

BEFORE THE SPECIAL EDUCATION REVIEW OFFICER

In the Matter of the Due Process
Review Hearing for A.B.,
Petitioner

v.

Case No.: 21DP512-001
(OAH No.: 22ED0001 SPED)

Shawnee Mission School
District USD 512,
Respondent.

REVIEW OFFICER'S DECISION

NOW on this 1st day of December 2021, this matter comes before the Special Education Due Process Review Officer (RO), Loren F. Snell, Jr., for a review of the decision issued by the original Hearing Officer (HO) on July 23, 2021, in accordance with 20 U.S.C. 1415(g)(2). 34 C.F.R. 300.514(b). K.S.A. 72-3418(b)(1).

Decision

Having carefully reviewed and considered the record, for the reasons detailed in the Findings of Facts and Conclusions of Law, the RO rules as follows as to the issues herein:

A. The District satisfied its' "Child Find Obligation" as relates to A.B. K.S.A. 72-3428 and § 34 C.F.R. 300.111(a).

B. The District failed to timely evaluate A.B. to determine his eligibility to receive special education services such that he was denied a free and appropriate public education (FAPE) resulting in lost educational benefit to A.B. K.S.A. 72-3428 and § 34 C.F.R. 300.301.

C. The District failed to appropriately determine A.B.'s educational placement through development of an Individualized Educational Program (IEP) such that he was denied a FAPE resulting in lost educational benefit to A.B. K.S.A. 72-3428 and § 34 C.F.R. 300.324.

D. The District failed to implement A.B.'s IEP such that he was denied a FAPE resulting in lost educational benefit to A.B. § 34 C.F.R. 300.17.

E. The District failed to provide A.B.'s parents with adequate notice.

F. There is insufficient evidence to establish the District failed to appropriately and timely evaluate A.B. for eligibility to receive special education services in Pre-K.

G. There is insufficient evidence to establish the District violated IDEA or denied A.B. a FAPE by providing him instruction in math in the special education room on three occasions during the first grade.

H. There is insufficient evidence to establish the District violated FAPE or denied A.B. a FAPE by proposing to provide adult support for A.B. in the afternoon in response to the parents' demand that A.B. be assigned a paraprofessional during math.

Procedural Background

The HO's Decision dated July 23, 2021 sets forth the lengthy procedural history of this matter prior to the petitions for review that resulted in this RO handling the matter. The HO's Procedural History is incorporated herein by reference and is supplemented as follows:

1. On July 23, 2021, counsel for the Petitioner emailed the HO questioning if there would be an addendum to the decision addressing compensatory damages.

2. On July 26, 2021, the HO sent a reply email to the parties advising that "The decision did not provide for compensatory education or other relief." The HO sent a subsequent email to the parties suggesting the HO would entertain a Motion for Reconsideration regarding remedies and providing a deadline of July 30, 2021 for the parties to make their views known.

3. The Petitioner filed a Motion for Reconsideration of Remedies to A.B. for Deprivation of a FAPE and Lost Educational Benefit on July 30, 2021.

4. The Respondent filed a Memorandum in Opposition to Modifying the Hearing Officer's Denial of Compensatory Education or Other Remedies on July 30, 2021.

5. On August 19, 2021 the Respondent, Shawnee Mission School District USD 512 (District), submitted a Notice of Appeal to the Kansas State Department of Education (KSDE). KSDE forwarded the District's Notice of Appeal to the Office of Administrative Hearings (OAH) on the same day.

6. On August 20, 2021 the Petitioner, A.B., submitted a Notice of Appeal to KSDE. KSDE forwarded A.B.'s Notice of Appeal to OAH on August 23, 2021.

7. A Status/Prehearing Conference was conducted on August 31, 2021. The parties and the RO agreed additional time beyond the statutory twenty (20) day deadline of September 8, 2021 was necessary to allow for delivery and review of the extensive record of the proceedings. The exact length of the extension was undetermined, and the matter was set for a telephone conference after the RO received the record of the proceedings.

8. On September 1, 2021, the RO received a copy of the record, produced by the District, which purportedly included exhibits, pleadings, and transcripts of the six (6) day hearing.

9. On September 7, 2021, the RO received a Stipulation and Certification of the Record of Due Process Hearing Proceedings, executed by counsel for the parties, certifying that the copy of the record supplied to the RO comprised the record of the proceedings.

10. On September 9, 2021, a second telephone conference was conducted between the parties and the RO. The parties were directed to provide additional written arguments as set forth in the Order dated September 13, 2021. It was further ordered that the statutory deadline for the RO to issue a decision was to be extended until October 29, 2021.

11. On September 24, 2021, the RO received briefs from the parties regarding the single issue upon which additional argument had been requested.

12. On October 13, 2021, the RO received an email from the KSDE inquiring as to why the RO had not obtained the official record from the HO for the hearings conducted. The copy of the record, certified by the parties, was not the official record. The RO had not been made aware that the copy of the record that had been received was not the official record until receiving correspondence from KSDE. Upon reviewing the exhibits compared to the official record, at least one (1) exhibit, Respondent's Exhibit SMSD-12, pp. 1117-118, was not included in the copy provided by the parties. And, two (2) of Petitioner's exhibits were mislabeled. Parties were contacted and instructed to obtain the official record from the HO and provide it to the RO. To allow the RO time to review and compare the record that had been reviewed with the official record, the deadline for issuing the RO's decision was extended to November 24, 2021.

13. On October 15, 2021, the RO received a paper copy of what was purported to be the official record of the case.

14. Shortly after October 15, 2021, the exact date is unknown to the RO, the RO determined that Respondent's Exhibit SMSD-12 was missing from the official record. The RO reached out to the HO regarding the missing exhibit and left a message. The HO returned the call on or about November 11, 2021. The RO returned the call to the HO on November 15, 2021, upon returning to the office, and left a voice mail. As of the date hereof, the RO has not received the physical copy of Respondent's Exhibit SMSD-12, nor has the RO received a return call from the HO concerning the matter.

Statement of the Case

A.B. is an eight-year-old third grade student born on September 13, 2012 to Natalie and Christopher B. (Tr. Vol. III, 534:22-536:6). The Bs reside within the Shawnee Mission School District in Westwood, Kansas. (Tr. Vol. III, 536:7-10, 569:25-570:9). A.B. first enrolled in the District as a tuition-based Pre-K student for the 2017-2018, school year. (Joint Exhibit 1 (JE-1), p. 83). During Pre-K, A.B. attended Briarwood Elementary (Briarwood) in the District. (JE-1, p. 98). A.B. currently attends Westwood View Elementary (Westwood View) in the District. (JE-

1, p.1612). A.B. has an Individualized Education Program (IEP) and receives special education services. (JE-1, pp. 1612-1626).

On August 14, 2020, Petitioners filed an expansive Due Process Complaint (Complaint) spanning thirty (30) pages. The Due Process Complaint alleged the District denied A.B. a free appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA), as well as discriminated against A.B. based on his disability under Section 504 of the Rehabilitation Act and "Title II of the ADA." (Complaint, pp.3-4). The Complaint is segmented into "Problems," which the Petitioners alleged "constitute a separate instance of the District's wrongful denial of FAPE." (Complaint, p.4). The Complaint is part of the record and incorporated herein by reference. Included within the Complaint was a request for remedies. Such request is incorporated herein by reference.

