

**ARKANSAS DEPARTMENT OF EDUCATION
SPECIAL EDUCATION UNIT**

**XXXXXXXXXX, Parent of
XXXXXXXXXXXXXXXX, Student**

PETITIONER

VS.

NO. H-23-22 and H-23-30

Vilonia School District

RESPONDENT

HEARING OFFICER'S FINAL DECISION AND ORDER

ISSUES PRESENTED:

Whether the Vilonia School District (hereinafter "District" or "Respondent") provided or denied the above referenced student (hereinafter "Student") a free, appropriate, public education (hereinafter referred to as "FAPE") from January 3, 2022 to January 23, 2023, pursuant to 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"), which requires an analysis of the following sub-issues:

- (1) whether the District provided the above referenced parent (hereinafter "Parent" or "Petitioner") meaningful participation in Student's education;
- (2) whether the District provided Student, who moved from out-of-state, FAPE by providing him "services comparable to those described in the child's IEP from the previous public agency" until it "[c]onducts an evaluation" and "[d]evelops, adopts and implements and new IEP, if appropriate, that meets the applicable requirements in §§300.324." 34 C.F.R. § 300.323(f) and 20 U.S.C. §1414(d)(2)(C)(i)(II);
- (3) whether the District provided an individualized educational program (hereinafter "IEP") reasonably calculated to provide educational benefit;

(4) whether the District provided Student FAPE in the least-restrictive environment (“LRE”) from January 3, 2022 to January 23, 2023;

(5) whether Parent’s private school placement of Student is appropriate for Student, and if so whether Parent’s private school tuition should be reimbursed pursuant to 20 U.S.C. §1412(a)(10)(C)(ii) and/or as compensatory education.

PROCEDURAL HISTORY:

On December 8, 2022, the Arkansas Department of Education (hereinafter the “Department”) received a written request from Parent to initiate due procedure hearing procedures on behalf of Student (“H-23-22”). Parents requested a due process hearing because they believed that the District failed to comply with IDEA and Department regulations by failing to develop an IEP that would provide Student FAPE in the LRE based on his placement in an Alternative Learning Environment (“ALE”), failing to perform an evaluation after Student moved to the District from out of state before altering Student’s IEP, failing to provide services comparable to those in Student’s prior school district in another state, and failing to create an IEP with a Functional Behavioral Assessment, and failing to afford Parent meaningful participation in Student’s education. At the time H-23-22 was filed, Student (male) was thirteen years old and lived with Parent at a residence within the District. He was bussed daily by the District to an ALE operated by Arch Ford Educational Service Cooperative (“Arch Ford”) at the Ruth Doyle Middle School in Conway, Arkansas from January 18, 2022 to Christmas break in December of 2022. Because the Student moved to his residence within the District in December of 2021, the Student has not resided within the District for more than the two year statute of limitations, and the Student’s time of residence

in the District from January of 2022 through the spring semester of 2023 is entirely within the time for consideration.

In response to the Parent's request for a hearing, the Department assigned the case to this impartial hearing officer who initially scheduled the due process hearing in Case H-23-22 for January 18-20, 2023 if Parents and District failed to reach resolution. A resolution conference was held between Parent and the District on January 9, 2023; however, the parties were unable to resolve the matter. Prior to the prehearing conference, the parties jointly moved for continuance. This Hearing Officer granted the continuance on January 18, 2023, and after conferring with the parties regarding available dates, rescheduled the hearing for March 14-16, 2023.

Prior to the hearing of H-23-22, on January 24, 2023, Petitioner filed a second request for a due process hearing, H-23-30. In the H-23-30 Complaint, Petitioner incorporated by reference the due process complaint in H-23-22, and the factual allegations of H-23-30 were a continuation of the allegations in H-23-22. Again in H-23-30, Petitioner alleged a denial of FAPE to Student in the LRE based on his placement in the ALE, failure to conduct an evaluation after he moved to the District, and failure to develop an Individual Education Plan with a Functional Behavioral Assessment, and failure to afford Parent meaningful participation in Student's education. However, Parent additionally pled that the student was placed in Compass Academy (hereinafter "Private School"), a private school setting, on January 23, 2023, that the private school setting was an appropriate placement for the student, and requested reimbursement for the private school tuition. Since the Student was enrolled in Private School on January 23, 2023, Student has not been enrolled in the District.

The Arkansas Department of Education, Special Education guidance provides that a hearing officer who is assigned two pending cases out of the same district with the authority to “consolidate the cases into a single case, or to keep the two cases separate.” *See* Ark. Dep’t of Educ., Special Education, Independent Hearing Officer Procedural Guide, p. 17. The consolidation of these two cases also meets the legal standard for the consolidation of cases that requires the hearing officer to consider (1) whether there are common questions of fact and law, (2) whether consolidation will serve the judicial economy, and (3) whether consolidation will prejudice the Respondent. *See Cheney v. Judd*, 429 F.Supp.3d 931 (D. N.M. 2019) (interpreting Fed. R. Civ. P. 42(a)).

Here, H-23-22 and H-23-30 both alleged a denial of FAPE under the IDEA, with common facts concerning FAPE in the LRE. The consolidation served judicial economy in that much of the testimony and evidence of H-23-22 would be duplicated in a hearing for H-23-30. As the hearing had not yet been set for H-23-30, Respondent was not prejudiced by a consolidation. The parties were consulted and did not object to the consolidation. Pursuant to the broad discretion provided to the hearing office for the conduct of due process hearings, this hearing office ordered the consolidation of cases H-23-22 and H-23-30 (hereinafter the “Consolidated Case”). After consulting the parties regarding scheduling, the hearing in the Consolidated Case was scheduled for the dates that H-23-22 had been scheduled for on March 14-16, 2023.

A prehearing conference in the Consolidated Case was held March 13, 2023 via zoom.¹ Counsel for both parties participated and discussed unresolved issues to be addressed at the hearing and the witnesses and evidence to be presented. Having been given

¹ See Transcript of Prehearing Conference dated March 13, 2023.

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, Debby Linton Ferguson, J.D., Hearing Officer for the Arkansas Department of Education, conducted a closed impartial hearing. Parent had the burden of proving the allegations in this Consolidated Case.

The closed hearing began as scheduled and was held on March 14-17, 2023, but additional time was needed to hear the evidence. The hearing was then continued to April 19-21, 2023. Present for the hearing were Theresa Caldwell, attorney for Petitioner; Jay Bequette, Attorney for the District; Audie Alumbaugh, parent advocate, XXXXXX ("Parent") and Jennifer Jensen, Director of Special Education for the District. The following witnesses testified in this matter: Rafeal Marlow (hereinafter, "Arch Ford ALE Director"), Ira Jones (hereinafter "ALE Campus Supervisor"), Toni Bugg (hereinafter, "Folder-Holder"), Sandra Cole (hereinafter, "ALE Special Education Teacher"), Jennifer Jensen (hereinafter, "District Special Education Director"), Beverly Webb (hereinafter "ALE Teacher of Record for Art and Music"), Jason Martin (hereinafter "ALE Teacher of Record for Health and Physical Education"), Rodney Partee (hereinafter "District Principal"), Kourtney Bradley (hereinafter "ALE Facilitator for Elective Classes"), Tim Kriesel (hereinafter "ALE Facilitator for Social Studies and Science"), Jeff Hart (hereinafter "ALE Teacher of Record for 7th Grade Health and PE"), Hal Landrith (hereinafter "ALE Teacher of Record for Science"), Parent, and Courtney Williams (hereinafter "Compass Director").

Prior to reconvening on April 19, 2023, Petitioner filed a Motion for Order Directing District to Produce Student Education Records, and the District responded. This hearing officer convened a hearing on the Petitioner's motion on April 12, 2023, and upon learning

that the requested records had been conveyed but not received due to a technological issue, Petitioner withdrew the motion.² The continued hearing of the Consolidated Case reconvened on April 19, 2023 and concluded on April 21, 2023.³ Both parties were requested to provide post-hearing briefs, and both timely submitted briefs in accordance with the deadline set by this Hearing Officer.

FINDINGS OF FACT:

1. It was undisputed that Student is a fifteen year old male in the eighth grade and is a child with a disability in need of special education, related services, supplementary aids and services, supports, accommodations, and/or modifications as defined by IDEA, that Parent is the biological mother of Student, and that Parent and Student currently reside within the District. *See* Parent Ex. p. 1; District Ex. p. 1; and Parent at Tr. Vol. VI p. 7.

2. Parent and Student previously resided in the District. *See* District Ex. p. 1. Student attended the District's primary school for the 2016-17 school year, and in Student's 3rd grade year, on May 2, 2017, a District IEP team determined that Student was eligible for special education services under the category of Other Health Impairment due to ADHD and the adverse effect it had on his educational performance. *See* District Ex. p. 061; Parent at Tr. Vol. VI p. 12. The family remained in the District until relocating to Missouri in November of 2017. *See* District Ex. p. 076.

