08, 213-14.

for purposes of conducting an FBA.¹⁴¹ No other observations took place between September 6, 2019, and the date that Parent filed Hearing #1, ADE H-20-09 and withdrew consent on September 23, 2019.¹⁴²

Between September 23, 2019, and March 17, 2020, Student remained in the ALE and continued to receive special education services pursuant to his August 26, 2019 IEP. Student continued to have behavioral issues during this period of time, with episodes including the following behaviors: refusing to work on assignments, refusing to participate in activities, throwing items, hitting and kicking staff and students, pinching students, turning over furniture, running around the room with a rolling chair and hitting other students and staff, putting himself in a locker, laying in the floor and screaming, scratching at staff, spitting at staff, attempting to leave the ALE room, crawling under furniture, pulling papers off of the wall, grabbing and attempting to tear up school work of other students, placing hands around another student's neck requiring staff to remove them, and shoving students.¹⁴³ On at least three occasions, specifically in October 2019, Student's behavior was so severe that staff was required to clear the room and, at times, call in the principal for additional assistance.¹⁴⁴ Student's special education teacher testified that Student's behavioral incidents did decrease over the six-month period in question, explaining that there were less incidents requiring someone to be called in, such as a principal, as time progressed.¹⁴⁵

¹⁴¹ ADE H-20-09 Ex. Vol. III, p. 336.

¹⁴² The facts up to this point are mostly identical to those in ADE H-20-09. Although some of these facts are not directly related to the specific issues in this case, this history, particularly given the sheer number of cases filed between Parent and District, is important for context.

¹⁴³ ADE H-20-34 Ex. Vol. I, pp. 102-183.

¹⁴⁴ *Id.* See also ADE H-20-34 Tr. Vol II, pp. 84-85.

¹⁴⁵ ADE H-20-34 Tr. Vol. IV, pp. 46-47.

Student's report card for the period of September 23, 2019, through March 17, 2020, reflects that, by the end of the third nine weeks, Student had mastered 30 of 59 kindergarten skills that were being worked on in the classroom.¹⁴⁶ During the first and second nine weeks, essentially the fall of 2019, Student struggled with coming to class ready to work, listening and following directions, demonstrating effort, demonstrating organizational skills, showing respect for adults, peers, and property, following school and classroom rules, working independently, demonstrating self-control, and accepting responsible for self.¹⁴⁷ Regarding Student's IEP goals, data provided by District shows that, as of the end of the third nine weeks, Student had mastered three of four objectives on goal #1, and three of four objectives on goal #2.¹⁴⁸ Student's special education teacher reported that Student was able to leave the ALE for special education instruction during the third nine weeks, whereas during the fall of 2019 (second nine weeks), Student had received special education services in the ALE classroom on account of his behavior.

District used a program called Istation for progress monitoring in reading and math.¹⁴⁹ At the beginning of September 2019, Student was on level 4 for overall math, with the subtests specific to measurement and data analysis, geometry, computations and algebraic thinking, and number sense all at level 4 as well.¹⁵⁰ In March 2020, Student remained on level 4 for overall math.¹⁵¹ Student scored the same level as before, specifically

¹⁴⁶ ADE H-20-34 Ex. Vol. II, p. 226.

¹⁴⁷ *Id.*

¹⁴⁸ ADE H-20-34 Ex. Vol. I, pp. 9, 11.

¹⁴⁹ ADE H-20-34 Ex. Vol. IV, pp. 437-39.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

level 4, in measurement and data analysis and computations and algebraic thinking.¹⁵² Regarding the subtest specific to geometry, Student's level had decreased from a level 4 to a level 3.¹⁵³ Regarding the subtest specific to number sense, Student's level increased from a level 4 to a level 5.¹⁵⁴ Regarding reading, Student was on level 2 for overall reading in September 2019, with the subtests specific to listening comprehension and vocabulary at level 4.¹⁵⁵ Regarding the reading subtests specific to letter knowledge and phonemic awareness, Student was on level 1 and level 2, respectively.¹⁵⁶ Approximately six months later, in March 2020, Student's overall reading level was at level 4.¹⁵⁷ Student's levels for the specific reading subtests were at level 4 for the areas of listening comprehension, vocabulary, and phonemic awareness, and level 5 for letter knowledge.¹⁵⁸ Student's DRA reading level as of the end of the third nine weeks, specifically March 2020, is unclear from the record. Testimony established, however, that Student was at DRA level 3 at the end of the 2019-2020 school year.¹⁵⁹ DRA level 3 is early kindergarten level.¹⁶⁰

Parent alleged that, between September 23, 2019, and March 17, 2020, District restrained Student and placed him in seclusion while he was in the ALE room. She further testified that District was withholding information from her by not documenting such activities.¹⁶¹ Parent specifically alleged that Student had been restrained and scratched by

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at p. 440.

¹⁵⁶ *Id.*

¹⁵⁷ ADE H-20-34 Ex. Vol. V, p. 442.

¹⁵⁸ *Id.*

¹⁵⁹ ADE H-21-23 Tr. Vol. I, pp. 35-36.

¹⁶⁰ *Id.* See also ADE H-21-23 Ex. Vol. II, p. 391.

¹⁶¹ ADE H-20-34 Tr. Vol. III, pp. 90-92.

the assistant principal on December 4, 2019.¹⁶² Parent saw and photographed a small scratch on Student's arm and reported that Student told her that the assistant principal had caused the scratch.¹⁶³ Parent immediately returned to the school to talk to the assistant principal.¹⁶⁴ During that conversation, which was recorded by Parent and played by Parent's counsel during the hearing of this matter, Parent was accusatory and rude to the assistant principal, raising her voice and refusing to have a constructive discussion with the assistant principal regarding her allegations.¹⁶⁵ Parent then contacted the Russellville Police Department and filed a report regarding the alleged incident.¹⁶⁶ The assistant principal repeatedly denied that he had harmed Student.¹⁶⁷ He explained that he had grabbed Student's arm earlier in the day to prevent Student from hitting him, but that he had no fingernails and did not scratch him.¹⁶⁸ The assistant principal explained that he had a habit of biting his fingernails, resulting in them being so short that he could not scratch anything.¹⁶⁹ Student's special education teacher never saw Student in a restraint or in seclusion.¹⁷⁰ District's LEA testified that she was not aware of Student being restrained, but she added that she had seen him transported from one location to another and that, at those times, staff had their hand on Student's back. She explained that Student was never immobilized by District staff.¹⁷¹ The principal stated that Student was secluded on October 3, 2019; however, a review of the

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at pp. 110-121.

¹⁶⁶ *Id.* at pp. 90-92.

¹⁶⁷ *Id.* at pp. 110-121.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ ADE H-20-34 Tr. Vol. IV, p. 69.

¹⁷¹ ADE H-20-34 Tr. Vol. V, pp. 71-72.

incident report indicates that Student was placed in an open-door time out room in the ALE.¹⁷² She further testified that there was no physical restraint of Student at any time.¹⁷³

Parent testified in ADE H-20-34 that she was prevented from observing Student in the classroom and that she was denied access to certain District personnel. On October 10, 2019, Parent went to District to observe Student in the ALE classroom.¹⁷⁴ District's LEA was supposed to meet Parent at the school so that she could observe Student, but an emergency arose and the LEA was unable to meet Parent.¹⁷⁵ Parent walked Student into the school, obtained a visitor's badge, and began to walk toward the classroom.¹⁷⁶ At that point, she was approached by a police officer, the principal, and the assistant principal and informed that she would not be able to observe Student.¹⁷⁷ Parent had attempted to observe Student two other days within the same week, but she and District could not agree on an appropriate time.

Parent also alleged in ADE H-20-34 that District committed a procedural violation regarding the parties' resolution conference in ADE H-20-09. After Parent filed Hearing #1, ADE H-20-09, counsel for Parent and District agreed that a resolution conference would take place on October 7, 2019. On October 6, 2019, counsel for Parent sent a letter to the Superintendent for District requesting records prior to the resolution conference the following day.¹⁷⁸ On this same day, at 11:14 p.m., Parent's counsel sent an email to District's

¹⁷² *Id.* at pp. 57-59. *See also* ADE H-20-34 Ex. Vol. I, pp. 132-33.

¹⁷³ ADE H-20-34 Tr. Vol. V, pp. 64-69.