This due process proceeding is a matter under IDEA and its implementing regulations at 34 C.F.R. § 300.507 to .513, K.S.A. 72-3416, and the Kansas Special Education Process Handbook.

Petitioner was represented by Matthew J. Rogers and Bethany Roberts of the Law Offices of Barber Emerson LC. (Complaint, p.29; Tr. Vol. I, 5:5-8). The District was represented by Joshua Douglass of Mickes O'Toole, LLC. (Tr. Vol. I, 5:11-13). Hearing Officer Larry R. Rute, Associates in Dispute Resolution LLC, presided over the six (6) day due process hearing.

Issues to Be Decided by the RO

Pursuant to K.S.A. 72-3430 and 34 C.F.R. 300.507, the following issues are to be decided herein:

A. Did the District fail to satisfy its "child find" obligation with regard to A.B. as specifically alleged in the Due Process Complaint? K.S.A. 72-3428 and 34 C.F.R. 300.111(a).

B. Did the District fail to evaluate A.B. to determine his eligibility to receive special education and related services as specifically alleged in the Due Process Complaint? K.S.A. 72-3428 and 34 C.F.R. 300.301.

C. Did the District fail to appropriately determine A.B.'s education placement through the development of an IEP as specifically alleged in the Due Process Complaint? K.S.A. 72-3428 and 34 C.F.R.300.324.

D. Did the District fail to implement A.B.'s IEP such that he was denied a FAPE as specifically alleged in the Due Process Complaint? 34 C.F.R. 300.17.

E. Did the District fail to satisfy IDEA's procedural requirements such that: (1) A.B.'s right to a FAPE was impeded; (2) Parent's opportunity to participate in the decision-making process was significantly impaired; (3) A.B. was deprived educational benefits as specifically

alleged in the Due Process Complaint? K.S.A. 72-3416 and 34 CFR § 300.513.

Professionals and Expert Witnesses

1. **Ashlea Becker.** Ms. Becker has been employed by the District for eleven (11) years as a certified early childhood special education teacher. (Tr. Vol. I, 59:22-60:10). Ms. Becker has a degree in unified special education for ages birth to third (3rd) grade. (Tr. Vol. I, 60:17-20).

2. **Tracey Breford.** Ms. Breford is a licensed occupational therapist employed by the District,

3. **Jackie Chatman.** Ms. Chatman is the District's Assistant Director of Special Education.

4. **Dr. Jennifer Dancer.** Dr. Dancer is the assistant director of special education at the District, having joined the District in July of 2019. (Tr. Vol. V, 1251:6-9). Dr. Dancer is a trained and licensed school psychologist and has a doctorate in educational leadership. (Tr. Vol. V, 1251:23-1252:1). Dr. Dancer assists the director in all the operations of the special education department, including staffing, retention, recruitment, policy, compliance, anything that the department needs support with, including sitting on IEP teams. (Tr. Vol. V, 1251:10-20). Dr. Dancer also serves as a building administrator for several elementary buildings within the District. (Tr. Vol. V, 1251:18-20). Prior to working for the District, Dr. Dancer was a special education administrator for another district for five (5) years, and prior to that, she was a school psychologist from another local school district for ten years. (Tr. Vol. V, 1252:2-7).

5. **Sherry Dumolien.** Ms. Dumolien served as the District's Director of Special Education. Ms. Dumolien has an undergraduate degree in elementary education and special education, has multiple master's degrees in various educational technology, leadership, and is in the process of completing a doctorate degree in educational leadership. (Tr. Vol. VI, 1472:10-16).

6. **Dr. Joseph Gentry.** Dr. Gentry is an expert on behavior analysis, school psychology, IEPs, and school-based evaluation assessment who was retained by Petitioners and is qualified to opine on all matters addressed in his testimony. Dr. Gentry is a Doctor of Philosophy in psychology and a licensed BCBA. Further, Dr. Gentry is a licensed psychologist in Arizona and owner of Gentry Pediatric Behavioral Services. (Tr. Vol. I, 11:9-12:19; (Tr. Vol. III, 734:20-736:4, 761:11-14).

7. **Lori Grover.** Ms. Grover is a certified special educator and long-term substitute at Westwood View.

8. **Laine Guerry.** Ms. Guerry, E.Ds., was the Westwood View school psychologist.

9. **Jenny Helzer.** Ms. Helzer has been the District's speech-language pathologist for twenty (20) years. Ms. Helzer has a bachelor's degree in communication sciences and disorders

and a master's degree in speech/language/hearing.

10. **Katherine Hensler.** Ms. Hensler is a speech-language pathologist for the District.
11. **Emily Hoffman.** Ms. Hoffman has a Bachelor of Science in elementary education and a master's in educational technology. (Tr. Vol. II, 262:16-18).
12. **Lori Judd.** Ms. Judd was A.B.'s first (1st) grade teacher at Westwood View.
13. **Kathy Keith.** Ms. Keith is Principal of Westwood View Elementary School.
14. **Jill Koertner.** Ms. Koertner is an autism coach for the District. (Tr. Vol. V, 1104:1-6). Ms. Koertner has a master's degree in applied behavioral science and is a BCBA. (Tr. Vol. V, 1105:7-9; 1106:17-22).
15. **Libby Kramer.** Ms. Kramer is the reading specialist at Westwood View. Ms. Kramer has an undergraduate degree in elementary education and a master's degree in curriculum and leadership with additional hours towards her building administrator licensure. Ms. Kramer helps students who need additional support in reading as part of a general education initiative. (Tr. Vol. V, 1235:16-1236:6).
16. **Mr. Lash.** Principal of Briarwood Elementary School. (Tr. Vol. III, 550:6-11).
17. **Dr. Katie Lindberg.** Dr. Lindberg is a psychologist and the PsyD LP of Development and Behavior Sciences at Children's Mercy Hospital.
18. **Todd McCarthy.** Mr. McCarthy is a licensed school psychologist with the Blue Valley School District in Overland Park, Kansas. Mr. McCarthy was a practicum student with the District from August 2018-December 2018, under the direction of Ms. Ostby.¹ (Tr. Vol. II, 456:3-457:23, 462:1-4).
19. **Kathy Ostby.** Ms. Ostby is the District's psychologist, having worked for the District for twenty-seven (27) years after working in Chicago, Illinois for four (4) years. Ms. Ostby has a bachelor's degree in psychology, a master's in school psychology and an education specialist. (Tr. Vol II, 442:9-22; Vol. IV, 988:11-13).
20. **Dr. Katherine Ostmeyer.** Dr. Ostmeyer is a licensed clinical psychologist and behavioral analyst. Dr. Ostmeyer has a Ph.D. in clinical psychology, two (2) master's degrees in psychology, a dual undergraduate degree in behavior analysis and psychology, and a certificate in behavior analysis.

¹ Mr. McCarthy completed the fall semester and continued for a second semester at a different school district. (Tr. Vol. II, 487:17-489:14).

21. **Emily Ruble.** Ms. Ruble has a unified early childhood degree and an endorsement in English as a second language. (Tr. Vol. I, 73:24-74:1).