3. While in Missouri, Student was admitted for psychiatric treatment and was diagnosed with Autism Spectrum Disorder (hereinafter "ASD") on August 5, 2021. *See* Parent Ex. pp. 085-80, 303; Parent at Tr. Vol. VI pp. 12-13. The ASD diagnosis helped Parent understand

² *See* Transcript of Motion from April 12, 2023.

³ *See generally* Transcript, Volumes 1 through VI.

Student's behaviors, and Parent learned to better work with Student. *See* Parent at Tr. Vol. VI pp. 67-69.

4. On August 12, 2021, North Kansas City School District (hereinafter "NKCS") developed an IEP for Student with a placement at the Joe Jacobs Center beginning August 19, 2021, a school focused on serving the needs of children with ASD; NKCS identified the Student's primary disability category as Emotional Disturbance and listed diagnoses of Disruptive Mood Dysregulation Disorder, Adjustment Disorder and ADHD. *See* District Ex. pp. 080-81, 083-86, 094; Parent Ex. pp. 029-033, 041; and Parent at Tr. Vol. VI pp. 8, 16-17, 80.

5. On November 29, 2021, NKCS amended IEP and BIP changed Student's placement from the Joe Jacobs Center to his resident district home school, Antioch Middle School. *Id.*

6. The November 2021 NKCS IEP provided Student direct special education services of: 60 minutes per week in social skills, 150 minutes per week in reading fluency, 60 minutes per week in written expression, and 291 minutes per day (5 x 291=1,455 per week) in "Behaviors Related to Learning Skills" to be provided at the Antioch Middle School. *See* Parent Ex. p. 030; District Ex. p. 083.

7. Based on the NKCS IEP, in the Fall of 2021, when tested at a beginning 5th grade level instructionally, Student approached proficiency in comprehension and read with an accuracy of 98% on the Fountas and Pinnell reading inventory. *See* Parent Ex. 031; District Ex. 084; and Parent at Tr. Vol. VI p. 94.

8. Student's IEP reflects that in the second semester of the 2020-2021 school year, NKCS began to transition Student to the general education setting by taking one class at his home school because the school said Student was "capable of handling himself". *See* Parent Ex. pp.

030, 032; District Ex. pp. 083, 085; Parent at Tr. Vol VI pp. 25, 78-79. The NKCS IEP also included a Behavior Intervention Plan (hereinafter "BIP"). *See* Parent Ex. pp. 047-051.

9. In December of 2021, Parent moved back to the District. *See* Parent Ex. pp. 299-303A.

10. Parent testified she completed enrollment of Student back in the District on December 10, 2021. The date of completion of the enrollment paperwork was disputed by the District Special Education Supervisor; however, this Hearing Officer found the Parent's testimony that she completed enrollment on December 10, 2021 compelling, along with the Parent signatures on District enrollment documents that were dated December 10, 2021. *See* Parent Ex. pp. 299-303A; Parent at Tr. Vol. VI pp. 9, 58-59; District Special Education Director at Tr. Vol. III p. 196; Vol. IV pp. 110-116.

11. Parent listed Autism, ADHD, and Adjustment Disorder as Student's disabilities on enrollment paperwork. *See* Parent Ex. p. 303. The District Special Education Supervisor does not see enrollment paperwork. *See* District Special Education Director at Tr. Vol. V p. 108.

12. As a part of enrolling Student in the District, Parent provided the District a copy of Student's most recent IEP. *See* Parent at Tr. Vol. VI pp. 8-9.

13. District requested Student's records from the Joe Jacobs Center in Missouri on December 21, 2021. *See* Parent Ex. p. 303B.

14. Student returned to the District after Christmas in 2021. *See* Parent at Tr. Vol. VI p. 9.

15. The school closest to Student's home and that he would attend if nondisabled was the District's Middle School. *See* Parent Ex. p. 160; Folder-Holder at Tr. Vol. II pp. 45-46. At the District's Middle School, Student could have received counseling, social skills training, and special education English, math and written expression at the District Middle School. *See* District Special Education Director at Tr. Vol. III pp. 165-171.

16. Other District students started school on January 3, 2022; however, Student was not able to start class at ALE until January 18, 2022 *See Parent at Tr. Vol. VI pp. 59-60.*

17. Student's Folder-Holder set up a transfer conference regarding Student because he transferred from out of state, she reviewed the IEP, looked at services Student was being given, last placement, and prior testing. *See Folder-Holder at Tr. Vol. I p. 205.* Based on the IEP review, the Folder-Holder said the District could accept the IEP as is or make necessary changes; because it was the only information the District had, the District "went with" the services previously given. *See Folder-Holder at Tr. Vol. I pp. 205-206.*

18. The District would send the file to an examiner if something is missing; however, the District did not have a clinical diagnosis of Emotional Disturbance by a licensed psychologist or a behavioral observation. *See Folder-Holder at Tr. Vol. I p. 206, Tr. Vol. II pp. 35-36, 38.*

19. The Folder-Holder admitted that when the District prepared Student's IEP, it had no information that Student had autism. *See Folder-Holder at Tr. Vol. II, pp. 9-17.*

20. The Folder-Holder admitted that the District never evaluated Student; the District only had Student's last IEP from NKCS and Student's BIP. *See Folder-Holder at Tr. Vol. II at pp. 15, 23, 41; Parent Ex. pp. 047-051.* The Folder-Holder did not believe the District had to evaluate the Student to change his IEP. *See Folder-Holder at Tr. Vol. I p. 207.*

22. The District's Notice of Action states: "[Student] was receiving services in an alternative setting to address behavior deficits." *See Parent Exhibit p. 77.*

23. The District scheduled an IEP meeting with Parent for January 14, 2022 and gave notice to Parent. *See District Ex. p. 101; Parent Ex. p. 15; and Parent at Tr. Vol. VI p. 20.*

24. Prior to the IEP meeting, the District Special Education Director called the Arch Ford ALE Director and asked whether he believed the ALE would be appropriate for Student based on

the IEP provided by Parent. *See* District Special Education Director at Tr. Vol. III p. 196; Vol IV pp. 9-12. The District Special Education Director and the Arch Ford ALE Director believed, based on Student's last IEP, that the ALE operated by Arch Ford in Conway, Arkansas was the most comparable placement for Student to his prior placement and that the Student would benefit from the regular counseling that was supposed to be provided at ALE and the smaller class size there. *See* Parent Ex. pp. 145-167; District Ex. pp. 148-155; District Special Education Director at Tr. Vol. III pp. 196-197; Arch Ford ALE Director at Tr. Vol. I, pp. 79-81, 90-92, 98-100, 116-117. The ALE Campus Supervisor believed the ALE was appropriate for Student because the referral packet stated Student was coming from an alternative setting and disruptive and other behaviors were checked. *See* Parent Ex. pp. 145-146; ALE Campus Supervisor at Tr. Vol. I, pp. 148-149, 155-156. The Folder-Holder believed the District provided Student with the closest services to what he had and was told that the behavior services on the Student's IEP were built into the ALE program. *See* Folder-Holder at Tr. Vol. I p. 212.; Tr. Vol. II p. 29. The NKCS BIP listed threats of self-harm, work refusal, whining and arguing with peers and adults, and the Folder-Holder thought Student needed ALE likely due to the threats of self-harm. *See* Folder-Holder at Tr. Vol. II p. 48.

25. The ALE at Ruth Doyle Middle School is located at 800 Padgett Road, Conway, Arkansas and has a one to fifteen teacher/student ratio. *See* Arch Ford ALE Director at Tr. Vol. I p. 11; Vol. II pp. 45-46. There are approximately forty-five students there. *See* Arch Ford ALE Director at Tr. Vol. I pp. 13-14.

26. The ALE is run by the Arch Ford Educational Service Cooperative ("Arch Ford") pursuant to a Memorandum of Understanding ("MOU") with the District. *See* Parent Ex. pp. 207-208.

The MOU between Arch Ford and the District showed the District only had 3 placements for 5th to 8th graders available at the Ruth Doyle Middle School ALE. *Id.*

27. Rafeal Marlow became the Director of the Arch Ford Nontraditional Learning Program (“Arch Ford ALE Director”) on July 1, 2022. *See* Arch Ford ALE Director at Tr. Vol. I pp. 9-10. ALE has a qualified special education teacher who can only provide up to 225 minutes per week in special education English and 225 minutes per week in special education math; the 450 minute per week limit was based on the MOU. *See* Arch Ford ALE Director at Tr. Vol. I pp. 17-18. The Student’s home District is responsible for providing any special education services beyond that limit, and Districts can send personnel to provide additional minutes of special education. *See* Arch Ford ALE Director at Tr. Vol. I pp. 91-93. ALE is an alternative environment but is considered a general education setting, because it is not on the continuum of special education, and Student was scheduled to be in general education 80 percent of the time there. *See* Arch Ford ALE Director at Tr. Vol. I p. 95-96.