¹⁷⁴ ADE H-20-34 Tr. Vol. III, p. 15.

¹⁷⁵ *Id.* at pp. 16-17.

¹⁷⁶ *Id.* at p. 17.

¹⁷⁷ *Id.*

¹⁷⁸ ADE H-20-34 Ex. Vol. VI, pp. 718-19.

counsel requesting records.¹⁷⁹ Seven minutes later, at 11:21 p.m., District’s counsel emailed Parent’s counsel and stated that she had tried to reach Parent’s counsel over the prior weekend but had not heard back.¹⁸⁰ The email contained a drop box link which contained Student’s academic records.¹⁸¹ On Monday, October 7, 2019, at 7:43 a.m., Parent’s counsel sent an email to District’s counsel thanking her for the records and requesting additional information that she thought was missing from the Student’s records.¹⁸² On Monday, October 7, 2019, the resolution meeting between the parties took place. It is unclear whether a classroom teacher for Student was at the October 7, 2019, resolution meeting.

On March 10, 2020, this Hearing Officer issued a Final Decision and Order in ADE H-20-09. Less than a week later, the Arkansas governor temporarily closed schools on account of COVID-19. Between March 18, 2020, and the end of the school 2019-2020 school year, Student attended school virtually, as did all other students in the state of Arkansas. Teachers were required to employ alternative methods of instruction (hereinafter “AMI”) and, as a result, District had all teachers prepare AMI packets for students.¹⁸³ Because Student was in the ALE, which was considered a general education placement, Student was initially provided a packet that included all general education assignments for kindergarten. These assignments were ultimately reduced in accordance with Student’s IEP accommodations.¹⁸⁴ In addition, Student was provided individualized AMI packets for special education.¹⁸⁵

¹⁷⁹ *Id.* at p. 717.

¹⁸⁰ *Id.* at p. 720.

¹⁸¹ *Id.*

¹⁸² *Id.* at p. 716.

¹⁸³ ADE H-21-23 Tr. Vol. III, pp. 185-87.

¹⁸⁴ ADE H-21-23 Tr. Vol. IV, p. 60.

¹⁸⁵ *Id.* at pp. 64, 124.

District's LEA explained that all assignments in the special education AMI packets were tied to Student's IEP objectives.¹⁸⁶ The assistant principal personally reviewed all packets prepared by Student's classroom teacher and, also, received input from Student's special education teacher.¹⁸⁷ Student's teachers communicated with Parent via telephone, email, and zoom for the remainder of the school year.¹⁸⁸

Between March 18, 2020, and the end of the 2019-2020 school year, Student continued to receive services pursuant to his August 26, 2019 IEP. Student's special education teacher provided direct instruction for Student in the areas of reading and written expression approximately two times per week for 30 minutes each session. These sessions were conducted via zoom.¹⁸⁹ She testified that she was doing other activities online as well, adding that she and other teachers were trying to work their way through the uncertainties of COVID-19.¹⁹⁰ District's LEA explained that the online assignments were related to the specific instruction minutes specified in Student's IEP, explaining that the days that he did not receive zoom direct instruction from his special education teacher, he had assignments that correlated in length to the time that Student would have received direct instruction at school.¹⁹¹ Throughout the fourth nine weeks, Student was receiving approximately one hour of direct instruction per week in reading and written expression, as opposed to 60 minutes

¹⁸⁶ *Id.* at p. 124.

¹⁸⁷ ADE H-21-23 Tr. Vol. III, p. 201.

¹⁸⁸ *Id.* at p. 194.

¹⁸⁹ ADE H-21-23 Tr. Vol. IV, pp. 99-100.

¹⁹⁰ *Id.* at p. 100.

¹⁹¹ *Id.* at pp. 124-25.

of direct instruction every school day.¹⁹² Student was then provided extended school year services during the 2020 summer.¹⁹³

A Notice of Action dated May 8, 2020, indicates that Student's IEP team held its annual meeting to review Student's progress on IEP goals and objectives for the 2019-2020 school year.¹⁹⁴ The IEP team determined that Student would remain on his August 26, 2019 IEP for the remainder of the 2019-2020 school year, and the team discussed ways that Student could be provided required services in light of COVID-19.¹⁹⁵ The team concluded that, regarding reading, Student had demonstrated mastery in identifying uppercase and lowercase letters and identifying alphabet letter sounds.¹⁹⁶ Student was continuing to work toward mastery of kindergarten sight words. Regarding writing, Student had demonstrated mastery for writing uppercase and lowercase letters and using a combination of drawing, labeling, and written words to compose a written message (with adult guidance).¹⁹⁷ The team discussed the fact that Student had struggled to remain on task with writing assignments in the weeks prior to the annual review conference.¹⁹⁸ The IEP team was concerned that Student might not continue to progress as a result of this issue and determined that extended school year (ESY) services were necessary.¹⁹⁹ It was determined that Student would receive a total of 17 hours of ESY, 10 of which would be designated for occupational therapy, and 7 of which

¹⁹² *Id.* at p. 101.

¹⁹³ *Id.*

¹⁹⁴ ADE H-21-23 Ex. Vol. III, p. 83.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

would be designated for direct instruction in reading and writing.²⁰⁰ Finally, Jennifer Nash (hereinafter “Nash”), a BCBA, was in attendance at the May 8, 2020 annual review conference.²⁰¹ She discussed observations and information that would be required for her to conduct a FBA of Student and plan for fall placement.²⁰² Parent attended this meeting via zoom.

Student’s IEP team met again at the beginning of the 2020-2021 school year, Student’s first grade year, to create a new IEP for Student. A Notice of Action dated August 23, 2020, indicates that Student’s IEP team also reviewed a recent occupational therapy evaluation and consulted with Nash, the BCBA utilized by District, to hear her recommendations regarding Student’s behavior plan for the first grade.²⁰³ Regarding Student’s behavior issues, Nash reported that she had conducted several observations of Student while he was receiving ESY during the prior summer.²⁰⁴ She had also reviewed documentation from Student’s ALE teacher during the 2019-2020 school year and interviewed Student’s teachers and providers.²⁰⁵ Nash reported that she needed to see Student in an official school setting in order to complete her analysis.²⁰⁶ Because Student had been at home since March 2020, the IEP team felt that Student was not ready to immediately transition into a traditional first grade classroom.²⁰⁷ Nash provided a proposed transition plan based on her observations and

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* at 131.

²⁰⁴ *Id.* at 132.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

interviews with Student.²⁰⁸ This plan outlined how Student should transition back to school in order to be most successful.²⁰⁹ Ultimately, the team agreed that Student needed to start out with a shortened school day to allow “shorter presentations” of information mixed with breaks, frequent feedback, and choices.²¹⁰ Parent was in attendance at this IEP meeting and stated in the meeting that she agreed with Nash’s recommendation to transition Student back to school in the ALE classroom so that he could acclimate to school before transitioning to a first grade classroom.²¹¹

The IEP that was drafted for Student on August 23, 2020 was to be in effect from August 24, 2020 to May 28, 2021.²¹² It specified that Student would attend school virtually for the first two weeks of the school year on account of the fact that Parent had undergone a medical procedure and was being caution in light of COVID-19.²¹³ Thereafter, Student would begin school on a reduced schedule, with part of his day being in person at the school, and the remainder being virtual.²¹⁴ He would begin each day in the ALE classroom because of his familiarity to that environment.²¹⁵ Student would participate in breakfast and social skills, OT, and, finally, literacy resource with his special education teacher, before leaving school and transitioning home so that he could attend the remainder of the school day virtually.²¹⁶ Student’s IEP provided that Nash would provide a FBA of Student and that, in the interim,

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.* at pp. 132-134.

²¹² *Id.* at p. 92.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.* at p. 133.