22. **Lindsey Seitnater.** Ms. Seitnater has a bachelor's degree in early childhood education and elementary education, and a master's degree in special education (Tr. Vol. I, 107:25-108:4). Ms. Seitnater is an early childhood special education teacher employed with the District for 13 years, and employed by the District as an early childhood special education teacher for six (6) years. (Tr. Vol. I, 107:9-24, Vol IV, 942:9-11, 23-25).

23. **Amy Shields.** Ms. Shields is a speech-language pathologist, having worked for the District for the past thirty (30) years. Ms. Shields has a master's degree in speech and language pathology. (Tr. Vol. II, 266:18-247:12).

24. **Billie Varuska.** Ms. Varuska is a paraprofessional for the District.

25. **Dr. Patricia Weigand.** Dr. Weigand is a special education and behavior expert retained by Petitioners, qualified to opine on all matters addressed in her testimony. Dr. Weigand is a licensed Board Certified Behavior Analyst, a licensed school counselor, has a Ph.D. in education, and has worked in Santa Fe Public School District for thirteen years in both special and general education. Since 1989, Dr. Weigand has consulted with families, schools, and IEP teams in the area of autism. Dr. Weigand is the director of a five-day intensive autism training for the Santa Fe Public School District. Dr. Weigand plays a significant role on IEP teams by providing guidance related to behavioral strategies to reduce interfering behaviors and guidance regarding evidence-based instruction. Dr. Weigand has experience in evaluating students as a member of a multidisciplinary team to determine whether a child is eligible and in need of special education. (Tr. Vol. I, at 11:9-12:19, 128:22-133:21).

26. **Dr. Nicole Wiseman.** Dr. Wiseman is a behavior support teacher at the District. (Tr. Vol. II, 410:15-19). Dr. Wiseman has an undergraduate degree, master's degree and doctorate degree in special education. (Tr. Vol. II, 411:2-7).

27. **Dr. Mitchell Yell.** Dr. Yell was retained by Respondents, and is an expert in IEP development, the IDEA, parental involvement, classroom management, placement LRE issues, and FBAs. He is the Fred and Francis Lester Palmetto Chair in teacher education and a professor in special education at the University of South Carolina. (Tr. Vol. VI, 1509:7-17, 1511:4-11).

Terms of Reference/Acronyms

1. Antecedent, Behavior, and Consequence (ABC)
2. Assessment, Evaluation, and Programming System Test (AEPS)
3. Autism Spectrum Disorder (ASD)
4. Behavior Assessment System for Children, Third Edition (BASC-3)
5. Behavior Intervention Plan (BIP)
6. Board-Certified Behavior Analyst (BCBA)

7. Free Appropriate Public Education (FAPE)
8. Functional Behavioral Assessment (FBA)
9. Independent Educational Evaluation (IEE)
10. Individualized Family Service Plan (IFSP)
11. Individuals with Disabilities Education Act (IDEA)
12. Individualized Education Program (IEP)
13. Least Restrictive Environment (LRE)
14. Other Health Impairment (OHI)
15. Prior Written Notice (PWN)
16. Student Improvement Team (SIT)

Findings of Fact

1. On or about June 5, 2014, A.B. was evaluated by the Johnson County Infant Toddler program to determine eligibility for early childhood services under Part C of the IDEA. The Johnson County Infant Toddler program concluded AB. was eligible for Part C services, family services coordination and speech-language pathology services, due to a developmental delay of 25% in one developmental area or 20% delay in two or more developmental areas. These services were to be provided between June 17, 2014, and December 17, 2014. (JE-1, pp. 4-6, 9).

2. On June 17, 2014, an IFSP was developed for A.B. (JE-1, pp. 8-15).

3. On December 16, 2014, the IFSP team met to review A.B.'s progress. It was noted that A.B. "had made a great deal of progress in all areas of development." (JE-1, p. 21). A.B.'s eligibility for services under the IFSP was extended to June 17, 2015. (JE-1, p. 22).

4. On March 26, 2015, A.B. was referred to the District for evaluation for eligibility for special education. The referral states: "Initial concerns with Autism but now more with speech, play, social skills and no longer ASD [autism spectrum disorder] concern." (JE-1, p. 30).

5. The District and Mrs. B met on May 15, 2015 to conduct a transition meeting. According to records of that meeting, A.B. was previously "screened for ASD with no concerns and pediatrician did not have concerns." (JE-1, p. 34). During the meeting, Mrs. B reported that she no longer had any concerns for AB. (JE-1, p. 38).

6. The District completed an evaluation of speech/language on September 15, 2015. According to the evaluation summary, A.B.'s parents described him as cooperative and well-behaved. They did not share any concerns about A.B.'s behavior. (JE-1, p. 65).

7. Following the completion of the District's evaluation on September 10, 2015, the District determined A.B. was not a child with a disability and did not require special education services. (JE-1, p. 69).

8. During the summer of 2017 A.B. attended "Smiley-Face Camp," a summer

enrichment opportunity for young children provided by the District. Summer enrichment is a general education program that families can enroll their children in for one week at a time or for the entire summer. (Tr. Vol. I, 60:21-61:8, 61:20-24). At Smiley-Face Camp, A.B.'s lead program teacher was Ms. Becker. (Tr. Vol. I, 60:14-61:2, 61:23-24).

9. A.B. and Ms. Becker interacted during the summer enrichment program. Ms. Becker noticed some differences between A.B. and his peers. (Tr. Vol. I, 63:4-8). A.B. required more prompting than his peers to complete directions. (Tr. Vol. I, 63:18-21). Ms. Becker provided individual instruction to A.B. rather than instructing him in a group setting. (Tr. Vol. I, 63:20-23).

10. Ms. Becker recalled A.B. pulled himself away from the group quite frequently, so she worked to include and bring A.B. into whatever the rest of the children were doing at the time. (Tr. Vol. I, 63:23-64:1).

11. Ms. Becker anticipated A.B. would need additional support when the 2017-2018 school year started, particularly with social-emotional/behavioral. Because summer enrichment did not have academics, Ms. Becker was not aware of A.B.'s academic skills. (Tr. Vol. I, 66:2-19).

12. On August 7, 2017, Ms. Becker alerted District employee and special educator, Ms. Seitnater, of her concerns regarding A.B. to make Ms. Seitnater aware in the event he would need extra supports to be successful in pre-Kindergarten (Pre-K). Ms. Becker communicated her concerns to Ms. Seitnater via an email that provided, in part: "Due to social/emotional/behavior needs [A.B.] needed additional support to navigate and participate in the classroom. Self-regulation, social skills, and following direction were his weaknesses." (Tr. Vol. I, at 62:25-63:18; Petitioner's Ex. 1).

Pre-K: 2017-2018 School Year

13. A.B. attended Pre-Kat Briarwood during the 2017-2018 school year, within the District. (JE-1, p. 82). Ms. Ruble was A.B.s' Pre-K teacher. (Tr. Vol. I, 74:10-14). Ms. Ruble had not participated in a special education student evaluation prior to being A.B.s' teacher. (Tr. Vol. I, at 73:11-17, 74:10-20, 79:18-80:2; Tr. Vol. III, 537:11-538:3).

14. On August 10, 2017, Ms. Seitnater forwarded Ms. Becker's e-mail to Ms. Ruble regarding the concerns about A.B.'s "social/emotional/behavior." (Petitioner's Ex. 1).