28. Arch Ford has a day treatment facility, but it is not a school-based day treatment. *See* Arch Ford ALE Director at Tr. Vol. I p. 96-97. Horizon is a school-based day treatment, but it is not part of the ALE umbrella. *See* Arch Ford ALE Director at Tr. Vol. I p. 97.

29. The District Special Education Director did not review any evaluation of Student until receiving the Parent records submitted to the District during this proceeding. *See* District Special Education Director at Tr. Vol. III pp. 153-154. The most recent evaluation of Student was conducted by Heartland Behavioral Health Services on August 5, 2021. *See* Parent Ex. pp. 85-90. Per Special Education Supervisor’s forthright testimony, the District “overlooked” doing an evaluation of the Student, although District should have done an evaluation “as soon as possible,” which could be an Existing Data Review; she did not believe the District needed

to evaluate the Student prior to changing his IEP. *See* District Special Education Director at Tr. Vol. II pp. 205-206. The Folder-Holder confirmed the District never evaluated Student and never did an Existing Data Review. *See* Folder-Holder at Tr. Vol. II p. 23.

30. Whether the District had the NKCS' IEP and BIP prior to the January 14, 2022 meeting was disputed, and this Hearing Officer finds that the District had the NKCS IEP prior to the January 14, 2022 meeting, as evidenced by the verbatim statements in the Vilonia initial IEP being taken from the NKCS IEP. *See* Parent at Tr. Vol. VI p. 81; District Ex. pp. 101-111; Parent Ex. pp. 29-46, 15-26.

31. This Hearing Officer finds statements regarding the Student in the last NKCS IEP to be accurate as of its date. Parent did not dispute that the NKCS IEP contained statements that Student has a problem with cursing; however, Parent testified cursing was common in middle school students. *See* Parent at Tr. Vol. VI pp. 82-84. Parent did not dispute that Student has lied and manipulated. *See* Parent at Tr. Vol. VI p. 84.

32. The District Special Education Supervisor requested the Arch Ford ALE Director attend the IEP meeting. *See* Arch Ford ALE Director at Tr. Vol. V p. 131.

33. At the January 14, 2021 meeting, the IEP team consisted of Toni Bugg (special education teacher at District Middle School), Jennifer Jenson (District's Special Education Supervisor who served as the District administrator per the Arch Ford ALE Director), Rapheal Marlow (the ALE Director for Arch Ford), Ira Jones (the ALE Campus Supervisor), the Parent, and Student. *See* Arch Ford ALE Director at Tr. Vol. I, pp. 82-83, 143; Parent Ex. p. 156.

34. The Folder-Holder testified that Parent agreed to the excusal of the general education teacher as documented; however, she could not state the name of the general education teacher invited and mistakenly stated that it was Parent's name. *See* Folder-Holder at Tr.

Vol. I pp. 224-226. Due to this discrepancy, this Hearing Officer questions the reliability of her memory on this point and finds that more likely than not, no general education teacher was invited to the meeting.

35. This Hearing Officer does find that the Folder-Holder never saw the enrollment paperwork completed by Parent and did not know Student had ASD; however, she did recall reviewing the last NKCS IEP. *See* Folder-Holder at Tr. Vol. II pp. 9, 13, 16; Parent Ex. pp. 30-

36. She used the evaluation information discussed in the IEP present levels of performance but did not have any of the prior evaluations. *See* Folder-Holder at Tr. Vol. II pp. 14-20.

37. Parent and Student told the IEP team they objected to Student being placed in the ALE, Parent felt the placement was not appropriate, and the District responded that ALE was Parent's only option at that time because Student had behavioral issues listed on his IEP and needed access to a safe room. *See* Parent at Tr. Vol. VI pp. 21-22, 24, 26-27, & 60-61. Parent informed the IEP Team of Student's ASD diagnosis at that meeting, but the District did not change course. *See* Parent at Tr. Vol. VI pp. 60-61 Parent did not believe the District staff took into account the things she and Student said. *See* Parent at Tr. Vol. VI. pp. 27, 60-61.

38. District Special Education Supervisor acknowledged that the Parent expressed concerns about placing the Student in the ALE. *See* District Special Education Director at Tr. Vol. II p. 213. The Folder-Holder confirmed there was discussion about the Student staying at the District Middle School at the January 14, 2022 meeting, but the District wanted to put him where he had the best chance to be successful because Student had not transitioned to regular school yet in his prior school district. *See* Folder-Holder at Tr. Vol. II p. 49.

39. IEP team placed Student at the ALE despite Parent and Student's objections and concerns voiced. *See* Parent Ex. p. 077.

40. The IEP developed by the District consisted of 225 minutes of special education services in English and Counseling "1 x Day" as a Related Service for an unspecified amount of time. *See* Parent Ex. p. 23. This was a reduction in special education minutes from 1,725 minutes per week on Student's prior IEP. *See* Parent Ex. p. 030. Parent does not believe these services were comparable to the services Student received at NKCS. *See* Parent at Tr. Vol. VI p. 103. Although this Hearing Officer finds District Officials at the time believed they were providing comparable services to Student at ALE, this Hearing Officer finds the placement and services were not comparable and resulted in a significant deprivation of special education instruction to Student.

41. The District sent the Student's IEP including services listed with the referral to ALE. *See* Arch Ford ALE Director at Tr. Vol. I pp. 99-100; Parent Ex. p. 23; District Ex. pp. 113-114.

42. This Hearing Officer finds Student did not receive individual counseling one time daily pursuant to his IEP. The ALE Campus Supervisor could not recall Student receiving individual counseling at ALE but recalled Student received counseling outside of school and group counseling in school. *See* ALE Campus Supervisor at Tr. Vol. 1 pp. 158-161. The Arch Ford ALE Director testified The Pointe provided counseling services for many students at the ALE, that a referral form for The Pointe was provided to Parent, and that he believed the Pointe was working with Parent. *See* Arch Ford ALE Director at Tr. Vol. I pp. 21-23; 132. The ALE did not have a counselor on staff since the ALE was not able to fill the counselor position a year earlier; instead, counseling services were the "responsibility of the District," citing the MOU. *See* Arch Ford ALE Director at Tr. Vol. I pp. 74-75, 123-124, 132; Parent Ex. pp. 207-208. The Arch Ford ALE Director and ALE Campus Supervisor testified Student received "group counseling" at ALE. *See* Arch Ford ALE Director at Tr. Vol. I pp. 132-133; ALE Campus

Supervisor at Tr. Vol. I p. 160. ALE Special Education Teacher stated she and staff are constantly working on social skills with students by talking with students about how to handle issues in a better way or asking them to try again; there was no social skills curriculum but staff receives professional development in social skills. *See* ALE Special Education Teacher at Tr. Vol. II pp. 193-194. School Districts are permitted to send personnel to the ALE to provide additional minutes of special education. *See* Arch Ford ALE Director at Tr. Vol. I pp. 92-93.

43. The Student did not receive STAR testing from the District. The Folder-Holder thought the ALE was supposed to STAR testifying for the Student. *See* Folder-Holder at Tr. Vol. II pp. 82-83. ALE did not conduct STAR testing and did not provide Parent Student's grade levels in reading; however, the ALE Special Education Teacher says his IEP showed progress. *See* ALE Special Education Teacher at Tr. Vol. II pp. 155-156.

44. Student took medication, and this Hearing Officer finds ALE had a nurse on campus to administer Student's medications. The Arch Ford ALE Director said ALE did not have a nurse on campus but Student had access to a nurse and a counselor because the ALE is an extension of the District. *See* Arch Ford ALE Director at Tr. Vol. I pp. 66, 68, 74. The ALE Campus Supervisor was convincing that there was a nurse on campus to give Student medication, and he was present on a day to day basis. *See* ALE Campus Supervisor at Tr. Vol. 1 p. 185.

45. The ALE's Student Action Plan outlined the goals that the Student needed to meet in order to transition back to the regular environment from ALE; a student's goals on their Student Action Plan do not necessarily match the goals on their IEP, although Student's Student Action Plan goals do track with Student's IEP goals. *See* Arch Ford ALE Director at Tr. Vol. I pp. 62-66, 86, 100-101; District Ex. pp. 255-256; Parent Ex. pp. 166-167D, 263-266.

46. The goals on the Student Action Plan are measured by daily "Points Sheets", Students get rewards based on the Points Sheets, and a "2" is the best possible score to receive while "0" would be the worst. *See* Arch Ford ALE Director at Tr. Vol. I pp. 66, 103-106, 128; District Ex. pp. 258-297; ALE Special Education Teacher at Tr. Vol. II pp. 120-123. Student's Points Sheets show all "2s." *See* District Ex. p. 258-297; Arch Ford ALE Director at Tr. Vol. I p. 128.

47. Student's schedule at ALE began at 8:25 am and ended at 1:45-1:50 pm for 6 blocks, but Student was picked up by District's bus after 5th block on Wednesdays. *See* Parent Ex. p. 319; District Ex. p. 275; *See* ALE Campus Supervisor at Tr. Vol. 1, pp. 169-72; Parent at Tr. Vol. VI p. 32. *See* ALE Special Education Teacher at Tr. Vol. II at pp. 111-117.