Student would have the following accommodations and behavioral supports: preferential seating, feedback, breaks, transition warnings, visual schedules, sensory supports, visual timers, paraprofessional support, and a crisis plan.²¹⁷ The schedule of services on Student's IEP indicates that Student is to receive a total of 150 minutes per week of direct instruction, with direct instruction in reading for 15 minutes per day, 5 days per week, as well as direct instruction in writing for 15 minutes per day, 5 days per week.²¹⁸ Student was also to receive 60 minutes per week of OT, and was to be with a 1:1 paraprofessional at all times that he was in the school.²¹⁹ Finally, Student's August 23, 2020 IEP included goals and objectives for Student. Student was assigned one goal for occupational therapy, six goals for English language arts, two goals for speech therapy, and one goal for behavior.²²⁰ Student's goals were extremely detailed, and all contained numerous objectives. All goals could be adequately measured as written.²²¹

Student began the 2020-2021 school year on the reduced schedule recommended by Nash and Student's IEP team. This plan specified that Student would attend school each day, in person, from 7:55 a.m. until 9:30 a.m.²²² Student's in-person schedule was subsequently increased by thirty minutes, resulting in Student attending school in-person from 8:00 a.m. to 10:00 a.m.²²³

²¹⁷ *Id.*

²¹⁸ *Id.* at p. 127.

²¹⁹ *Id.*

²²⁰ *Id.* at pp. 99-126

²²¹ *Id.*

²²² *Id.* at p. 133.

²²³ *Id.* at p. 1.

A Notice of Action dated November 5, 2020, states that Student's IEP team met to discuss Student's programming, as well as recently obtained evaluations.²²⁴ Parent attended this meeting.²²⁵ After reviewing additional data obtained by Student's BCBA, the IEP team decided to keep Student's current schedule, which provided for two hours per day of school on campus, followed by virtual attendance for the remainder of the school day.²²⁶ Parent did not object to keeping Student's schedule the same, explaining that she was told by teachers that Student was not ready for additional in-person instruction because he was struggling with his in-person reading and writing block.²²⁷ In addition, after tense debate, the IEP team added 60 minutes per week of speech therapy during the time that Student was on campus.²²⁸ It was also decided during this IEP meeting that the recommended behavior intervention plan that was proposed by Nash be adopted and implemented.²²⁹ FBA data indicated that Student, between September 15, 2020 and October 8, 2020, had 7 episodes of physical aggression, 32 episodes of non-compliance, and 6 episodes of throwing objects.²³⁰ It was noted that most behavioral incidents occurred during Student's reading and writing block, which occurred every morning at 9:00 a.m. Nash, as part of her data collection for Student's FBA, reviewed communication logs, Parent's Preference Assessment Questionnaire, Behavior Rating Inventory of Executive Function completed by Parent and

²²⁴ *Id.* at p. 139.

²²⁵ *Id.* at p. 140.

²²⁶ *Id.* at p. 139.

²²⁷ ADE H-21-23 Tr. Vol. II, pp. 200-01.

²²⁸ ADE Ex. Vol. III, p. 139.

²²⁹ *Id.*

²³⁰ *Id.*

teachers, Social Responsivity Scale, and Questions about Behavioral Function.²³¹ Nash wanted to continue collecting data, particularly related to social skills deficits.²³²

Parent took Student to Compass Academy on December 1, 2020, December 2, 2020, and December 3, 2020 for a trial visit.²³³ Student's last day of attendance in District was November 30, 2020, according to the LEA.²³⁴ On December 5, 2020, Parent's counsel sent a letter to District's superintendent, informing him that Parent rejected Student's continued placement at Sequoyah Elementary because she felt that Student's IEP was failing to provide FAPE for Student.²³⁵ The letter further stated that Parent disagreed with Student's placement because Student had only been able to attend school for two hours per day.²³⁶ Parent's counsel indicated that Parent intended to enroll Student in a private school at public expense.²³⁷

Courtney Williams (hereinafter "Williams"), the Director of Compass Academy, which is located in Conway, Arkansas, testified at the hearing of this matter. Compass Academy is a private school that operates as a non-profit organization.²³⁸ The school provides educational services for disabled Students in grades K-12.²³⁹ Students that attend Compass Academy are typically in need of a smaller setting.²⁴⁰ There are a total of approximately 87 students and

²³¹ *Id.*

²³² ADE H-21-23 Tr. Vol. IV, p. 162.

²³³ *Id.* at p. 167.

²³⁴ *Id.*

²³⁵ ADE H-21-23 Ex. Vol. I, p. 70.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ ADE H-21-23 Tr. Vol. I, p. 147.

²³⁹ *Id.*

²⁴⁰ *Id.*

21 staff members at the school.²⁴¹ There is a teacher and a paraprofessional in every classroom, and the maximum number of Students in any given class is 10.²⁴² Compass contracts with organizations that provide a variety of services. OT, physical therapy, speech therapy, and ABA services.²⁴³ Student is in a K-2 classroom with approximately nine other students.²⁴⁴ Parents receive daily feedback from teachers and therapists, and progress documentation is maintained.²⁴⁵ The school operates year-round.²⁴⁶ Tuition for a single year at Compass Academy is \$9,200.²⁴⁷

Student was on a DRA 6 reading level, which translates to being on mid-kindergarten grade level, when he began Compass Academy. Williams testified that Student, at the time of her testimony, was on DRA Level 18, which represents the equivalent of a first grade, second semester grade level equivalent.²⁴⁸ When Student came to Compass Academy, he was on grade level for math, but below grade level for reading.²⁴⁹ She stated that Student is happy to be at school and to see his classmates when he arrives.²⁵⁰ Student receives nine to ten hours of ABA therapy per week, a decrease as compared to the amount of ABA therapy that he was receiving when he first enrolled in the school.²⁵¹ Student also receives speech and OT services at Compass Academy.²⁵²

²⁴¹ *Id.* at p. 149.

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.* at p. 168.

²⁴⁵ *Id.* at p. 223.

²⁴⁶ *Id.* at p. 188.

²⁴⁷ *Id.* at p. 191.

²⁴⁸ *Id.* at p. 152.

²⁴⁹ *Id.* at p. 169.

²⁵⁰ *Id.* at p. 156.

²⁵¹ *Id.* at p. 157.

²⁵² *Id.* at p. 167.

Compass Academy utilizes the Wilson Reading Program, which is an Orton Gillingham program, for its reading curriculum.²⁵³ All staff and teachers at Compass Academy have been trained in this reading system.²⁵⁴ Students has responded well to the curriculum at Compass Academy and, behaviorally, he has responded well to a system in which he can lose privileges, such as recess, as a consequence of inappropriate behavior; however, he has the opportunity with positive behavior to later earn back the privileges that he lost.²⁵⁵

Parent testified that she moved from Russellville, Arkansas to Maumelle, Arkansas effective April 30, 2021.²⁵⁶ She also accepted a job in Maumelle.²⁵⁷ Parent's residence in Russellville, which Parent was renting, was active until May 31, 2021.²⁵⁸

CONCLUSIONS OF LAW AND DISCUSSION:

Pursuant to Part B of the IDEA, states are required to provide a FAPE for all children with disabilities between the ages of three and twenty-one. 20 U.S.C. § 1412(a); 34 C.F.R. §300.300(a). In 1982, in *Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, the United States Supreme Court addressed the meaning of FAPE and set forth a two-part analysis that must be made by courts and hearing officers in determining whether a school district has failed to provide FAPE as required by federal law. 458 U.S. 176, 206-07 (1982); *K.E. ex rel. K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795, 804 (8th Cir. 2011). The first inquiry that a court or hearing officer must make is that of whether the State, *i.e.* local educational agency or district,

²⁵³ *Id.* at p. 161.

²⁵⁴ *Id.* at p. 166.

²⁵⁵ *Id.* at pp. 164-66.

²⁵⁶ ADE H-21-23 Tr. Vol. II, pp. 5-8.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

has complied with the procedures set forth in the IDEA. Thereafter, it must be determined whether the student's education was reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. Even though testimony for the above-captioned cases was consolidated, there are two distinct cases to consider. For clarity, ADE H-20-34 and ADE H-21-23, and the claims raised in each, are addressed separately below.

ADE H-20-34

Alleged Denial of FAPE Between September 23, 2019 and March 17, 2020

1. Allegations of Procedural Violations of the IDEA

It must first be determined whether District complied with the procedures set forth in the IDEA. In the present case, Petitioner asserts that District procedurally violated the IDEA by (1) preventing Parent from meaningfully participating in the decision-making process regarding the provision of FAPE to Student, and (2) failing to adhere to the IDEA's stay put provision by continuing to educate Student in the ALE.