15. Ms. Ruble testified that early in the school year she observed A.B. had difficulty building peer relationships and friendships and appeared unsure about how to play with the other students, appearing to need guidance on how to do so. Ms. Ruble also noted A.B. was a little bit destructive of materials, and would flee group learning time, finding a "hiding space" in the classroom to "hide himself into a small kind of locker space when he didn't want to participate." The magnitude of A.B.s' social-emotional deficits led Ms. Ruble to ask for assistance. Ms. Ruble also observed A.B. would greet peers "in his way," meaning he would stand closer in proximity

than most people would and would repeatedly greet them if they did not "greet him back in the way that he liked." (Tr. Vol. I, at 78:13-25, 80:6-81:4, 87:23-88:8).

16. Ms. Ruble testified that throughout the 2017-2018 school year she used various general education interventions with A.B. For example, to increase the amount of time A.B. would stay in circle time, Ms. Ruble used a sand timer. A.B. would have to stay in circle time until the sand timer ran out. After it did, Ms. Becker allowed A.B. to leave circle time and use his break box, provided he asked for it appropriately. (Tr. Vol. I, 83:24-84:8). Items in the break box included coloring sheets, Play-Doh, Legos, etc... If A.B. stayed in circle time until the timer ran out, A.B. was free to use his break box items just outside the circle where he could still hear the instruction taking place. (Tr. Vol. I, 83:24-84:13).

17. Ms. Ruble used other general education interventions with A.B., like warning him before a transition. Ms. Ruble testified she warned all her students before a transition (e.g., "in one minute we're going to be doing [fill in the blank]"), but she also individually and directly warned A.B. a change was coming. (Tr. Vol. I, 84:14-19).

18. Another general education intervention Ms. Ruble used with A.B. was "first-then statements." An example of a first-then statement is: "First, you need to stay at circle time for one minute, then you can use the break box." Using first-then statements with A.B. allowed him to prepare for what was coming. (Tr. Vol. I, 84:20-24). Ms. Ruble also used "first-then" charts with picture icons for A.B., as well as for other students. The charts are used quite often and were not created specifically for A.B. (Tr. Vol. I, 85:15-25).

19. Ms. Ruble testified she did not think A.B.'s behaviors impacted his ability to learn, although at the beginning of the school year A.B.'s behaviors impacted his ability to form healthy friendships in the classroom. (Tr. Vol. I, 86:8-14).

20. Ms. Ruble testified sometimes drop-off was tough for A.B., just as it is for many four- year-old children in the middle of the day. (Tr. Vol. I, 88:5-7).

21. At no point in time did Mrs. B ever convey dissatisfaction with the instruction A.B. received from Ms. Ruble. In fact, it was quite the opposite. Mrs. B often expressed her gratitude to Ms. Ruble for her work with A.B. (Tr. Vol. IV, 930:20-23; 931:24-932:12; Respondent's Ex. SMSD-12, p. 173).

22. Ms. Ruble testified she had never lied to or withheld any information from Mrs. B. (Tr. Vol. IV, 934:23-935:2).

23. Mrs. B testified school was quite difficult for A.B. in the first few months of Pre-K. According to Mrs. B, A.B. had numerous social problems, both at drop off and throughout the school day, did not interact with his peers, had one-sided conversations, and could not "empathize with the person next to him." (Tr. Vol. III, 538:4-539:2).

24. Mrs. B testified she recalled Ms. Ruble telling her that "[Ms. Ruble] believed [A.B.] was presenting with autism and displaying some of the characteristics." (Tr. Vol III, 539:8-11). Ms. Ruble testified that Mrs. B did not tell Ms. Ruble she thought A.B. had autism and Ms. Ruble never told Mrs. B that she thought A.B. had autism. (Tr. Vol. IV, 935:9-14).

25. Ms. Ruble told Mrs. B she was going to request an evaluation, and Mrs. B agreed. (Tr. Vol. III, 539:18-25).

26. On August 23, 2017 Ms. Ruble emailed Ms. Seitnater. The subject of the email concerned ideas for social stories Ms. Ruble suggested could help A.B. navigate "unsure social situations." Ms. Ruble indicated she was "not super sure on the steps to follow" regarding the evaluation of A.B. since her "kids are identified and rolling." (Petitioner's Ex. 5; Tr. Vol. I, 79:8-80:12).

27. By PWN dated August 30, 2017 the District requested parental consent to conduct an initial evaluation of A.B. in the area of "Social/Emotional Status/Behavioral Status." (JE-1, pp. 116-119). Mrs. B consented to the District's proposal to conduct such an evaluation on August 31, 2017. (JE-1, pp. 116-119).

28. PWNs are a procedural safeguard afforded to parents, to give them notice before the school initiates or changes the identification, evaluation, educational placement, or the provision of special education related services to their child. (Tr. Vol. VI, 1541:5-17). The District uses PWNs to communicate a student's need for special education and related services, and to request written parental consent. (Tr. Vol. II, 392:2-8; Tr. Vol. VI, 1544:3-6).

29. Mrs. B testified she assumed the school was evaluating A.B. for the possibility of autism because of a prior conversation Mrs. B testified she had with Ms. Ruble regarding concerns that A.B. was a child with autism. (Tr. Vol. III, 539:18-540:11, 565:11-13).

30. On September 11, 2017 the District issued a PWN to Mr. and Mrs. B to schedule a meeting on November 6, 2017 to review the evaluation, determine eligibility, and, if needed, develop an IEP for A.B. (JE-1, pp. 160-162).

31. Dr. Wiseman testified the purpose of an evaluation is to determine whether a student has a qualifying disability and needs special education, and to gather information that can later be used to formulate goals if special education services are needed. (Tr. Vol. II, 414:15-20; (Tr. Vol. VI, 1521:18-25, 1546:8-10). Ms. Seitnater testified evaluations consist of gathering information and then take that information and determining "what categories [of eligibility] [the child] would qualify under" without thinking about the eligibility category during the evaluation itself. (Tr. Vol. IV, 949: 18-950:2).

32. Ms. Ostby testified an evaluation can be triggered if a teacher or staff member thinks or suspects a student might have a disability. (Tr. Vol. IV, 988:2-13; 991:4-13).

33. Ms. Seitnater testified to qualify for special education services in Kansas, a student has to show a significant discrepancy between his/her same age peers and has to require service beyond what is available in the general education classroom. (Tr. Vol. IV, 943:1-8).

34. Ms. Seitnater testified a medical diagnosis does not automatically qualify a student for special education. And, while a medical diagnosis provides information, the District, regardless of the medical diagnosis, would still do the same type of testing, interview, and observation. (Tr. Vol. IV, 943:9-16).

35. The District does not typically conduct an FBA to determine eligibility at ages three, four and five. Ms. Seitnater works with a behavior support teacher who would do the FBA, but even still, Ms. Seitnater has been a part of only two FBAs during her six years as an early childhood special education teacher. (Tr. Vol. IV, 944:2-8).

36. Ms. Seitnater testified the District is obligated to follow Child Find through the State of Kansas, which establishes different ways to find children for special education evaluation. She also testified that the District conducts monthly screenings where parents can bring their kids in, and the District provides transition services, including infant-toddler and pre-K transition services. Ms. Seitnater testified the best practice is to put interventions in place - which they did with A.B. - in conjunction with an evaluation to see what kind of progress a student can make with those interventions. (Tr. Vol. IV, 944:25-945:16).