48. Student's nondisabled peers in the District attended school from 8:00 am to between 3:10 and 3:30 pm. five days a week. *See* Folder-Holder at Tr. Vol. II p. 68. *See* ALE Campus Supervisor at Tr. Vol. I p. 174. Parent at Tr. Vol. VI p. 33. The District school week contains 2,040 minutes. *See* District Special Education Director at Tr. Vol. III p. 157.

49. Most days Student would only be at ALE from 8 am to 1 pm. *See* ALE Campus Supervisor at Tr. Vol. 1 p. 177. *See* ALE Special Education Teacher at Tr. Vol. II p. 105. The ALE Campus Supervisor reviewed the Student's "Behavior Sheets," which showed Students' instructional day ended after fourth block on most days and meant Student was really only there five hours most days. *See* Parent Ex. pp. 210-250; ALE Campus Supervisor at Tr. Vol. 1 pp. 173-177. Thus, this Hearing Officer finds Student experienced a significant loss of educational instruction time during his placement at ALE.

50. About a month after Student began school at the ALE in the spring of 2022, Student had a conflict where he came home with a cut on his nose and a black eye after he used the "n" word; Parent contacted the District Special Education Director and reasserted that the

placement at ALE was not proper. *See* Parent at Tr. Vol. VI pp. 27, 82. District Special Education Director said she would pull a meeting together, but Parent did not hear back from her until Parent followed up in April. *See* Parent at Tr. Vol. VI pp. 27-28.

51. On February 20, 2022, by email to the District Special Education Director, Parent asked the District to look at options other than the ALE for the Student, and Parent listed Compass Academy as a possible option. *See* Parent at Tr. Vol. VI p. 92.

52. On April 29, 2022, after Parent contacted the District Special Education Director, a meeting was held, and District Special Education Director, Arch Ford ALE Director, and ALE Campus Supervisor attended that meeting. *See* Parent at Tr. Vol. VI pp. 28-30, 89. Parent asked to remove Student from ALE and was told Student could not move at that time due to his behaviors seen by the ALE Campus Supervisor. *See* Parent at Tr. Vol. VI pp. 30-31. *See* District Special Education Director at Tr. Vol. II pp. 214-215

53. Parent got no grades from the ALE for Student until toward the end of his seventh grade year when she found out Student was failing because the ALE Special Education Teacher told Parent that Student was failing. *See* Parent Ex. p. 262B; Parent at Tr. Vol. VI pp. 30-31. Student was trying to catch up at home, but the Apex system would lock him out if he was not on campus to take a test. *See* Parent at Tr. Vol. VI p. 31.

54. An annual review conference was held on May 20, 2022, where the IEP team developed the Student's eighth grade IEP and determined that the Student would receive Extended School Year ("ESY") services of three hours a day on one day per week; it did not report whether Student made progress on his goals or in the general education curriculum. *See* District Ex. pp. 186-199; Parent Ex. pp. 1-28.

55. The May 2022 IEP reported that Student was reading “at level T (beginning 5th grade) instructionally”; this language is inaccurate as of May 2022 as it appears to have been cut and pasted from Students most recent out-of-state IEP. *See* Parent Ex. pp. 3-4 compared to 31-32; ALE Special Education Teacher at Tr. Vol. II p. 157. The goals were simply taken from the last out-of-state IEP and increased to the next grade level; for example, “to be able to read an 6th grade reading level”; “to comprehend material on a 6th grade reading level.” *See* Parent Ex. pp. 3, 32. The May 2022 IEP contained other language borrowed from the last out-of-state IEP regarding Student’s behaviors. *See* Parent Ex. pp. 32 & 4. District borrowed language for its BIP from the last out-of-state IEP. *See* Parent Ex. pp. 27-28 compared to p. 47-51.

56. District’s Special Education Supervisor never checked on the Student while at the ALE nor checked on whether the services on the IEP were implemented. *See* District Special Education Director at Tr. Vol. III p. 194.

57. Although the May 2022 IEP shows ALE did not initiate work on Student’s IEP goals, the ALE Special Education Teacher was credible and noted improvement on Student’s goals for his 8th grade year. *See* District Ex. pp. 211-212, 159-160, 217-218; ALE Special Education Teacher at Tr. Vol. II pp. 160-161. The ALE Special Education Teacher made these goal progress determinations by observation, and she saw behavior improvement in Student over time with his requiring less redirection. *See* ALE Special Education Teacher at Tr. Vol. II pp. 164-168, 183-186, 191. ALE Special Education Teacher testifies that Student was reading at a third or fourth grade level based on her personal opinion at that time, which is likely accurate as it is consistent with the ESY reading data. *See* ALE Special Education Teacher at Tr. Vol. II p.190.

58. Student was assessed on June 23, 2022 during ESY at the District, and he was reading on an end-of-year fourth grade level at that time. *See* District Special Education Director at Tr. Vol. V pp. 56-60.

59. The Student threatened suicide in May of 2022 because he was so miserable, and [the District] was not acknowledging that [he's] proving [he] can go back to school. *See* Parent at Tr. Vol. VI pp. 64-65.

60. Student attended Extended School Year for three hours one day per week in the summer of 2022 at the District with no incidents; the District enjoyed him. *See* Parent at Tr. Vol. VI pp. 65-67, 101.

61. Student would beg Parent to stay home from ALE; he never wanted to go. *See* Parent at Tr. Vol. VI p. 33. Parent was not allowed to see Student's classroom at the ALE; she was only walked down the hall and taken to a room to meet with ALE staff on two occasions and she complained about the ALE placement both times. *See* Parent at Tr. Vol. VI pp. 35 Other meetings were held via zoom. *See* Parent at Tr. Vol. VI p. 35.

62. One of the in-person meetings with the ALE Campus Supervisor was in September of 2022 with Student's therapist, the District Special Education Director, and the District Principal attending via zoom. *See* Parent at Tr. Vol. VI p. 35. The September 2022 meeting was in the room where the children have lunch. *See* Parent at Tr. Vol. VI p. 36. In the September 2022 meeting, Parent again complained about Student's placement at ALE, and Student's therapist asked the District Special Education Director when the District would move the Student back to the District Middle School. *See* Parent at Tr. Vol. VI p. 37. The therapist told the persons at the meeting that the Student needed access to the counselor on campus because Student had increasing depression and anxiety. *See* Parent at Tr. Vol. VI p.

38. There was no counselor on campus. *See* Parent at Tr. Vol. VI pp. 38, 41 & Arch Ford ALE Director at Tr. Vol. 1, p. 75; Parent Ex. p. 207. District officials responded that they would re-evaluate the Student at nine weeks; the only behaviors they reported Student having was some use of profanity. *See* Parent at Tr. Vol. VI. pp. 38-40.

63. Despite the September 2022 discussion of transitioning the Student, Parent heard nothing further about the plan or timing to transition until January of 2023. *See* Parent at Tr. Vol. VI pp. 38-39, 90.

64. Student's Behavior Sheets also tracked Student's behavior at ALE and contained notes about talking and some inappropriate words. *See* ALE Campus Supervisor at Tr. Vol. 1, pp. 164-165; Parent Ex. 210-51; ALE Special Education Teacher at Tr. Vol. II p. 120. The Behavior Sheets began at Parent's request. *See* Parent at Tr. Vol. VI p. 40.

65. Student did require any interventions for disruptive behavior, in-school suspension, or out-of-school suspension. *See* ALE Campus Supervisor at Tr. Vol. 1 pp. 161-162. The ALE Campus Supervisor's only recollections of Student's negative behaviors were that he was talkative or used inappropriate words. *See* ALE Campus Supervisor at Tr. Vol. 1 pp. 162, 165-

166. ALE Campus Supervisor recalled Student's behavior got better with time. *See* ALE Campus Supervisor at Tr. Vol. 1 pp. 162-163.

66. Student did not receive any services at ALE that he could not receive in the regular education environment. *See* ALE Campus Supervisor at Tr. Vol. 1 p. 158.

67. The ALE Campus Supervisor could not recall seeing Student's Behavior Intervention Plan. *See* ALE Campus Supervisor at Tr. Vol. 1 pp. 191-192.

68. The ALE Campus Supervisor admitted Parent contacted him more than once, maybe every other month, and stated she wanted the Student out of the ALE. *See* ALE Campus

Supervisor at Tr. Vol. 1 pp. 163, 188-189. The ALE Special Education Teacher recalled several meetings where Parent was asking for Student to be moved out of ALE. *See* ALE Special Education Teacher at Tr. Vol. II p.172.