Parental Participation. The IDEA requires that the parents of a child with a disability either be present at each IEP meeting or be afforded the opportunity to participate. *Lathrop R-II Sch. Dist. v. Gray*, 611 F.3d 419, 427 (8th Cir. 2010). Furthermore, a school district can neither refuse to consider parents' concerns when drafting an IEP, nor predetermine the educational program for a disabled student prior to meeting with parents. *Schaffer v. Weast*, 546 U.S. 49, 53 (2005). Such predetermination could deprive parents of a meaningful opportunity to participate in the formulation process pertaining to the IEP. *Gray*, 611 F.3d at 424 (citation omitted). "The IDEA explicitly requires school district to include

parents in the team that drafts the IEP to consider ‘the concerns of the parents for enhancing the education of their child’ and to address ‘information about the child provided to, or by, the parents.’” *M.M. ex. rel. L.M. v. Dist. 0001 Lancaster County Sch.*, 702 F.3d 479 (8th Cir. 2012). Certainly, a school district’s obligation under the IDEA regarding parental participation in the development of a student’s IEP “should not be trivialized.” *Rowley*, 458 U.S. at 205-06.

In *Rowley*, the Court stated that “[i]t seems . . . no exaggeration to say that Congress placed every bit as much emphasis on compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard.” *Id.* It should be noted, however, that by requiring parental participation, the IDEA in no way requires a school district to accede to parents’ demands without considering suitable alternatives. A district does not procedurally violate the IDEA simply by failing to grant a parent’s request.

In the present case, Parent alleges that District prevented her from meaningfully participating in Student’s education in the following ways: failing to timely provide records and make Student’s classroom teacher available for a resolution conference on October 7, 2020, withholding information from Parent regarding the alleged seclusion and restraint of Student, and denying Parent access to Student’s classroom teacher and other District employees.

First, regarding Parent’s allegation that District procedurally violated the IDEA by failing to provide Student’s educational until the night prior to a resolution conference and

failing to secure a classroom teacher for the meeting, it is the opinion of this Hearing Officer that District did not procedurally violate the IDEA. The resolution conference in question was specific to Hearing #1, ADE H-20-09. Here, the evidence establishes that a resolution conference was scheduled for October 7, 2019. On October 6, 2019, a few hours prior to the start of the conference, counsel for Parent sent a letter to District's superintendent requesting records prior to the resolution conference. On this same day, at 11:14 p.m., Parent's counsel sent an email to District's counsel requesting records. Seven minutes later, at 11:21 p.m., District's counsel emailed Parent's counsel and stated that she had tried to reach Parent's counsel over the prior weekend but had not heard back. The email contained a drop box link which contained Student's academic records. On Monday, October 7, 2019, at 7:43 a.m., Parent's counsel sent an email to District's counsel thanking her for the records and requesting additional information that she thought was missing. On Monday, October 7, 2019, the resolution conference between the parties took place. It is unclear whether a classroom teacher for Student was at the October 7, 2019, resolution conference.

Parent argues that District did not make Student's records available to her until the night before the October 7, 2020, resolution conference in ADE H-20-09; however, Parent's counsel did not request those documents from District's counsel until nearly midnight on October 6, 2020, and District's counsel responded seven minutes later with the requested information. There was insufficient evidence that Parent had made other requests for information that had been ignored or rejected. Similarly, Parent alleges that District failed to include Student's classroom teacher in the October 7, 2020, resolution conference. Parent has failed to meet her burden in this regard, as it is unclear in the record whether a classroom

teacher was present for the conference. As such, it is the opinion of this Hearing Officer that District did not procedurally violate the IDEA regarding producing educational records prior to the October 7, 2020, resolution conference and including appropriate staff for same.

Second, Parent alleged that between September 23, 2019, and March 17, 2020, District restrained and secluded Student, and that these incidents were withheld from her. The specific incident cited by Parent was in relation to a scratch that she noticed on Student's arm on December 4, 2019. Parent noticed the scratch when she picked up Student and, after photographing his arm, she returned to the school and confronted the assistant principal. According to Parent, Student had identified the assistant principal as the individual who scratched him.

During Parent's meeting with the assistant principal, Parent was hostile and rude, and the assistant principal was unable to have a productive conversation with Parent regarding the matter. The assistant principal tried to explain to Parent that Student had attempted to hit him that day, and that he grabbed Student's arm to prevent that action; however, he explained that he had practically no fingernails as a result of a biting habit and did not scratch Student. Parent alleged that assistant principal had engaged in restraint and failed to report that to her. She further alleged that Student had been restrained prior to December 4, 2020, and the school failed to report.

Based on the testimony in this case, this Hearing Officer finds that the assistant principal was credible in his testimony about this incident. In addition, this Hearing Officer was able to hear the recorded conversation between Parent and the assistant principal, and the assistant principal's testimony was consistent with the explanation that he gave to Parent

on December 4, 2020. Parent did not request the December 4, 2020 meeting to get to the bottom of an issue, but instead to make accusations against the assistant principal. This was evident in the fact that she was not interested in hearing any explanation provided by the assistant principal. In addition, Parent called and filed a police report on the incident following the meeting. Here, there is insufficient evidence that the assistant principal harmed Student in any way, or restrained Student on December 4, 2020.

Regarding Parent's allegations that Student was being restrained and secluded by District, and that these incidents were not being reported, Parent has failed to meet her burden of proof. Parent testified that Student relayed incidents at school that she considered to be restraint and seclusion. Evidence provided by numerous witnesses at District, however, refutes these allegations. Student's special education teacher never saw Student in a restraint or in seclusion. District's LEA testified that she was not aware of Student being restrained, but she added that she had seen him transported from one location to another and that, at those times, staff had their hands on Student's back. She explained that Student was never immobilized by District staff. The principal stated that Student was secluded on October 3, 2019; however, a review of the incident report indicates that Student was placed in an open-door time out room in the ALE. She further testified that there was no physical restraint of Student at any time. In light of the testimony addressed herein, it is the opinion of this Hearing Officer that District did not procedurally violate the IDEA by withholding evidence of restraint and seclusion from her. In fact, there was no evidence of Student being restrained or secluded. This is the reason that Parent has not received any records regarding same.

Third, Parent testified in ADE H-20-34 that she was prevented from observing Student in the classroom and that she was denied access to certain District personnel. Based on the testimony in the record, this Hearing Officer finds that District did not procedurally violate the IDEA as alleged. Parent refers most specifically to an incident that occurred on October 10, 2019. On that day, Parent went to District to observe Student in the ALE classroom. District's LEA was supposed to meet Parent at the school so that she could observe Student, but an emergency arose, and the LEA was unable to meet Parent. This resulted in the Parent and the administrators at Sequoyah Elementary having a misunderstanding. As Parent walked Student into the school and obtained a visitor's badge, a police officer, as well as the principal and assistant principal, approached her and told her that she could not observe Student in the classroom that day. Unfortunately, the LEA was not there to explain the situation, creating more confusion for both parties.

While this situation was not ideal, and this Hearing Officer is of the opinion that calling police was certainly unnecessary, this situation cannot be viewed in a vacuum. Parent had attempted two other days in the same week to come to the school and observe Student in the ALE classroom. District had attempted to work with Parent to choose an appropriate day and time for observation. The nature of an ALE is that students in that environment have behavioral issues. Having various parents and visitors come in and out of a classroom of this nature can be even more disruptive for the students and school personnel than it would perhaps be in a regular, general education classroom. While Parent certainly has rights with regard to Student and observing the environment in which he is being educated, District did

not procedurally violate the IDEA by attempting to put some limits in place to prevent further disruption for Student, as well as all other students in the ALE.

Stay Put. In cases ADE H-20-34, Parent alleged that District violated the “stay put” provision of the IDEA when District refused to move Student out of the ALE during the pendency of ADE H-20-09, specifically, Hearing #1. The time period that ADE H-20-09 was pending was September 23, 2019, through March 10, 2020. Regarding maintenance of current educational placement during a due process proceeding, the IDEA states as follows:

Except as provided in subsection (k)(4), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until such proceedings have been completed.