37. The Child Find obligation is different in Pre-K than it is in kindergarten and after. General education interventions are mandated for students in kindergarten through twelfth grade but not for students in early childhood or Pre-K programs. (Tr. Vol. IV, 945:17-22).

38. The whole District uses the same evaluation report across all ages. (Tr. Vol. IV, 945:23-946:1).

39. An evaluation does not include an analysis of every possible qualifying factor; it only looks at what triggered the Child Find obligation. (Tr. Vol. IV, 949:6-10).

40. The area the District was going to be evaluating for A.B. was the social-emotional category because of some behaviors observed. The evaluation was limited to just that one (1) component because the District did not have concerns in other areas, such as: motor, communication, or cognitive concerns. Mrs. B did not ask the District to evaluate A.B. in any other area. (Tr. Vol. IV, 948:23-949:17).

41. A.B.'s evaluation included a parent interview, a teacher interview, an observation, and the AEPS for ages three (3) to six (6). (Tr. Vol. I, 111:15-23, 114:1-2; JE-1, pp. 151-159).

42. The purpose of the parent interview is to get more information outside of the family report about how a student is doing at home, what concerns the parents have, what behaviors they might see at home, what strategies work at home (which is a good piece of information to

report in case it is a strategy the District had not already thought of). (Tr. Vol. IV, 955:7-17).

43. Mrs. B completed a parent questionnaire at the request of the school, informing the school about her experiences with A.B. in the home environment. (Tr. Vol. III, 540:12-541:3). Some of the input Mrs. B provided indicated that A.B. spoke with a robotic tone, had a hard time understanding emotions in himself and others, difficulty with stopping conflicts, difficulty with toy play, difficulty in group activities, and lack of empathy. (Tr. Vol. III, 541:16-543:13; JE-1, pp. 145-148).

44. The parent interview question form completed by Mrs. B provided:

If behavior is a concern, can you describe his behavior, how many times per day/week it occurs, and where it can occur (home, community, etc)? Now both [A.B.'s father] and myself are thoroughly pleased with [A.B.'s] progress. He listens to us now and we are using the visual references and we talk about why and what are manners are. How to treat people with empathy and kindness...
P.S. Thank You, for all helping him. We really have seen a vast improvement in him, since the beginning of school.

(JE-1, p. 165).

45. Ms. Seitnater relied on what Mrs. B told her, reporting it in the evaluation report under the Parent Interview piece. (Tr. Vol. IV, 955:24-956:1; JE-1, pp. 165, 183-190).

46. The family also completes an AEPS report, so the evaluator(s) can look at the whole child, not just what A.B. does at school. They also want to see what he's doing at home, so they can tell whether it is only going on at school. The evaluator relies on what the parents report in the evaluation process. (Tr. Vol. IV, 951:3-14).

47. The AEPS is a play-based assessment that involves observations of behaviors in both structured and unstructured activities. (Tr. Vol. I, 111:15-23, 950:1).

48. Ms. Seitnater completed the AEPS as part of A.B.'s October 2017 evaluation. (Tr. Vol. I, 112:4-113:1; JE-1, pp. 151-159).

49. Ms. Seitnater testified she had first observed A.B. multiple times on or just before September 11, 2017 which was the date reflected on the records comprising her observations of A.B. for the AEPS. (Tr. Vol. I, 112:7-9, 112:20-113:1, 113:6-16, 952:2-; JE-1, pp. 151-159).

50. Ms. Seitnater testified that when she completed her first observation of A.B. his behaviors were concerning. It was decided by Briarwood staff to put interventions in place and see how A.B. responded to them at the next stage of observation. (Tr. Vol. I, at 109:13-110:2).

51. About six (6) weeks later, on October 25, 2017, Ms. Seitnater conducted another observation to document A.B.'s progress. Ms. Seitnater testified the gap in time between the observations provided sufficient time to assess whether the intervention(s) employed resulted in measurable progress. It also ensured that the District completed the evaluation within 60 days. (Tr. Vol. IV, 947:9-13, 951:15-952:1, 952:13-23; JE-1, pp. 151-159).

52. Mrs. B completed the family report portion of the AEPS for A.B. On the AEPS, Mrs. B reported that A.B. was intelligent, inquisitive, independent, willful, funny, passionate, strong in math, engineering, spatial recognition, art, playful and sensitive. She further stated that A.B. needs to "learn social and emotional skills without breaking his spirit." (JE-1, p. 120. Mrs. B further reported that A.B. was smart and a leader, can be bossy, is empathetic but can take his playfulness too far, and is not afraid to "just join in with others." In response to the question, "What social skills do you want your child to learn?" Mrs. B stated: "This is of course our problem area." (Tr. Vol. I, 111:15-23, 114:1-2; JE-1, pp. 148, 151-159).

53. The family report covers all areas of development, while Ms. Seitnater was just doing the social piece of the AEPS. The social piece of the family report and the social piece of Ms. Seitnater's report go hand in hand. It tells them exactly what A.B. is doing in those areas at home and then Ms. Seitnater looks at what he is doing at school. Then Ms. Seitnater combines those scores to get the score for the protocol. (Tr. Vol IV, 950:7-24; JE-1, pp. 120-149).

54. In an October 25, 2017 teacher interview as part of the evaluation, Ms. Ruble expressed that A.B. "has a difficult time at circle (whole group)" and that "[s]ome days he doesn't participate at all," was having difficulty with peer interactions, and would hit and kick other students. When he was mad or upset, he was not redirectable by teachers. Ms. Ruble described A.B. as demonstrating "huge progress" in peer interactions because, "[i]f he takes something from someone or hits, he understands that isn't kind and will say sorry." (Tr. Vol. I, 89:20-90:19; JE-1, p. 166).

55. At the end of her AEPS report, Ms. Seitnater included calculations on the bottom of the last page. (JE-1, p. 159; Tr. 953:10-17. Ms. Seitnater's calculations reflect A.B. received a score of 38% (36 out of 94 points) for September 11, 2017. They also reflect that A.B. received a score of 68% (64 out of 94 points) from the October 25, 2017 observations. Ms. Seitnater also included "the cut[off] scores" on the bottom of the last page of the AEPS report, which allows the District to look at the scores in a variety of ways relative to other children of 61 months. (Tr. Vol. IV, 953:10-954:12; JE-1, pp. 151-159).

56. Ms. Seitnater's analysis reflected that A.B. had experienced growth in the areas of observation, utilizing the interventions put into place by Ms. Ruble. A.B. had demonstrated the skills 38% of the time in September 2017 and, in just about six weeks, he almost doubled what he had initially done. It showed that the interventions were working for A.B. and he was able to better participate socially in the classroom. (Tr. Vol. IV, 953:10-954:12; JE-1, pp. 151-159).

57. Despite Ms. Ruble's contemporaneous input that sometimes A.B. did not participate at all in late October 2017 Ms. Seitnater testified that A.B. had demonstrated "huge gains," was participating from a separate area of the classroom behind a table and receiving instruction. (Tr. Vol. I, 110:14-116:8; JE-1, p. 166).