69. In November of 2022, Parent was contacted by the ALE Campus Supervisor and went to the ALE in person where she was told that Student was failing science and social studies by the ALE Campus Supervisor, Nick Trusty, the District Special Education Supervisor, the District Principal, the Student's therapist via zoom, and Carol Edwards (a District Special Education Teacher); Student had those classes in fifth and sixth blocks and was having to leave at the beginning or middle of fifth block. *See* Parent at Tr. Vol. VI pp. 41-42, 49-50. *See* ALE Special Education Teacher at Tr. Vol. II p. 154. District and ALE staff pointed to records showing log-in attempts as evidence that the Student was not putting in effort, and Parent again informed the school officials that Student has trouble accessing the system from home and cannot get caught up. *See* Parent at Tr. Vol. VI p. 48. The educators agreed to send alternative work home over Thanksgiving break, but they waited until after Thanksgiving break and sent no work, only printouts of study guides from the program. *See* Parent at Tr. Vol. VI p. 48. Parent expressed her concerns about Student's mental health and that he was falling behind academically. *See* Parent at Tr. Vol. VI pp. 42-43. Parent was provided no progress information about Student's goals and objectives on his IEP. *See* Parent at Tr. Vol. VI p. 44.

70. Parent never got a report card from ALE for Student's seventh grade semester in the spring of 2022, but Parent was shown Student's eighth grade grades at the failure conference in November of 2022 regarding his failure of social studies. *See* Parent at Tr. Vol. VI pp. 44-46, 102; Parent Ex. pp. 261-262B. District Special Education Director did not know why there

was a failure conference held in November of 2022 after the failure in the first nine weeks already occurred. *See* District Special Education Director at Tr. Vol. II p. 208.

71. The ALE Campus Supervisor or Mr. Trusty initiated Student's transition back to the District in the November of 2022, and Student was ready to transition out of ALE. *See* District Special Education Director at Tr. Vol. II pp. 206-207, 212-213. ALE Campus Supervisor at Tr. Vol. 1 pp. 178, 189; ALE Special Education Teacher at Tr. Vol. II p. 186.

72. Parent was not informed of ALE's plan to transition student in November of 2022. ALE Campus Supervisor first stated Parent knew Student was transitioning out, but then conceded there was no documentation to show Parent knew Student was transitioning out. *See* ALE Campus Supervisor at Tr. Vol. 1 pp. 178-179, 189. If the District Special Education Supervisor called and asked for Student to come back to the District earlier, the Arch Ford ALE Director would have discussed sending the Student back earlier. *See* ALE Campus Supervisor at Tr. Vol. 1 pp. 186-188.

73. The documents and testimony from Student's time in the spring semester of 2022 in seventh grade and the fall semester of 2023 in eighth grade show that the Student experienced no significant behavior issues, but there was some evidence that Student used profanity, said inappropriate things, and would rough house. *See* ALE Campus Supervisor at Tr. Vol. 1 pp. 162, 165-166, 180-182, 190-193; Parent Ex. pp. 210-250; District Ex. pp. 258-298. Student's ALE Special Education Teacher only recalled that Student's language, interrupting, and how he would respond at times were a behavior problem; she did not know Student's diagnoses of ASD, Emotional Disturbance, Schizophrenia but that would help her understand the behaviors she described. *See* ALE Special Education Teacher at Tr. Vol. II pp. 98-99, 119, 198. Student's interrupting improved well. *See* ALE Special Education Teacher

at Tr. Vol. II p. 119. She knew Student had ADHD and Adjustment Disorder. *See* ALE Special Education Teacher at Tr. Vol. II p. 198.

74. Student's ALE Special Education Teacher provided Student 225 minutes per week of direct in-person instruction in reading and math, and she is certified in special education and social studies. *See* Arch Ford ALE Director at Tr. Vol. I pp. 49-50. *See* ALE Special Education Teacher at Tr. Vol. II pp. 89, 92, 101-102, 138-140, 144. The ALE Special Education teacher taught math and English because she is the certified teacher and those are the tested subjects. *See* Folder-Holder at Tr. Vol. II p. 103. She did not teach social studies, although she was listed on Student's report card as teaching social studies. *See* ALE Special Education Teacher at Tr. Vol. II pp. 137, 144-145.

75. With the exception of Student's ALE Special Education Teacher who taught him math and English, Student's teachers of record listed on his report card had no interaction with Student, but Student received instruction at the ALE via the Apex computer program and through the use of facilitators who are not certified in the area of instruction. *See* Arch Ford ALE Director at Tr. Vol. I pp. 17, 38-52; 54-57; Tr. Vol. V pp. 187-188; ALE Special Education Teacher at Tr. Vol. II pp. 104, 141-143, 150-153, 162-164. *See also* Tr. Vol. III and IV generally for testimony of the teachers of record and facilitators.

75. The Student Action Plan from the ALE contained a note written by the ALE Campus Supervisor stating ALE was "waiting on home school for transition 1/16/23." *See* Parent Ex. p. 167C; ALE Special Education Teacher at Tr. Vol. II. P. 177.

76. Still, Parent did not receive information about the plan and filed her due process complaint on December 8, 2022, asking that the Student be removed from ALE and returned to the District. *See* Complaint in H-23-22; Parent at Tr. Vol. VI p. 50.

77. At the resolution conference on January 9, 2023, Parent rejected Student's placement proposed by the District to provide FAPE to Student at the District Middle School and requested that Student be removed from the ALE and be placed at Compass Academy due to his anxiety and mental health needs that were unaddressed at the ALE. *See* Parent at Tr. Vol. VI pp. 91-92. The Parent disagreed with the District placing the Student in 80 percent general education classes and only one resource class; Parent believed Student needed more resource class time. *See* Parent at Tr. Vol. VI pp. 91-92. District did not agree to Student's placement at Compass Academy and instead proposed to do an evaluation and return the Student to the District Middle School. *See* District Special Education Director at Tr. Vol. II pp. 218-220; Tr. Vol. V pp. 104-105.

78. Parent notified the District at the resolution conference on January 9, 2023 that Parent intended to place Student in Compass Academy, and Parent filed the second due process complaint H-23-30 requesting reimbursement for private school tuition on January 23, 2023. *See* District Special Education Director at Tr. Vol. V pp. 91-92.

79. On January 18, 2023, Student was told by the ALE Campus Supervisor or the ALE Special Education Teacher that Student was not supposed to be at ALE and that he was going back [to the District Middle School], which distressed the Student. *See* Parent at Tr. Vol. VI pp. 51-52; ALE Special Education Teacher at Tr. Vol. II p. 181. Parent still had not been informed of the details of the District's plan for transitioning Student to the District Middle School. *See* Parent at Tr. Vol. VI pp. 51-52.

80. On January 23, 2023, Parent placed Student in a Compass Academy and on January 24, 2023, Parent filed H-22-30 seeking private school reimbursement at public expense. *See* H-

23-30; Parent at Tr. Vol. VI p. 52. *See* District Special Education Director at Tr. Vol. V pp. 78-79, 91-92.

81. The Student viewed Compass Academy on January 23 or 24, 2023 and was able to talk with some students, see the facility, and ask questions. *See* Parent at Tr. Vol. VI pp. 53-55. Afterward, the Student asked to stay at Compass Academy and if he could start there tomorrow. *See* Parent at Tr. Vol. VI pp. 54-55. Student asked if there were computers at the school and expressed that he did not like computers because he learns better hand-on. *See* Compass Director at Tr. Vol. VI p. 117. In-person instruction is important to Student's learning. *See* Parent at Tr. Vol. VI p. 70.

82. Student started school at Compass Academy on January 24, 2023, and Parent has seen Student much happier and able to discuss what he learned during the day. *See* Parent at Tr. Vol. VI pp. 55-58. Student's therapist feels Compass Academy has been good for Student; Student is less anxious and depressed. *See* Parent at Tr. Vol. VI pp. 56-57. Student's attitude at home with Parent and sibling have improved since he is attending Compass Academy. *See* Parent at Tr. Vol. VI p. 58.

83. Student confided to the Compass Director that he can get angry sometimes and has trouble focusing. *See* Compass Director at Tr. Vol. VI p. 117. The Compass Director said that she could tell that he had ADHD and was aware of his' anger issues, but she felt he has adjusted and was doing very well in his new setting and is learning self-control even though his temper has been tested at times. *See* Compass Director at Tr. Vol. VI pp. 118-119. Student has been able to stay throughout the day and push through. *See* Compass Director at Tr. Vol. VI p. 119. Self-control is one of Student's goals. *See* Compass Director at Tr. Vol. VI p. 131.

84. Students receive daily work in the moment of need on replacement phrases and calming

techniques. *See* Compass Director at Tr. Vol. VI pp. 131-132. Behavior work is embedded in the program at Compass Academy, and most of the time, the Compass Director asks the students to talk through their thoughts and feelings as a consequence for their behaviors, which seems to work. *See* Compass Director at Tr. Vol. VI p. 140. If a student damages property or harms others, the student would be sent home. *Id.* Otherwise, the staff makes sure the consequence matches the behavior. *Id.*

85. Compass Academy introduced Student to Community Connections, at which Student attends social get-togethers for teens, and he is able to practice social skills in real life settings. *See* Parent at Tr. Vol. VI p. 57. Student talks about his friends at Compass Academy. *See* Parent at Tr. Vol. VI p. 57-38.