20 U.S.C.S. § 1415(j). As a threshold matter, there are no proceedings pending, pursuant to this provision, until a request for a due process hearing is filed. *Monahan v. Nebraska*, 491 F. Supp. 1074, 1089 (D. Neb. 1980) (affirmed in part and vacated in part), *Monahan v. Nebraska*, 645 F.2d 592 (8th Cir. 1981). Other circuits agree with this interpretation as well. *See generally K.D. v. Dept. of Educ.*, 665 F.3d 1110, 1117 (9th Cir. 2011) (finding that the IDEA’s stay put provision does not apply until a request for a due process hearing is filed); *Sammons v. Polk Cnty. Sch. Bd.*, 165 F. Appx. 750, 753 (11th Cir. 2006) (finding that only the filing of a request for a due process hearing invokes the stay-put injunction as referenced in 34 C.F.R. § 300.514).

Once this requirement has been met, *i.e.* a due process complaint has been filed, the question then becomes that of what constitutes the “then-current educational placement” of Student. The IDEA does not provide a definition for the term “then-current educational

placement.” *Hale v. Poplar Bluffs R-I Sch. Dist.*, 280 F.3d 831, 833 (8th Cir. 2002). Therefore, based on case law, what is deemed to be the then-current placement of Student is determined at the time that a due process complaint is filed. Some circuits have determined a student’s “then-current educational placement” by focusing on the “operative placement that is actually functioning at the time the dispute first [arose].” *Drinker v. Colonial Sch, Dist.*, 78 F.3d 859 (3d. Cir. 1996); *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618 (6th Cir. 1990). The operative placement is defined as the placement in which Student actually received instruction at the time that the dispute arose, *i.e.* a due process hearing was filed. *Id.*

Applying this caselaw to the present situation, it is necessary, as a threshold issue, to first evaluate when a due process hearing was filed by Parent. ADE H-20-09, which was the first due process hearing filed by Parent and against District, was filed on September 23, 2019. This constituted the precise date that the IDEA’s stay put provision was invoked. As such, it is necessary to consider the second inquiry required of this analysis, specifically, to determine Student’s operative placement on September 23, 2019.

On August 26, 2019, approximately one month prior to the date that Parent filed for due process in ADE H-20-09, Student’s IEP team met. Parent was present in that meeting and the team reviewed all new evaluations provided by Parent. In addition, Student’s behavior over the first few days of school was discussed, and it was determined by the team that an FBA should be conducted. On account of Student’s recent behavioral issues, the IEP team made the decision to place Student in the district’s ALE, which is a general education placement with behavioral supports. This required Student to be moved from Dwight Elementary School to Sequoyah Elementary School. Testimony established that Parent

ultimately agreed to move Student to the ALE based on the IEP team's statements that ALE was the best option for Student. Although the IEP team agreed that the ALE would be ideal for Student, it did not have authority to place Student in that setting without approval by the ALE team. Therefore, on August 27, 2019, Parent met with District officials responsible for operating the ALE. Parent consented to the ALE and Student began attending school in the ALE at Sequoyah Elementary on September 4, 2019. Student's IEP was implemented in the ALE setting from that point forward. Although Parent later decided that she did not want Student in the ALE, for purposes of the stay put issue, the ALE had been agreed to by Parent in late August and was Student's operative placement as of September 23, 2019, when Parent requested a due processing hearing in ADE H-20-09.

In conclusion, it is the opinion of this Hearing Officer that the stay put provision of the IDEA was not invoked by Parent until September 23, 2019. On this date, Student's operative placement was, and had been, the ALE classroom at Sequoyah Elementary, with Student receiving direct services in reading and writing in that environment pursuant to his IEP. District did not, therefore, violate Student's rights pursuant to the stay put provision of the IDEA during the pendency of ADE H-20-09.

Conclusion. Having considered Parent's allegations of procedural due process violations, and in light of the findings and conclusions *supra*, it is the conclusion of this Hearing Officer that District did not procedurally violate the IDEA as alleged by Parent in ADE H-20-34.

2. Allegations of Substantive Violations of the IDEA

Having analyzed the first prong of the FAPE analysis, specifically that of procedural violations, and determined that District did not procedurally violate the IDEA as alleged in ADE H-20-34, it is now necessary to consider whether District substantively denied Student a FAPE.

Prior to March 22, 2017, Eighth Circuit law provided that if a student received “slight” or “de minimis” progress, then he or she was not denied educational benefit. *K.E.*, 647 F.3d at 810; *Paris Sch. Dist. v. A.H.*, 2017 WL 1234151 (W.D. Ark 2017). On March 22, 2017, however, the United States Supreme Court “rejected the ‘merely more than *de minimis*’ standard that had previously been the law of the Eighth Circuit.” *Paris Sch. Dist.*, 2017 WL at 4 (citing *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1, No. 15-827*, 2017 WL 1066260, 580 U.S. ___ (2017), 137 S.Ct. 988 (2017)).

In *Endrew F.*, the standard set forth by the Court is “markedly more demanding” as compared to the “merely *de minimis*” test outlined in *Rowley*. *Endrew F.*, 137 S. Ct. at 1000.

The Court stated the following:

It cannot be the case that the Act typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than *de minimis* progress for those who cannot. When all is said and done, a student offered an educational program providing “merely more than *de minimis*” progress from year to year can hardly be said to have been offered an education at all. For children with disabilities, receiving instruction that aims so low would be tantamount to “sitting idly . . . awaiting the time when they were old enough to “drop out.”

Endrew F., 137 S.Ct. at 1001 (citations omitted). The Court held that the IDEA requires, even demands, more. Specifically, the IDEA requires that students under the Act be provided with

an “educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Id.*

The IEP is the guiding document and primary method for providing special education services to disabled children under the IDEA. *Honig v. Doe*, 484 U.S. 305, 311 (1988). “Through the development and implementation of an IEP, the school provides a FAPE that is ‘tailored to the unique needs of a particular child.’” *Paris Sch. Dist.*, 2017 WL 1234151, at *5 (citing *Andrew F.*, 2017 WL 1066260, at *1000). An IEP is not designed to be merely a form but, instead, a substantive document that is developed only after a district has carefully considered a student’s “present levels of achievement, disability, and potential for growth.” *Id.* (citations omitted). Pursuant to *Andrew F.*, a district “must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” 2017 WL 1066260, at *1000. For most students, to comply with this standard, providing FAPE “will involve integration in the regular classroom and individualized special education calculated to achieve advancement from grade to grade.” *Id.* However, in the event that this is not possible, the education of a disabled child still needs to be “appropriately ambitious” in light of a student’s individual circumstances. *Id.*

Every IEP, pursuant to the IDEA, is required to include the following: (1) a statement of a student’s present levels of academic achievement and functional performance; (2) a description of how a student’s disability affects his or her involvement and progress in the general education curriculum; (3) annual goals that are measurable, as well as a description as to how progress toward stated goals will be measured; and (4) a description of special education and related services provided to student. 20 U.S.C. § 1414(d)(1)(A).

Appropriate IEP. Parent asserted that the District’s August 26, 2019 IEP was not reasonably calculated to enable Student to make educational progress in light of his individual circumstances. Regarding appropriateness of the IEP, “[a]cademic progress is an ‘important factor’ in deciding ‘whether a disabled student’s IEP was reasonably calculated to provide educational benefit.’” *M.M.*, 702 F.2d at 479 (citing *CJN*, 323 F.3d at 638 (citing *Rowley*, 458 U.S. at 202)). For children who are Student’s age, the IDEA requires that IEPs include the following: “(1) a statement of the student’s present levels of academic and functional performance, (2) measurable annual goals, (3) a description of how progress will be measured, (4) a statement of educational and related services to be provided, (5) an explanation of the extent to which the student will not be in the regular classroom, (6) a statement of accommodations necessary to measure achievement, and (7) the date on which services will commence. *Park Hill Sch. Dist. v. Dass*, 655 F.3d 762 (8th Cir. 2011). *See also* 20 U.S.C. § 1414(d)(1)(A)(i).

Regarding behavioral issues, courts have stated that “[w]hen a child’s learning is impeded by behavioral issues, the IDEA requires that the IEP team ‘consider the use of positive behavioral interventions and supports, and other strategies, including positive behavioral interventions.’” *M.M.*, 702 F.2d at 479 (citing 20 U.S.C. § 1414(d)(3)(B)(i)). A failure to address behavioral issues appropriately can amount to a denial of FAPE for a student. *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022 (8th Cir. 2003). The Eighth Circuit Court of Appeals has stated that “it is ‘largely irrelevant’ if the school district could have employed ‘more positive behavior interventions’ as long as it made a ‘good faith effort’ to help the

student achieve the educational goals outlined in his IEP.” *M.M.*, 702 F.2d at 479 (citing *CJN*, 323 F.3d at 639).