58. Dr. Weigand testified it was her opinion the observations by Ms. Seitnater were of insufficient timeframe and did not provide enough detail to assess a student who was having such difficulty accessing the curriculum and benefiting from instruction. Further, the observation narrative had missing information regarding A.B.'s behaviors. (Tr. Vol I, at 144:9-145:12). Dr. Weigand testified she felt Ms. Seitnater's conclusions "contradicted" the information provided by Ms. Ruble in the interview.² Dr. Weigand testified given the extensive deficits A.B. displayed, she did not think it was a realistic expectation that the skills assessed in the AEPS would develop in the short timespan between the first and second administration of the assessment. (Tr. Vol. I, at 138:20-141:25). Dr. Weigand also testified it was her opinion that a single socialization evaluation is not sufficient to identify an individual with autism. (Tr. Vol. I, at 151:7-152:6).

59. Based upon her belief that the District had "a suspicion ... that [A.B.] had autism", Dr. Weigand testified the school's evaluation in fall 2017 was not sufficiently comprehensive and inadequate to determine whether A.B. was a child with an exceptionality in need of special education and related services, even if the school did not have concerns that A.B. was a child with ASD. Dr. Weigand testified she thought the District should have conducted a more sophisticated social and communication evaluation, expanded the scope of the evaluation regarding the concerning social-emotional development and behaviors, administered a screening tool such as the Gilliam Autism Rating Scale (GARS), and conducted more evidence-based observational assessments such as the Autism Diagnostic Observational Survey. (Tr. Vol. I, at pp. 150:22-152:6, 152:21-153:8).

60. Dr. Weigand was not present to participate or observe A.B. during the evaluation conducted during the 2017-2018 school year. Moreover, A.B. had not been diagnosed with autism at the time this evaluation was conducted.

61. At the beginning of the 2017-2018 school year A.B. scored zeros in whole group instruction and small group instruction. He was also escaping and leaving the small group area, or alternatively, not coming to the small group area to begin with. But, by October 2017 A.B. was getting scores of two in those areas. A score of two reflects that A.B. was doing it consistently in some of the areas and able to participate in the whole group and small group instruction more fully. (Tr. Vol. IV, 954:13-955:3).

62. Ms. Seitnater also conducted a review of the record, which is where she found A.B. had received infant/toddler services and was evaluated but did not qualify. (Tr. Vol. IV, 947:14-17).

² In reviewing the interview fonn submitted by Ms. Ruble, there was no indication that Ms. Ruble "indicated that she still had a great deal of concerns with [A.B.'s] ability to interact with others." Ms. Ruble did indicate A.B. was making "huge progress" in the area of peer interactions, noting there was still room for improvement.

63. On November 6, 2017 the District completed a Confidential Education Evaluation report (Pre-K Evaluation) for A.B. The Pre-K Evaluation includes an itemization of background information; screening information, including a recitation of anecdotal and screening information from both the teacher and parent; a description of the observations; and the use of the AEPS assessment tool. (JE-1, pp. 183-190).

64. In the area of social-emotional/behavioral status, the Pre-K Evaluation states that A.B. "has made tremendous progress since the beginning of the school year. At the beginning of the school year, [A.B.] was not able to stay and attend during circle time. Currently, he will stay during longer stretches of circle time (sometimes the whole circle time) and will appropriately ask for a break if he needs one. During his break time, [A.B.] sits at a table behind the circle and colors but will often participate in songs and attend to what the teacher is saying. [A.B.'s] teacher reports that he has made great progress in seeking adult permission and identifying the emotions of others. [A.B.] is also making progress in his ability to interact with peers through his day. He has shown the ability to initiate and respond for 2-4 exchanges during play." (JE-1, p. 187).

65. Ms. Seitnater testified parents are a valuable part of the evaluation team and Mrs. B was fully included on A.B.'s evaluation team. (Tr. Vol. IV, 955:18-23).

66. The November 6, 2017 evaluation team meeting³ was the first team meeting that Mrs. B ever attended. (Tr. Vol. III, 543:21-544:5). Mrs. B testified that she believed the team discussed the possibility of autism at the meeting, discussed A.B.'s progress, and discussed getting more data later. (Tr. Vol. III, 544:22-545:6). Ms. Seitnater testified that the team reviewed the evaluation report and discussed whether there was a significant discrepancy between A.B. and his same age peers and whether or not what A.B. needs is beyond what is available in a general education classroom. (Tr. Vol. IV, 947:18-948:9).

67. Ms. Seitnater testified that as of the November 6, 2017 meeting she did not suspect A.B. might be displaying some behaviors consistent with autism because all kids at ages four (4) and five (5) have a variety of different behaviors. Ms. Seitnater also testified that A.B.'s behaviors were not affecting his ability to participate in a classroom anymore, so it looked like the variety of behaviors Ms. Seitnater would typically see at that age. (Tr. Vol. I, 115:5-13). Ms. Seitnater testified she does not recall whether autism was discussed during the November 6, 2017, meeting. (Tr. Vol. I, 115:1-4).

68. The evaluation team relied on the following sources of information: General Education Intervention/Screening, record review, interviews, observation, and testing. (JE-1, p. 189).

69. On November 6, 2017 the evaluation team determined that A.B. was not a child with an exceptionality and was not in need of specially designed instruction for social-emotional

³

This first meeting was often referred to as an "IEP team meeting." However, this was merely the evaluation team meeting. An IEP team meeting does not occur until there has been a determination that the student has an exceptionality and needs special education services.

**In the Matter of the Due Process Review Hearing for
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Review Officer's Decision

skills. (JE-1, p. 183-190). According to Ms. Seitnater, "after putting all the interventions into place, [AB.] did not qualify for service" and "[AB.] did not show a significant discrepancy from same age peers or require resources beyond what's available in the general education classroom." The team determined AB. did not require resources beyond what was available in Ms. Ruble's general education classroom. (Tr. Vol. I, 114:3-15; Tr. Vol IV, 947:18-948:9, 971:24-972:3; JE-1, pp. 183-190).

70. All members of the evaluation team, including Mrs. B, signed the Pre-K Evaluation indicating agreement with the report's conclusions. (JE-1, p. 189-190).

71. Ms. Seitnater testified that during the meeting Mrs. B agreed with the evaluation conclusion that AB. was not eligible for special educational services. (Tr. Vol. IV, 971:21-972:3). Mrs. B testified she felt a sense of relief the evaluation team did not find anything wrong with AB. because she was concerned about the effect a disability label would have on AB. Mrs. B thought maybe she "just needed to work harder as a parent." (Tr. Vol. III, 544:6-17).

72. Ms. Seitnater testified a PWN was issued documenting AB. was not eligible for special education services. (Tr. Vol. IV, 979:12-14; JE- 1, pp. 173-175). The PWN states the evaluation team's conclusion that AB. was "evaluated and determined not eligible for special education services in the area of social/emotional skills and he will benefit from continuing in his Pre-K general education setting and exposure to age appropriate curriculum... [AB.] is not discrepant from same age peers and does not demonstrate a need for special education services at this time...It is believed that [AB.] will continue to progress through general education resources. However, if concerns arise in the future, parent may contact the school district to discuss further options." (JE-1, pp. 173-175, 183-190).