86. Compass Academy is a private school located at 1150 North Museum Road, Conway, Arkansas. *See* Compass Director at Tr. Vol. VI pp. 109, 111-113. Parent provided Student transportation from their home at 16 Ridgeway Dr., Vilonia, Arkansas since Student began Compass Academy on January 24, 2023; Compass Academy is between a 25 and 30 minute drive each way; and Parent makes two trips per day. *See* Parent at Tr. Vol. VI p. 62. Parent is requesting that the District provide transportation to Compass Academy, as they were already transporting Student to ALE in Conway. *See* Parent at Tr. Vol. VI p. 63.

87. The Director of Compass Academy testified that Compass Academy provides educational services for disabled and nondisabled Students in grades K-12; many of the students have ASD, ADHD or defiant behavior. *See* Compass Director at Tr. Vol. VI pp. 111-113. Approximately ninety percent of students at Compass Academy have disabilities. *Id.* at Tr. Vol. VI p. 152.

88. Currently, there are a total of approximately 117 students at Compass Academy. *Id.* at Tr. Vol. VI p. 111. There is a teacher and a paraprofessional in every classroom, and the number of students in any given class ranges from six to twelve, although most have eight to ten students. *Id.* at Tr. Vol. VI pp. 124-125. The paraprofessionals track behavioral progress. *Id.* at Tr. Vol. VI p. 132. The Compass Director has a BSE in Special Education K-12, a Masters in reading, and national board certification in exceptional children with 17 years of experience teaching in public schools. *Id.* at Tr. Vol. VI p. 109. Compass has teachers with Masters and Masters plus degrees, many with Bachelors degrees in education, some with psychology degrees. *Id.* at Tr. Vol. VI p. 143. Compass Academy has one teacher that has a teaching degree, nontraditional certification and one teacher that is nontraditional who is not yet certified; the other one has two Masters degrees and two Bachelors' degrees. *Id.* Nine staff members are trained and certified in Wilson Reading. *Id.* at Tr. Vol. VI p. 145. The teachers at Compass Academy do not all have a teaching license in the area they are teaching. *Id.* at Tr. Vol. VI p. 152.

89. Compass contracts with organizations that provide a variety of therapy services, including OT, physical therapy, speech therapy, and ABA therapy. *See* Compass Director at Tr. Vol. VI p. 125. Compass Academy operates year-round, reducing the chance that a student will academically regress during summer months. *See* Compass Director at Tr. Vol. VI pp. 141-142. Tuition for a single year at Compass Academy is \$9,200 for twelve months. *See* Compass Director at Tr. Vol. VI p. 141. There is a new student enrollment fee of \$250 and the re-enrollment fee is \$50 for each additional year. *See* Compass Director at Tr. Vol. VI p. 141. The Student's tuition is unpaid at this time. *See* Compass Director at Tr. Vol. VI p. 152.

90. Compass Academy administers academic testing. *See* Compass Director at Tr. Vol. VI p. 132. Early testing at Compass Academy shows Student is reading at fifth grade level. *See* Compass Director at Tr. Vol. VI p. 120. Compass Academy uses paper that helps guide Student's handwriting and that has lowered Student's push back. *Id.* Student's Wilson Reading screener showed Student can read 147 words correctly per minute, which is a 97 percent accuracy on a Step Four screener. *See* Compass Director at Tr. Vol. VI p. 121. Compass Academy uses the Wilson reading program, which provides instruction in all five components of reading recognized by the Department. *Id.* at Tr. Vol. VI p. 122. Parent testified that Student's grade level equivalent was assessed at a third grade level by Compass Academy upon entry to the best of Parent's memory, but this Hearing Officer finds the Compass Director's testimony more reliable due to consistency with other testing. *See* Parent at Tr. Vol. VI p. 94.

91. At Compass Academy, Student receives reading instruction, written expression instruction, is doing some pre-algebra, is in a literature class. *See* Compass Director at Tr. Vol. VI p. 120-124. Student are also taught learning or study skills. *Id.* at Tr. Vol. VI p. 136-137.

92. Student is able practice social skills in a real life setting with peer to peer mentoring at Compass Academy. *Id.* at Tr. Vol. VI p. 128, 135-136. Student has made friends and his socialization behaviors have improved. *Id.* at Tr. Vol. VI pp.133-134. The Student appears to feel safe at Compass Academy. *Id.* at Tr. Vol. VI p. 139.

93. This Hearing Officer finds testimony of Compass Director to be reliable when she states Student would not be successful at a traditional middle school at this time because he needs to work on skills like getting along and issues between students that come up; she believes Student will get there, but a traditional middle school would not be in Student's best interest

right now. *Id.* at Tr. Vol. VI p. 153. Compass Director's experience has been that when a student has come to Compass from an ALE, it takes time for student to overcome things learned there. *Id.* at Tr. Vol. VI p. 156.

94. Compass has a quasi-IEP, which contains goals, that include functional behavior goals for every student. *Id.* at Tr. Vol. VI p. 125. They have academic goals, social/emotional goals, behavior goals, and independence and self-care goals for some students. *Id.* at Tr. Vol. VI p. 126. Goals are based on assessments and observations made at Compass Academy. *Id.* at Tr. Vol. VI p. 127-128. The goals and settings are constantly modified based on a student's needs. *Id.* at Tr. Vol. VI p. 129-130. Students are taught to adapt to change. *Id.* at Tr. Vol. VI p. 130.

95. Compass offers school based mental health therapy as well as OT, PT, speech, and ABA therapy services. *Id.* at Tr. Vol. VI p.125, 127-128.

96. Compass Academy meets the eligibility requirements of the ADE for participation in the Succeed Scholarship program.⁴ *See* Compass Director at Tr. Vol. VI p. 113-114. Ark. Code Ann. § 6-41-801 et seq., provides a scholarship to an eligible provide school for students with disabilities that have an individualized education program (IEP), individualized service plan (ISP), and students in foster care living in a group home or facility that meet eligibility requirements. The Succeed Scholarship currently covers \$6,700 of tuition at Compass. *See* Compass Director at Tr. Vol. VI p. 158.

97. Compass Academy follows the state curriculum guidelines and uses evidence-based curriculum in all areas, except for grade level expectations. *Id.* at Tr. Vol. VI p. 151.

In the role of factfinders, special education hearing officers are charged with the responsibility of making credibility determinations of the witnesses who testify.

⁴ <https://dese.ede.arkansas.gov/Offices/special-education/policy-regulations/succeed-scholarship>

Independent Sch. Dist. No. 283 v. S.D. ex rel. J.D., 88 F.3d 556, 561 (8th Cir. 1996); Parrish v. Bentonville Sch. Dist., No. 5:15-CV-05083, at *8 (W.D. Ark. March 22, 2017). This hearing officer found each of the witnesses who testified to be credible in that they all testified to the facts to the best of their recollection; minor discrepancies in the testimony were not deemed to be intentionally deceptive. However, inconsistencies did play a role in the hearing officer's decisions. The weight accorded the testimony, however, is not the same as credibility. Some evidence, including testimony, was more persuasive and reliable concerning the issues to be decided.

The findings of fact were made as necessary to resolve the issues; therefore, not all of the testimony and exhibits were explicitly cited. In reviewing the record, the testimony of all witnesses, and each admitted exhibit's content were thoroughly considered in issuing this decision, as were the parties' post hearing briefs.

CONCLUSIONS OF LAW AND DISCUSSION:

Pursuant to Part B of the IDEA, states are required to provide a FAPE for all children who are eligible for special education services. 20 U.S.C. § 1412(a); 34 C.F.R. § 300.300(a). FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. In 1982, the U.S. Supreme Court addressed the meaning of FAPE and set forth a two-part analysis that must be made by hearing officers in determining whether a school district has failed to provide FAPE as required by federal law. *See Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-07 (1982). First, a hearing officer must determine whether the State in the form of the local education agency or district, complied with the procedure set forth in IDEA. *Id.* Then, the hearing officer must determine whether a student's IEP was reasonably calculated to enable to the student to receive educational benefit. *Id.* The burden

of proof falls on the party seeking relief. *See Sneitzer v. Iowa Dep't of Educ.*, 796 F.3d 942, 948 (8th Cir. 2015).

An IEP is a comprehensive program prepared by a child's "IEP Team," which includes teachers, school officials, the local education agency (LEA) representative, and the child's parents; an IEP must be drafted in compliance with a detailed set of procedures. 20 U.S.C. §1414(d)(1)(B). An IEP must contain, among other things, "a statement of the child's present levels of academic achievement," "a statement of measurable annual goals," and "a statement of the special education and related services to be provided to the child." *Id.* § 1402(9). "Special education" is "specially designed instruction . . . to meet the unique needs of a child with a disability"; "related services" are the support services "required to assist a child . . . to benefit from" that instruction. *Id.* §§ 1401(26), (29). A school district must provide a child with disabilities such special education and related services "in conformity with the [child's] individualized education program," or "IEP." 20 U.S.C. §1409(9)(D). When formulating an IEP, a school district "must comply both procedurally and substantively with the IDEA." *Rowley*, at 206-07.