Regarding Parent’s allegation that Student was denied FAPE between September 23, 2019, and March 17, 2020, because he did not have an appropriate IEP, this Hearing Officer agrees. As outlined in this Hearing Officer’s March 10, 2020 Final Decision and Order in ADE H-20-09, this Hearing Officer found Student’s August 26, 2019 IEP to be inappropriate on account of the fact that it did not take Student’s aggressive behaviors into account. In the present case, specifically Hearing #2, ADE H-20-34, the issue to be determined is whether Student was similarly denied FAPE between September 23, 2019, and March 17, 2020, which is the period that ADE H-20-09 was pending. It is the opinion of this Hearing Officer that Student was, in fact, denied FAPE during this time period. All of the programming that this Hearing Officer found inappropriate for Student in ADE H-20-09 was in effect during the time period raised in ADE H-20-34. It can hardly be said that Student was denied FAPE up through September 22, 2019, but then received FAPE for approximately six months thereafter, despite the same exact programming and lack of behavioral supports.

Between September 23, 2019, and March 17, 2020, Student remained in the ALE classroom and continued to receive special education services pursuant to his August 26, 2019 IEP. Student continued to have behavioral issues during this period of time, with episodes including the following behaviors: refusing to work on assignments, refusing to participate in activities, throwing items, hitting and kicking staff and students, pinching students, turning over furniture, running around room with rolling chair and hitting other students and staff, putting himself in a locker, laying in the floor and screaming, scratching

at staff, spitting at staff, attempting to leave the ALE, crawling under furniture, pulling papers off of the wall, grabbing and attempting to tear up school work of other students, placing hands around another student's neck requiring staff to remove them, and shoving students. On at least three occasions, specifically in October 2019, Student's behavior was so severe that staff was required to clear the room and, at times, call in the principal for additional assistance. Although Student's aggressive behaviors did decrease some over the period in question, this does not negate the fact that Student's behavior, in large part, was not being appropriately addressed.

In addition, and considering progress, Student's report card for the period of September 23, 2019, through March 17, 2020, reflected that, by the end of the third nine weeks, Student had mastered 30/59 kindergarten skills that were being worked on in the classroom. Student's DRA reading level as of the end of the third nine weeks, specifically March 2020, is unclear from the record. Testimony established, however, that Student was at DRA level 3 at the end of the 2019-2020 school year. DRA level 3 is mid-kindergarten level. Based on this data, it is logical to assume that Student's DRA level as of March 2020, nearly 75% of the way through the school year, fell somewhere below this level. Essentially, Student was not progressing as a normal kindergarten Student typically progresses. Had District properly addressed Student's behaviors, it is likely that Student would have academically progressed as expected.

In addition, and again looking at Student's report card, Student struggled with coming to class ready to work, listening and following directions, demonstrating effort, demonstrating organizational skills, showing respect for adults, peers, and property,

following school and classroom rules, working independently, demonstrating self-control, and accepting responsible for self during the first and second nine weeks of the school year. It is noted that Student did make some progress regarding his IEP goals; however, quite telling was the testimony of Student's special education teacher that Student had to receive his direct instruction in reading and writing in the ALE room for the first and second nine weeks of the year on account of Student's behavior. Clearly, Student's behavior was so significant that he could not transition to the resource room for his special education direct instruction for approximately sixty percent of the time between September 23, 2019, and March 17, 2020. For all of these reasons, it is the opinion of this Hearing Officer that Student's IEP was inappropriate during the period in question.

Least Restrictive Environment.

Parent alleged in her due process complaint for ADE H-20-34 that District failed to education Student in the least restrictive environment. The IDEA requires that students with disabilities be educated in the least restrictive environment pursuant to 20 U.S.C. §1412(a)(5). There is a "strong preference in favor of disabled children attending regular classes with children who are not disabled," resulting in a "presumption in favor of public school placement." *CJN*, 323 F.3d at 641. However, the IDEA "significantly qualifies the mainstreaming requirement by stating that it should be implemented to the 'maximum extent appropriate.'" *Pachl v. Seagren*, 453 F.3d 1064, 1067 (8th Cir. 2006). Essentially, a disabled student should not be separated from his or her peers unless the services that make segregated placement superior cannot be "feasibly provided in a non-segregated setting." *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983). The requirement to mainstream is

not applicable when it “cannot be achieved satisfactorily.” *Pachl*, 453 F.3d at 1068. As such, it is permissible to remove a disabled child from a mainstream environment when he or she would not benefit from mainstreaming or when the “marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting.” *Roncker*, 700 F.2d at 1063.

In the present case, Parent alleges that the ALE was not the least restrictive environment for Student. This Hearing Officer agrees. With appropriate supports, evidence suggests that Student would likely have been able to function in a general education classroom with his non-disabled peers. This is particularly true given that Student was required, pursuant to this Hearing Officer’s March 10, 2020 Final Decision and Order, to provide a 1:1 paraprofessional to Student. Certainly, it is possible that Student could struggle more in a regular, non-ALE, general education classroom. There is no way to know for sure, however, given that District has failed since August 2019 to transition Student back into that environment. Therefore, based on the evidence in the record at this point, Parent has established by a preponderance of the evidence that the ALE was not likely Student’s least restrictive environment.

Conclusion. Having considered Parent’s allegations of substantive due process violations, and in light of the findings and conclusions *supra*, it is the conclusion of this Hearing Officer that Student’s August 26, 2019 IEP, which was in place during the timeframe addressed in ADE H-20-34, specifically September 23, 2019 to March 17, 2020, was inappropriate and did not educate Student in the least restrictive environment. As such, Student was substantively denied FAPE between September 23, 2019, and March 17, 2020.

ADE H-21-23

Alleged Denial of FAPE Between March 18, 2020 and December 7, 2020

1. Allegations of Procedural Violations of the IDEA

Regarding the first inquiry, that of whether District complied with the procedures set forth in the IDEA, this Hearing Officer notes that counsel for Parent did not allege procedural violations in ADE H-21-23 for the period of March 18, 2020, through December 7, 2020. As such, the analysis turns to the substantive allegations made by Parent in Hearing #3, ADE H-21-23.

2. Allegations of Substantive Violations of the IDEA²⁵⁹

In Hearing #3, ADE H-21-23, Parent alleged that Student was denied FAPE between March 18, 2020, and December 7, 2020. For clarity, this decision will divide the stated period into two timeframes. First, this decision will address whether District denied FAPE to Student between March 18, 2020, and August 23, 2020, which represents the fourth nine weeks of Student's kindergarten year and the subsequent summer. This date span also represents the period that schools were closed for in-person instruction in the state of Arkansas on account of COVID-19. Second, this decision will address whether District denied FAPE to Student between August 24, 2020, the first day of school, through December 7, 2020, the date that Student was withdrawn from District. This timeframe represents the first semester of Student's first grade year.

²⁵⁹ See case law cited in previous section regarding FAPE and requirements for IEPs.

Appropriate IEP: March 18 through August 23, 2020 (Kindergarten). Based on the evidence in the record, Student was denied FAPE between March 18, 2020, and August 23, 2020. In March 2020, the United States Department of Education (USDOE) published a question-and-answer guide²⁶⁰ regarding special education and expectations for delivery of services during COVID-19. At that time, Student was receiving services virtually, and District had access to this publication. Pursuant to the guidance provided by USDOE, District had an obligation to make every effort to provide special education and related services to Student in accordance with his IEP.

Between March 18, 2020 and August 23, 2020, Student remained on the August 26, 2019 IEP that had been in effect for the remainder of the 2019-2020 school year. Like all other students in the state, Student was attending school via AMI and virtually. Because Student was in a general education placement, specifically the ALE, as well as receiving special education services, Student received two AMI packets each week. Student's general education assignments were reduced in accordance with Student's IEP accommodations. The LEA testified that she worked to ensure that all special education packets that were provided to Student were tied to his IEP objectives. Between March 18, 2020, and the end of Student's kindergarten year, Student's teachers communicated with Parent via telephone, email, and zoom. No IEP meetings were held during the period in question because District was trying to navigate COVID-19 and was unable to modify IEPs for over hundreds of students.