73. Mrs. B testified she did not remember receiving a PWN from the District documenting the fact AB. was determined not eligible for services at the November 6, 2017 meeting. (Tr. Vol. III, 660:3-15).

74. Mrs. B testified that after the November 6, 2017 meeting, she did not receive any notices from the District requesting she provide consent for the school to collect additional evaluative data on AB. through the remainder of the school year. (Tr. Vol. III, 545:9-12).

75. Mrs. B testified that during the spring 2018 semester of Pre-K, AB. began demonstrating more aggressive behavior, such as violent physical incidents on the playground, became "obsessed" with another student, and directed inappropriate drawings of "TNT" and "Angry Birds" blowing up toward that student. (Tr. Vol. III, 545:13-546:23). The behavior necessitated meetings with Mr. Lash. (Tr. Vol. III, 545:13-546:23, 550:3-7).

76. In comparing AB.'s behavior to the beginning of the school year, Ms. Ruble testified [the typical behaviors demonstrated by AB. in spring 2018 included wandering around most of the time and stepping into other children's play in a negative manner; arriving at peer play with the intent of knocking down blocks or removing toys from other students' reach; disinterest

in cooperative play; and inappropriate play with classroom materials. Ms. Ruble noted that the strategies that had been implemented at the beginning of the school year were working and were not needed as much in the spring. (Tr. Vol. I, at 92:14-94:9; Petitioner's Ex. 22).

77. Ms. Seitnater testified that a SIT team is a general education intervention team. The SIT team meets to discuss students who might be struggling in any developmental area (such as difficulty with transitions). The SIT team problem-solves what they can do to help students in those areas. Members of a SIT team typically comprise of the Pre-K teacher and Ms. Seitnater. Further, in situations involving a student with a related-services concern, the SIT team would call in an occupational therapist, a physical therapist, or a speech pathologist. Mr. Lash also attended when he could, but he was not at all of them. (Tr. Vol. I, 118:6-17; Tr. Vol. IV, 973:17-974:12).

78. The SIT team met on two (2) different occasions during the Spring 2018 semester to discuss A.B. The members of A.B.'s SIT team were Ms. Ruble and Ms. Seitnater. (Tr. Vol. I, 118:1- 5, 118:11-14).

79. During a SIT team meeting in February 2018 Ms. Seitnater testified there were no concerns regarding A.B., but the team did discuss A.B.'s obsession with a friend and Ms. Ruble was teaching him how to play with other peers. Ms. Ruble and Ms. Seitnater put a couple of things in place to try with A.B. to see if that would help him be able to play with other friends besides just the one he was focusing all of his attention on. (Tr. Vol. I, 118:18-119:3).

80. Ms. Seitnater testified that during a SIT Team meeting in March 2018 they were following up on A.B. and Ms. Ruble noted A.B. was really sad and was not liking coming to school. Ms. Seitnater referred Ms. Ruble to talk to the school social worker. Ms. Ruble and a social worker at Briarwood, Mrs. Caren Howes, came up with a social story for A.B. (Tr. Vol. I, 119:7-21; Tr. Vol. IV, 976:8-23).

81. Ms. Seitnater testified that a social story is a common intervention. It is not unique to special education and it is commonly used throughout the school year for general education purposes. (Tr. Vol. IV, 976:24-977:16).

82. Ms. Seitnater testified autism was not discussed in those spring SIT Team meetings for A.B. (Tr. Vol. I, 119:4-6).

83. Mrs. B testified about a separate incident that occurred in the Spring 2018 semester which resulted in the District calling a meeting between Ms. Ruble, a Briarwood social worker [Ms. Howes], Mrs. B and A.B. to discuss A.B.'s behavior. (Tr. Vol. III, 545:13-546:23). Mrs. B testified that during the meeting she questioned whether A.B.'s behavior was associated with autism, her parenting or what. (*Id.*).

84. Sometime after the meeting with Ms. Ruble and Ms. Howes in the Spring 2018, Ms. B memorialized conversations between herself and District staff, including Ms. Ruble and Mr. Lash, in a handwritten note she maintained in binders dedicated to A.B.'s school records. (Tr.

Vol. III, 547:23-548:19, 549:15-553:7; Petitioner's Ex. 23).

85. On May 29, 2018 a Student Enrollment Form & Enrollment Checklist was completed for A.B. to attend Westwood View Elementary School (Westwood View). (JE-1, pp. 192-196).

86. Dr. Weigand testified that after an evaluation is completed, the school should conduct an evaluation if renewed concerns arise that a child has a disability. (Tr. Vol. I, at 154:23-155:11).

87. Dr. Weigand testified to her opinion that the information available to the District during the 2017-2018 school year presented red flags that A.B. possibly had autism. Those red flags include the social peculiarities of not being able or knowing how to initiate interaction, not knowing how to express emotion, not knowing how to escape a situation that is non-preferred and having symptoms of sensory processing disorder. Dr. Weigand testified that by removing himself from social interactions with other people, A.B. demonstrated a "hallmark of autism." (Tr. Vol. I, 148:15-150:21).

88. Mrs. B testified she did not know that she could request an evaluation for A.B. during the Spring of 2018 and believed the school had previously evaluated the possibility of autism. Mrs. B testified she did not learn that she could request an evaluation until August 2018. (Tr. Vol. III, at 564:2-565:13).

89. Mrs. B testified that during the 2017-2018, school year, the District did not evaluate A.B. after the November 6, 2017 evaluation, did not send any notices declining to evaluate A.B. to the Bs, and did not send any notices requesting parental consent to evaluate A.B. (Tr. Vol. III, 566:3-17).

90. During the summer of 2018, between A.B.'s Pre-K and kindergarten years, Mrs. B exchanged several emails with District staff, including Ms. Ruble, in which Mrs. B voiced her concerns that A.B. had autism. (Tr. Vol. III, 553:16-560:16; Petitioner's Exs. 24, 32, 39).

Kindergarten: 2018-2019 School Year

91. Mrs. B completed a Kindergarten Information and Skills Questionnaire for A.B. (JE-1, pp. 213-214). Mrs. B wrote:

[A.B.] is advanced in math, arts, vocabulary, well read...[A.B.] has advanced well this past year Ms. Ruble has been an amazing teacher. [A.B.] is strong willed. I hope his spirit is not broken but nurtured. I am excited to see him learn to read. I hope that "project work" is part of the curriculum and that he learns to work with others...[A.B.] was in parents as teachers at 1 yr. for speech. He was evaluated for Autism at Age 3 via SMSD. [A.B.] was again

evaluated for Autism (social and behavioral) at age 5 via SMSD Pre-K Briarwood Ms. Ruble. In both instances he was found not to need an IEP. [A.B.] and I attend a play therapy privately.

92. During the 2018-2019 school year, A.B. attended kindergarten at Westwood View within the District. (Tr. Vol. III, 569:25-570:12). Emily Hoffman, a first-year teacher, was A.B.'s kindergarten teacher. (Tr. Vol. II, 262:5-263:13, 265:9-12).