I. IDEA Procedural Compliance

Pursuant to *Rowley*, a hearing officer must first determine whether the District complied with the procedures set forth in IDEA. For a child to be denied a FAPE, the procedural inadequacies must (1) impede the student's right to an appropriate education, (2) seriously hamper the parent's opportunity to participate in the decision-making process, or (3) cause a deprivation of educational benefits. *See K.E. ex rel. K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795, 804-805 (8th Cir. 2011); 20 U.S.C. § 1415(f)(3)(E)(i)-(iii).

Here, Parent alleges that the District committed procedural violations of the IDEA by (A) denying the Parent meaningful participation in Student's education; and (B) failing to evaluate the Student or provide comparable services.

A. Meaningful Parental Participation

The U.S. Supreme Court held that a school district cannot refuse to consider parents' concerns when drafting an IEP and cannot predetermine the educational program for a disabled student prior to meeting with parents. *See Schaffer v. Weast*, 546 U.S. 49, 53 (2005). Predetermination could deprive parents of a meaningful opportunity to participate in the formulation process pertaining to the IEP. *See Lathrop R-II Sch. Dist. v. Gray*, 611 F.3d 419, 424 (8th Cir. 2010). "The IDEA explicitly requires school districts 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) (citing 20 U.S.C. § 1414(d)(3)(A)(ii), (d)(4)(A)(ii)(III)). However, the IDEA does not require 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 this Consolidated Case, Parent alleges she was denied a meaningful opportunity to participate in Student's education, specifically asserting that the District predetermined Student's placement at the ALE and failed to consider her request for placement. Based on the Student's prior NKCS IEP, the District Special Education Supervisor contacted the Arch Ford ALE Director and asked him to attend the January 12, 2022 IEP meeting to discuss ALE as a placement for Student. Although District general education students started school on January 3, 2022, the Student was not permitted to begin school in the District until admission

to ALE January 18, 2022. If the District had not predetermined that Student would enter ALE, Student would have started at the District Middle School on January 3, 2022. Therefore, consistent with Parent's testimony, the objections and concerns of Parent and Student about placing Student at the ALE did not change the District's course of action in the January 12, 2022 IEP meeting. Based on these facts, it is the opinion of this Hearing Officer that a preponderance of the evidence establishes that District did predetermine the placement of Student before the January 12, 2022 IEP meeting.

The ALE was not as close as possible to the Student's home and was not the school the Student would attend if nondisabled. *See* 34 C.F.R. §300.116(b)(2). The District's predetermination that ALE was the setting for Student caused Student a significant loss of special education time, general instruction time, and individual counseling, which Student needed. Student was largely denied direct instruction and instruction by certified educators. Due to the lack of services and time at ALE, Student failed to progress and even regressed by some measures.

This Hearing Officer finds that a preponderance of the evidence establishes that the District's improper predetermination caused a deprivation of educational benefits to Student and significantly impeded Parent's opportunity to participate in the decision making process regarding the provision of FAPE to the Student. Because the District predetermined and failed to listen to the Parent's and Student's objections and concerns regarding Student's placement, Student was denied educational instruction time, special education minutes, and counseling minutes, which resulted in harm to both the Student and Parent's right to participate as discussed herein.

B. Comparable Services until Student Evaluation

Pursuant to State and Federal law, for a student who moves from another State, the local education agency shall provide FAPE by providing the child “services comparable to those described in the child’s IEP from the previous public agency” until it “[c]onducts an evaluation” and “[d]evelops, adopts and implements and new IEP, if appropriate, that meets the applicable requirements in §§300.324.” 34 C.F.R. § 300.323(f) and 20 U.S.C. §1414(d)(2)(C)(i)(II).

Here, the District Special Education Supervisor testified candidly that the District “overlooked” doing an evaluation for the Student. If an evaluation had been done, it likely would have yielded information about each of Student’s medical diagnoses and current behavior data. The examiner would have had recommendations for services and input on Student placement that the District likely would have heeded, instead of assuming the ALE was the best placement for Student based on their interpretation of the last IEP that Student needed small class size and possible need for a cool down space. It is the opinion of this Hearing Officer that the failure to evaluate the Student to determine his current needs resulted in his ALE placement, which lead to the denial of Student’s education time, counseling, and in-person instruction by certified teachers and yielded a harm to Student’s educational progress as discussed above. Further, the failure to evaluate more likely than not caused Student’s IEP to fail to be reasonably calculated to provide the Student FAPE because the goals were not based on current data.

Because the District had failed to perform an evaluation of the Student, the District’s obligation was to provide comparable services to the Student’s last out-of-state IEP. As discussed above, the District’s Notice of Action dated January 14, 2022 shows a decrease of

1,725 minutes of special education time per week, and Student did not receive daily individual counseling that he previously had. Further, Student lost instruction time due to the District's bus schedule and lost in-person instruction by certified teachers. Because the Student received no counseling services at ALE, the District failed to even implement the IEP that it wrote for Student and Student's mental health and education declined. Although the District argued that Student made behavioral progress at the ALE, the only testimony of behavior issues at ALE pertained to occasional bad language, interrupting, and horse play. Student's Points Sheets show no deductions, and his Behavior sheets reflected good behavior. There was no evidence that Student exhibited had any significant behaviors to improve on when he entered ALE, and there is no evidence of any behavior on the part of Student that would cause him to need to remain at the ALE for two full semesters.

As the District failed to provide similar levels of daily minutes of special education, regular education, and counseling as the last out-of-state IEP, this Hearing Officer concludes that a preponderance of the evidence establishes that the District failed to provide comparable services to the Student. The District Special Education Supervisor and Folder-Holder admitted the District never evaluated the Student, so such a substantive change in the Student's services was not permissible. These were substantive violation of the IEP that caused harm to the Student's educational progress, a denial of FAPE to the Student, and the District failed to provide an IEP reasonably calculated to provide benefit to the Student in light of his circumstances.

Conclusion

Having considered Parent's allegations of procedural due process violations above, it is the conclusion of this Hearing Officer that the Student was denied FAPE as a result of

procedural violations of the IDEA of predetermination and failure to provide comparable services until an evaluation was completed.

II. Allegations of Substantive Violations of the IDEA

Next, this Hearing officer must consider whether the District substantively provided FAPE in a timely manner to the Student.

A. Reasonably calculated for progress appropriate in light of the child's circumstances

In considering the application of the *Rowley* standard, the U.S. Supreme Court observed that an IEP "is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth." *See Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S.Ct. 988, 999 (2017) stating: "a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.* at 1001. An IEP calculated to provide "merely more than *de minimis* progress from year to year" does not satisfy the substantive requirements of the IDEA. *Id.* at 999.

The services the District provided in the January 14, 2022 NOA were not based on a current evaluation or even an existing data review, and for this reason, Student's goals were not appropriate and service levels were not provided at the level that Student needed to progress. The effect was that Student's education and mental health progress stalled or regressed during his time at ALE, as detailed above.

Even at Student's May 2022 annual review, the District IEP did not report whether Student made expected progress on his goals or in the general curriculum. See 20 U.S.C. §1414(d)(4)(A)(ii)(I). The District did no Star or other testing, so the District made no adjustment to Student's services or goals to enable Student to progress. Instead, the District

borrowed academic progress and behavior progress language from Student's last out-of-state IEP. This is inexcusable.

If the District had done progress monitoring, the District would likely have noticed Student's lack of progress and been able to adjust Student's services or placement before Student languished for an entire calendar year in ALE without the special education time and counseling that he needed to progress. This was not the provision of FAPE in a timely manner. Moreover, the Student was not receiving in-person instruction from a certified teacher other than the ALE Special Education Teacher for reading and math. The District failed to implement the IEP as it was as the Student received no daily individual counseling services in the ALE pursuant to the IEP written by the District. The District's failure to create an IEP reasonably calculated to allow Student to progress in light of his circumstances caused a deprivation of educational benefits to the Student in the form of special education and counseling time. As a result, Student's progress stalled or regressed.

CONCLUSION

This Hearing Officer finds a preponderance of the evidence establishes that the District failed to provide an IEP reasonably calculated to provide benefit to the Student in light of his circumstances. As discussed above, this was a substantive denial of the provision of FAPE in a timely manner to the Student.

B. Least Restrictive Environment

Parent further alleged that the District failed to educate Student in the LRE. As discussed above, 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.” *See C/JN ex rel. SKN v. Minneapolis Public School*, 323 F.3d 630, 641 (8th Cir. 2003). However, the IDEA “significantly qualified the mainstreaming requirement by stating that it should be implemented to the ‘maximum extent appropriate.’” *Pachl v. Seagren*, 453 F.3d 1064, 1067 (8th Cir. 2006); *see also* 20 U.S.C. §1412[a](5). 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.” *See Pachl*, 453 F.3d at 1068. However, 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.” *See Roncker*, 700 F.2d at 1063.