²⁶⁰ <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/qa-covid-19-03-12-2020.pdf>

The LEA, as well as Student's special education teacher, testified that Student received OT services via zoom, and that he also received direct instruction in reading and written expression approximately two times per week for thirty minutes each session. These sessions, like Student's OT sessions, were conducted via zoom. Student's IEP specified that he was to have 150 minutes per week of direct instruction in reading, and 150 minutes per week of direct instruction in writing. Essentially, Student should have been receiving one full hour of direct instruction per day, with half of that covering reading and the other half covering writing. The LEA testified that Student was doing other activities online to account for the time that he was not receiving direct instruction, and she explained that she told all special education teachers to ensure that assignments given translated to the amount of direct instruction minutes that students were to receive. Student was provided ESY in the amount of 17 hours for the 2020 summer. Ten (10) of these hours were dedicated to OT services, and the remainder were designated for reading instruction with Student's special education teacher.

Considering that Student's August 26, 2019 IEP has been previously deemed inappropriate (twice now, considering ADE H-20-09 and this decision pertaining to H-20-34), it is likely that this conclusion would also hold true for the period of March 18, 2020 through August 24, 2020. This Hearing Officer does not need to specifically consider this issue, however, because District failed to follow Student's August 26, 2019 IEP as written. Regardless, Student experienced a loss of direct special education services. Here, Student was supposed to receive five hours of special education direct instruction per week. Testimony is clear that Student received, at best, one hour of direct instruction per week.

This Hearing Officer is sympathetic to the plight of District in dealing with COVID-19 and the uncertainties that it presented; however, delivering only 20% of direct special education services is woefully inadequate. District's efforts with regard to the AMI packets are applauded, but written packets do not replace in-person direct instruction. There were approximately nine weeks (fourth nine weeks of 2019-2020 school year) that Student was attending school virtually as a result of COVID-19. In total, Student should have received 45 hours of direct special education instruction. Based on testimony, it appears that Student received, at best, only 9 hours. Student did receive ESY in the amount of 7 hours (hours specifically designated for reading) during the 2020 summer. Considering this, in conjunction with direct services provided during the fourth nine weeks, Student received approximately 16 hours of direct special education instruction in reading and writing between March 18, 2020 and August 23, 2020. That is a loss of twenty-nine total hours of direct instruction. As such, it is the conclusion of this Hearing Officer that Student was denied FAPE between March 18, 2020 and August 23, 2020.

Appropriate IEP: August 24 through December 7, 2020 (First Grade). Based on the evidence in the record, Student was denied FAPE between August 24, 2020 and December 7, 2020. Student's IEP team met in August 2020, the beginning of Student's first-grade year, to create a new IEP for Student. A Notice of Action dated August 23, 2020, indicates that Student's IEP team reviewed recent progress, as well as a recent occupational therapy evaluation. In addition, District consulted with Nash, the BCBA utilized by District, to hear her recommendations regarding Student's behavior plan for the first grade. District's

actions at this point were tracking with the March 10, 2020 Final Decision and Order of this Hearing Officer.

Regarding Student's behavior issues, Nash reported that she had conducted several observations of Student while he was receiving ESY during the prior summer. She had also reviewed documentation from Student's ALE teacher during the 2019-2020 school year and interviewed Student's teachers and providers. Nash reported that she needed to see Student in an official school setting in order to complete her analysis. Because Student had been at home since March 2020, the IEP team felt that Student was not ready to immediately transition into a traditional first grade classroom; therefore, Nash provided a proposed transition plan based on her observations and interviews with Student. This plan outlined how Student should transition back to school in order to be most successful. Ultimately, the team agreed that Student needed to start out with a shortened school day to allow "shorter presentations" of information mixed with breaks, frequent feedback, and choices. Parent was in attendance at this IEP meeting and stated in the meeting that she agreed with Nash's recommendation to transition Student back to school in the ALE classroom so that he could acclimate to school before transitioning to a first-grade general education classroom. At this point, all appeared to be going well.

In addition, Student's August 23, 2020 IEP, which was to be in effect from August 24, 2020 to May 28, 2021, specified that Student would attend school virtually for the first two weeks of the school year on account of the fact that Parent had undergone a medical procedure and was being cautious in light of COVID-19. Thereafter, Student would begin school on a reduced schedule, with part of his day being in person and the remainder being

virtual. He would begin each day in the ALE classroom because of his familiarity to that environment, after which he would go to OT and then a literacy block. Student would then transition home to complete his school day virtually. The idea, based on testimony and documents in the record, was that Student could slowly transition back into the school setting, with small periods of time regularly added so as to reduce the amount of change that Student would experience at one time. Nash was to continue observations so that she could complete an FBA for Student.

Student's IEP provided that Nash would provide a FBA of Student so that a behavior intervention plan could be created. In addition, the IEP provided that Student would have numerous accommodations and behavioral supports, including preferential seating, feedback, breaks, transition warnings, visual schedules, sensory supports, visual timers, paraprofessional support, and a crisis plan. The schedule of services on Student's IEP indicates that Student was to receive a total of 150 minutes per week of direct instruction, with direct instruction in reading for 15 minutes per day, 5 days per week, as well as direct instruction in writing for 15 minutes per day, 5 days per week. Student was also to receive 60 minutes per week of OT and was to be with a 1:1 paraprofessional at all times that he was in the school. Finally, Student's August 23, 2020 IEP included goals and objectives for Student. Student was assigned one goal for OT, six goals for English language arts, two goals for speech therapy, and one goal for behavior. Student's goals were extremely detailed, and all contained numerous objectives. The content appeared to be appropriate for a first-grade student, and all goals could be adequately measured as written.

On its face, Student's IEP appeared to be thorough, and District was taking steps to determine appropriate programming for Student. This Hearing Officer acknowledges that District's efforts to this point indicated that District was trying very hard to create an appropriate environment for Student. Unfortunately, following the creation of Student's August 23, 2020 IEP, District's efforts fell short.

First, although Nash's recommendation to transition Student into District at a slower pace seemed appropriate in theory, the result was that Student, at the point that Parent withdrew him from the District on December 7, 2020, was still attending school only two hours per day. Of those two hours, a portion was dedicated to indirect therapy services, such as OT. Essentially, Student was not receiving even two full hours of academic instruction. He was eating breakfast, doing a social skills exercise with his ALE teacher, after which he went to OT. He had a short literacy block thereafter. Although slow transitions are typically advised for situations of this nature, under no reasonable circumstance should Student, nearly a full semester into the 2020-2021 school year, essentially be at the same point in his transition that he was at the beginning of the year. If Student was struggling so much that his in-person school day could not be gradually increased, District needed to consider other options.

Second, Student's behaviors were continuing to be an issue. Certainly, District brought in Nash to help with this issue, and the evidence is clear that she was conducting observations and collecting data to conduct an FBA. Still, there was no behavior plan adopted for Student until November 5, 2020. Between September 15, 2020, and October 8, 2020, Student had seven episodes of physical aggression, thirty-two episodes of non-compliance,

and six episodes of throwing objects. This number of behavioral incidents occurred despite the fact that Student was only physically attending school for two hours per day. Additionally, it was noted that most behavioral incidents occurred during Student's reading and writing block, which occurred every morning at 9:00 a.m. Basically, Student's behaviors were continuing to impede him from accessing his education. This is particularly true given that Student's in-person academic instruction was quite limited.

Third, and finally, Student remained in the ALE during the fall 2020 semester. Pursuant to the March 10, 2020, Final Order and Decision of this Hearing Officer, the directive was to move Student out of the ALE and transition him into a regular classroom, with a 1:1 paraprofessional to accompany Student at all times. Nevertheless, during the fall 2020 semester, Student's general education placement continued to be the ALE. There was testimony that the idea was to start transitioning Student out of the ALE and into a regular classroom, and in the subject area of math, there were some attempts. As of December 7, 2020, however, Student was still reporting to the ALE.

In light of these considerations, it is the conclusion of this Hearing Officer that District denied Student FAPE between August 24, 2020, and December 7, 2020.

3. Tuition Reimbursement and Compensatory Education

Having determined that District denied FAPE to Student during the period covered by ADE H-20-34, as well as the period covered in ADE H-21-23, this Hearing Officer must now determine whether Student is entitled to tuition reimbursement, as requested by Parent, for attending Compass Academy, a private school in Conway, Arkansas. Student

alternatively seeks compensatory damages to the extent necessary to put Student in the position in which he would have been had he been provided FAPE.

A hearing officer has broad discretion regarding the remedy granted in cases where a student is denied FAPE by a school district. The IDEA authorizes tuition reimbursement for placement in private schools in situations where a district is unable to provide an appropriate placement for a student and the private school placement, itself, is deemed appropriate. *Sch. Comm. of Town of Burlington, Mass. v. Dep't. of Educ.*, 471 U.S. 359, 369 (1996). The Eighth Circuit Court of Appeals has previously held that movement to another school district does not prohibit student from seeking compensatory education from a prior school district for violations of FAPE. *Indep. Sch. Dist. No. 283 v. A.C.*, 258 F.3d 769, 774 (8th Cir. 2001). Where a student's case concerns obligations that a prior district owed to student and failed to meet, the remedy sought is compensatory. *Id.* "It does not matter whether the [d]istrict has any present or future obligation to develop a new IEP . . . or to give [a student] further hearings." *Id.* Similarly, regarding compensatory education, "[w]hether District is able to provide FAPE prospectively is irrelevant to an award of compensatory education." *Indep. Sch. Dist. No. 283 v. E.M.D.H.*, 960 F.3d 1073, 1085 (8th Cir. 2020). The purpose of compensatory education is "restorative," and damages are "strictly limited to expenses necessarily incurred to put Student in the education position [he] would have been had the District appropriately provided a FAPE." *Id.* at 1086.

In the present case, District denied FAPE to Student between September 23, 2019, and March 17, 2020, as alleged in ADE H-20-34, as well as between March 18, 2020 and December 7, 2020, as alleged in ADE H-21-23. This does not count the period covered by

Hearing #1, ADE H-20-09. Essentially, Student has been denied FAPE since the beginning of the 2019-2020 school year, nearly two years. Student was a kindergartner when this began, and he is now entering the second grade. Given this time period, it is the opinion of this Hearing Officer that District is not able to provide FAPE to Student at this time. As such, it is necessary to determine if the private placement sought by Parent is appropriate for Student.

Parent took Student to Compass Academy on December 1, 2020, December 2, 2020, and December 3, 2020 for a trial visit., and Student's last day of attendance in District was November 30, 2020, according to the LEA. On December 5, 2020, Parent's counsel sent a letter to District's superintendent, informing him that Parent rejected Student's continued placement at Sequoyah Elementary because she felt that Student's IEP was failing to provide FAPE for Student. The letter further stated that Parent disagreed with Student's placement because Student had only been able to attend school for two hours per day. Parent's counsel indicated that Parent intended to enroll Student in a private school at public expense.

Compass Academy, a private school that operates as a non-profit organization, is in Conway, Arkansas. The Director of Compass Academy, Courtney Williams, testified at the hearing of this matter. This Hearing Officer found her testimony to be credible and thorough. Compass Academy provides educational services for disabled Students in grades K-12. Students that attend Compass Academy are typically in need of a smaller setting. There are a total of approximately 87 students and 21 staff members at the school. There is a teacher and a paraprofessional in every classroom, and the maximum number of Students in any given class is ten. Compass contracts with organizations that provide a variety of therapy services, including OT, physical therapy, speech therapy, and ABA therapy. During the spring

2021 semester, Student was in a K-2 classroom with approximately nine other students. Parent received daily feedback from teachers and therapists, and progress documentation was maintained on Student. Compass Academy operates year-round, reducing the chance that a student will academically regress during summer months. Tuition for a single year at Compass Academy is \$9,200.

Student was on a DRA 6 reading level, which translates to a mid-kindergarten grade level, when he began Compass Academy. By the end of the spring 2021 semester, Student was on DRA Level 18. Williams testified that a DRA Level 18 was the equivalent of a first grade, second semester, grade level equivalent. Essentially, Student was approximately one entire grade level behind his peers when he began attending Compass Academy, and after only a single semester, Student is approximately six months behind his peers in the subject area of reading. Williams testified that Student loves math and was nearly on grade level in this subject area when he came to Compass Academy.

Aside from making academic progress, Student has been able to attend school all day since starting at Compass Academy. This increase in school hours has likely contributed to the level of growth that Student has experienced. Williams stated that Student is happy to be at school and to see his classmates when he arrives, and she further explained that Student has become more social with his peers in the short time that he has been in the school. Student receives several services while at Compass Academy, including ABA therapy, speech therapy, and occupational therapy. Regarding ABA therapy, Student receives nine to ten hours of ABA therapy per week, a decrease as compared to the amount of ABA therapy that

he was receiving when he first enrolled in the school. Student also receives speech and OT services at Compass Academy.

Compass Academy utilizes the Wilson Reading Program, which is an Orton Gillingham program, for its reading curriculum. All staff and teachers at Compass Academy have been trained in this reading system. Student has responded well to the curriculum at Compass Academy and, behaviorally, he has responded well to a system in which he loses privileges, such as recess, as a consequence of inappropriate behavior, however, can earn back lost privileges by showing appropriate behavior.

Based on these facts, it is the opinion of this Hearing Officer that Compass Academy is an appropriate placement for Student at this time. Although Student will not be with non-disabled peers on a daily basis, the environment at Compass Academy is still less restrictive than the ALE placement where District has placed Student for nearly two years. Considering all other factors, including academic growth and social skills growth, as well as the fact that Student is able to attend school for entire days, Compass Academy appears to be an appropriate environment for Student at this time. It is noted that District elicited testimony regarding some behavioral issues that Student has exhibited at Compass Academy. This Hearing Officer acknowledges that Student's behavior has not been without occasional incidents at Compass Academy. The difference between District and Compass Academy, however, is that Compass Academy seems more prepared to handle these outbursts and has not let Student's behavior distract from keeping Student on track for full school days. For all of these reasons, it is the opinion of this Hearing Officer that District has denied Student FAPE, Compass Academy is an appropriate placement, and District should compensate

Student by providing tuition reimbursement and expenses to Parent. Because this Hearing Officer is awarding tuition reimbursement to Parent, no additional compensatory education is considered necessary. In fact, Parent testified in the above-captioned matters that she was no longer seeking compensatory education if she could receive tuition reimbursement for Compass Academy.

ORDER:

The results of the testimony and evidence in both ADE H-20-34 and ADE H-21-23 warrant a finding for Parent. Specifically, Parent introduced sufficient evidence in the record to establish by a preponderance of the evidence that District denied Student FAPE between September 23, 2019, and March 17, 2020 (ADE H-20-34), as well as between March 18, 2020 and December 7, 2020 (ADE H-21-23). District is hereby ordered to take the following actions regarding Student:

1. District shall reimburse Parent for any tuition paid or, if not yet paid, tuition owed to Compass Academy for Student's attendance at the school from December 7, 2020 through June 30, 2021.
2. District shall pay Parent mileage, in accordance with mileage rates for other District employees and staff, for all trips made by Parent to and from Compass Academy between December 7, 2020 and June 30, 2021.
3. District is hereby ordered to pay tuition for Student to attend Compass Academy from July 1, 2021, through July 31, 2022. Because Parent now lives within a reasonable distance from Compass Academy, no additional transportation costs must be provided by District during this same time period. It is noted that the

award of tuition reimbursement for the 2021-2022 school year is not prospective in nature. Instead, this award of tuition reimbursement is intended to be a compensatory remedy. Because of the District's denial of FAPE for the past two years, Student is still academically behind his peers. An additional year of tuition reimbursement should serve to compensate Student for that loss and, hopefully, allow him to academically reach the level of his same-aged peers.

It is also noted that any non-IDEA claims made in Parent's due process complaint, such as claims brought pursuant to Section 504 of the Rehabilitation Act, are hereby dismissed without prejudice, as this Hearing Officer only has jurisdiction to adjudicate claims brought pursuant to the IDEA. Any and all other outstanding motions, to the extent that there are any, are hereby deemed moot.

FINALITY OF ORDER AND RIGHT TO APPEAL:

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

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

IT IS SO ORDERED.

/s/ Danna J. Young

HEARING OFFICER

07/03/2021

DATE