Here, this Hearing Officer finds the evidence does not support that the ALE was the LRE for the Student, as ALE officials stated, there is nothing in the evidence to suggest that Student received services at the ALE that could not feasibly be provided in the District’s general education setting. The Student’s last out-of-state IEP from NKCS showed he was transitioning back to his general education setting. Even assuming arguendo that the Student’s behavior had necessitated his placement in ALE in January of 2022, the District should have known by May of 2022 that the Student had nothing to gain from further time at the ALE based on the absence of any incidents beyond talking and using inappropriate language at the ALE. At the ALE, the District failed to provide Student comparable special education time and related service time of individual daily counseling based on his last out-

of-state IEP, failed to provide educational instruction time equal to that of his nondisabled peers, and failed to monitor the Student's progress. As discussed above, Student's educational progress stalled or regressed as a result, as exhibited by Student's reading levels and grades.

CONCLUSION

For the above stated reasons, this Hearing Officer finds the ALE was not the LRE for Student, and thus, not an appropriate placement for the Student. and the District denied the Student a FAPE in the LRE causing harm to Student's educational progress.

REMEDIES

Having determined that the District denied FAPE to the Student during the period covered by the Consolidated Case, 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 the 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. *See D.L. by Landon v. St. Louis City Sch. Dist.*, 950 F.3d 1057, 1066 (8th Cir. 2020). ADE Spec. Ed. Rules §10.01.22. *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 a student from seeking compensatory education

from a prior school district for violations of FAPE. *Indep. Sch. Dist. No. 283 v. A.C.*, 358 F.3d 769, 774 (8th Cir. 2001). Where a student's case concerns obligations that a prior district owed to a student and failed to meet, the remedy sought is compensatory. *Id.* "It does not matter where 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.

The District remains responsible for transportation pursuant to 20 U.S.C. §1412(a)(10)(B)(i)(child placed in private school entitled to all IDEA rights); 34 C.F.R. §300.325(c) school district still responsible for compliance with IDEA); 20 U.S.C. §1401(26)(A)("Related Services means transportation . . . "); 34 C.F.R. §300.34 (same); ADE Spec. Ed. Rules §2.56 (same). "Transportation includes [t]ravel to and from school and between schools." 34 C.F.R. §300.34.(c)(16).

In the present case, District denied FAPE to Student between January 3, 2022 to the end of December of 2022, a full calendar year. The District did not believe it could serve the Student in its general education setting, which is the reason the District placed Student at ALE. This Hearing Officer gives weight to the Compass Academy Director's opinion that Student will need time to catch up academically and emotionally and then can re-enter general education. It is the opinion of this Hearing Officer that District's plan to place Student at the District Middle School in eighty percent general education classes was not appropriate,

as it is such a great divergence from the level of support Student had been successful with at his last placement prior to returning to the District.

Given these facts, 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.

At the resolution conference on January 9, 2023, Parent rejected Student's placement proposed by the District to provide FAPE to Student at the District Middle School with 80% of time in general education. Parent counsel indicated that Parent intended to enroll Student in a private school at public expense and took Student for a shadow day at Compass Academy. Thus, Parent provided the District with timely notice of her intent.

Compass Academy is a private school in Conway, Arkansas. The Director of Compass Academy testified in this matter, and this Hearing Officer found her testimony to be credible and thorough. Compass Academy provides educational services for disabled and nondisabled Students in grades K-12. There is a teacher and a paraprofessional in every classroom, and the maximum number of students in any given class is twelve. Compass has teachers with Masters and Masters plus degrees, many with Bachelors degrees in education, some with psychology degrees. The Compass Director has a BSE in Special Education K-12, a Masters in reading, and national board certification in exceptional children with 17 years of experience teaching in public schools. Compass Academy has one teacher that has a teaching degree, nontraditional certification and one teacher that is nontraditional who is not yet certified; the other one has two Masters degrees and two Bachelors' degrees. Nine staff members are trained and certified in Wilson Reading. However, the teachers at

Compass Academy do not all have a teaching license in the area they are teaching. *Id.* at Tr. Vol. VI p. 152.

At Compass, student can access a variety of therapy services, including OT, physical therapy, speech therapy, and ABA therapy. Compass Academy operates year-round, reducing the chance that Student will academically regress during summer months. Tuition for a single years at Compass Academy is \$9,200 with a new student enrollment fee of \$250 and re-enrollment fee of \$50 every year thereafter. Student's tuition has not been paid.

When Student began at Compass Academy, he was reading at a fourth grade level, he was depressed and anxious, and his social skills needed work to say the least. Compass Director testified that Student is adjusting well, starting to open up, has friends, and seems to feel safe. They constantly practice social skills and coping skills in a real life setting, as situations arise. Student was recently assessed as reading on a fifth grade level at Compass, which is already an improvement from his last assessment in ESY at the District of fourth grade level reading. Compass has a quasi-IEP, which contains goals, that include functional behavior goals for every student. They have academic goals in math, literacy, and written expression. Compass academy meets the eligibility requirements of the ADE for participation in the Succeed Scholarship program. Student's attitude about attending school and toward his family at home has improved as well.

The District elicited testimony regarding some behavioral issues that Student exhibited at Compass Academy, and this Hearing Office acknowledges that Student's behavior has not been without a few incidents at Compass Academy. However, Compass Academy has handled these incidents well and has not let Student's behavior distract from

keeping Student moving forward academically and behaviorally. Student has been able to stay at school and push through.

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 Compass Academy largely serves disabled students, Student will also be with some non-disabled peers who also attend Compass Academy. In addition, the environment at Compass Academy is less restrictive than the ALE placement where District placed Student, and more appropriate than abruptly placing Student in a general education setting eighty percent of the time immediately with large classes and expecting him to navigate the general education Middle School environment. Parent's actions were reasonable in light of the circumstances of a year of requesting a change and none occurring.

CONCLUSION

Considering all the facts discussed above, including academic growth and social skills growth, it is the opinion of this Hearing Officer that Compass Academy is an appropriate placement for Student at this time, the Parent was reasonable and gave notice, and District should compensate Student by providing tuition reimbursement and expenses through May 31, 2023, as well as a year of compensatory education at Compass through May 31, 2024. Because this Hearing Officer is awarding tuition reimbursement to Parent, no additional compensatory education is considered necessary.

FINAL CONCLUSIONS AND ORDERS:

Upon consideration of all the testimony and evidence, this Hearing Officer finds that a preponderance of the evidence establishes a finding in favor of the Parent that District failed to provide the Student a FAPE in a timely manner as a result of the procedural and

substantive violations of IDEA discussed above. This Hearing Officer further finds that Parent was reasonable, gave notice, moved the Student to Compass Academy, and Compass Academy is an appropriate placement for Student. 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 January 3, 2023 through May 31, 2023. District shall reimburse Parent for mileage, in accordance with mileage rates for other District employees and staff, for all trips made by Parent to and from Compass Academy between January 3, 2023 through May 31, 2023.

2. District shall pay tuition for Student to attend Compass Academy from June 1, 2023 through May 31, 2024. Should Parent receive assistance with tuition through the succeed scholarship or any other means, the District need only pay the portion of tuition not covered. District shall be responsible for bussing Student from Student's home to Compass Academy and back each day Compass Academy is in session between June 1, 2023 through May 31, 2024. District bus arrival and departure times at Compass Academy shall be consistent with the arrival and dismissal times set forth by Compass Academy. It is noted that the award of tuition reimbursement for the 2023-2024 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 to the Student for a year, Student is academically and socially behind his peers and where he should be in light of his circumstances prior to placement at ALE. 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.

3. If Parent enrolls Student in the District for the 2024-2025 school year, District is ordered to evaluate Student within sixty days of Student's enrollment and provide Parent a facilitated IEP meeting through the Arkansas Special Education Mediation Project operated by the UALR Bowen School of Law.

4. Parent is ordered to apply for the Succeed Scholarship at the earliest opportunity.

5. Parent also alleged that the District's conduct constitutes disability discrimination in the Consolidated Case pursuant to §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794(a) or Title II of the Americans' with Disabilities Act, 42 U.S.C. § 12131-12165. This Hearing Officer has no jurisdiction over disability discrimination claims. See ADE Spec. Ed. Rules §10.02.22.1. Therefore, to the extent Parents' due process complaints raise disability discrimination claims, those claims are dismissed.

FINALITY OF ORDER AND RIGHT TO APPEAL:

The decision of this Hearing Officer is final and shall be implemented unless a party aggrieved by it shall file a civil action in either federal district court or a state court of competent jurisdiction pursuant to the Individual's 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 THIS 12th day of May, 2023.

/s/ Debby L. Ferguson
Hearing Officer