93. A.B. underwent Lineagen FirstStepDx PLUS genetic testing on August 27, 2018, (provider Dr. Marion S. Pierson, MD) and the testing results identified a "15q26.1 (deletion)," suggesting A.B. possibly had autism but not providing a definitive diagnosis. (JE-1, pp. 221-224). Lineagen's genetic testing results for A.B. states that "[t]he clinical consequences caused by this finding, if any, are not currently known. This testing did not identify a genetic diagnosis." (JE-1, p. 221). Mrs. B testified she communicated the genetic results to Ms. Ruble. (Tr. Vol. III, 568:22-569:9)⁴ Ms. Ruble sent an email response to Mrs. B on September 5, 2018 stating in part: "Seems pretty spot-on" and recommending an educational advocate to Mrs. B. (Petitioner's Ex. 46). Mrs. B testified she immediately got A.B. onto the wait list at Children's Mercy for an evaluation. (Tr. Vol. III, 569:14-20).

94. Mrs. B testified that within the first few weeks of the 2018-2019 school year, A.B. began constantly perseverating, biting his shirt as a nervous tick. Ms. Hoffman expressed concerns that A.B. was not listening in class, was not participating, or following directions, and was not joining in group activities. (Tr. Vol. III, 570: 13-572:20). Mrs. B testified that she noticed A.B.'s desk was at the back of the room away from everyone else, and that A.B. had "papers ripped up and torn everywhere." (Tr. Vol. III, 570:13-572:3).

95. Mrs. B testified she observed A.B.'s peer interactions to be one-sided, and he was not playing with people. Mrs. B observed that A.B. did not "understand kids' jokes or the games that they were playing." (Tr. Vol. III, 572:21-573:9).

96. Mrs. B testified she had attempted to collaborate with Ms. Keith and other District staff to address her concerns about A.B., but perceived Ms. Keith was not wanting to collaborate. (Tr. Vol. III, 560:17-562:1; Petitioner's Ex. 39).

97. At the start of A.B.'s kindergarten school year, 2018-2019, Mrs. B invited Ms. Ruble to attend a meeting with Ms. Hoffman and Ms. Keith to discuss A.B. and teaching strategies. Ms. Ruble testified she felt Ms. Hoffman was receptive to Ms. Ruble's ideas; however, she did not feel like Ms. Keith "was interested in the meeting or the topic." (Tr. Vol. I, at 98:4-99:5). Ms. Ruble sent an email to Mrs. B on August 29, 2018 in which she stated she sensed tension from

⁴ The District offered a proposed fact that Mrs. B emailed Ms. Hoffman, Ms. Ostby, Ms. Keith, and Mr. Mirsch to inform them of the genetic testing results on September 4, 2018, and cites to Respondent's Exhibit SMSD-12, p. 403. In reviewing the record, first, the cited exhibit was not included in the record provided to the RO. Moreover, the cited exhibit was never offered or admitted to the record.

staff at Westwood View. (Petitioner's Ex. 34). Ms. Ruble testified she felt the tension she had sensed was directed at Mrs. B. (Tr. Vol. I, at 102:8-103:19).

98. Ms. Hoffman testified she was able to incorporate some of the strategies used in Pre-K by Ms. Ruble for kindergarten. Ms. Hoffman was able to create her own visual schedule that suited A.B.'s kindergarten day with the support from her own school and started to work on offering A.B. choices. (Tr. Vol. II, 264:23-265:8).

99. In or about August 2018, Petitioners began receiving A.B.'s Color Cash sheets, which noted whether A.B. made great choices all week; whether A.B. showed big improvement; or whether A.B. needed to work on following directions, listening, staying on task, shouting out, being kind to others, or self-control. (JE-1, p. 200-207).⁵

100. Ms. Hoffman testified that Westwood View had a building-wide strategy where a student was sent to a "buddy room" if they were not able to follow directions after prompts. Ms. Hoffman testified she used the other kindergarten room located next door to her classroom as A.B.'s "buddy room," and had used the nurse's office one time when A.B. was crying. (Tr. Vol. II, 267:18-268:1, 272:13-17). Ms. Hoffman testified A.B. went to the nurse's office per protocol that if a student is crying, they can go to the nurse to calm down. (Tr. Vol. II, 272:13-17). Ms. Hoffman testified she did not recall feeling like A.B. was going to the nurse's office more than the average kindergartner. (Tr. 277:11-15). Ms. Hoffman testified teachers in specials classes⁶ used the office as A.B.'s "buddy room." (Tr. Vol. II, 274:7-12). Ms. Hoffman testified she did not recall sending A.B. to the office as a buddy room. (Tr. Vol. II, 272:9-12).

101. Ms. Hoffman testified that she did not ordinarily track buddy room usage. But, if a student was sent to the buddy room multiple times, then she may have had a conversation with the student's parent to discuss the implementation of strategies that would prevent or reduce the need to repeatedly use the buddy room. (Tr. Vol. II, 268:9-16).

102. Ms. Hoffman testified before sending A.B. to the buddy room, she would first seat A.B. in a "buddy seat," which is a seat off by itself in her classroom. (Tr. Vol. II, 275:7-21). A.B. was sent to the buddy seat when displaying behaviors disruptive to the classroom. (Tr. Vol. II, 276:1-5).

103. The main reason Ms. Hoffman sent A.B. to the buddy room was disruptive behavior. A.B. exhibited disruptive behavior in interactions with other students and by going into different areas of the classroom without permission. Ms. Hoffman testified kindergarten has "center time" at the end of the day which is where students can be in the art center or building center. As an example, during reading time, A.B. might have been in the building center, or messing things up around the room, or throwing things around the art center. (Tr. Vol. II, 269:20-270:10). While in the buddy room, A.B. would just sit and decompress. He would return to his

⁵ Color Cash is an incentive program used at Westwood View for students exhibiting good behavior, great choices, positive attitude, kind words, and participation. (JE-1, p. 199).

⁶ Specials classes were identified as physical education, music, etc....

classroom when directed to do so. The length of time A.B. spent in the buddy room was not tracked, but "only ended up being about five to ten minutes." (Tr. Vol. II, 271:3-15, 273:19-25).

104. Ms. Ruble sent an email to Ms. Seitnater on August 29, 2018 asking for information on A.B. noting "As we all predicted, things aren't going to smooth for [A.B.]" as A.B. entered kindergarten. (Petitioner's Ex. 214).

105. On August 29, 2018, at approximately 11:56 a.m., Ms. Ruble emailed Mrs. B and asked whether A.B. had an official diagnosis of autism or any other diagnosis. Ms. Ruble also asked whether A.B. had met with the school social worker or the psychologist. Further, Ms. Ruble advised Mrs. B that she could request a full evaluation in writing by providing the request to the principal. Ms. Ruble advised the school must legally have the evaluation completed and reported back to Mrs. B in "60 school (not calendar) days." (Tr. Vol. I, 95:19-96:22; Petitioner's Ex. 35).

106. Mrs. B sent an email to District staff on August 29, 2018 requesting a full evaluation of A.B. (Tr. Vol. III, 575:2-4, 666:1-4; Tr. Vol. IV, 999:14-18; Respondent's Ex. SMSD-12, pp.313-314). Mrs. B's August 29, 2018 email also stated,

"My son is currently going thru his pediatrician to be evaluated for autism ...My son has been evaluated twice by SMSD...He has shown vast improvements at both evaluations so an IEP was not recommended...I have tried to set up a meeting with A.B.'s previous teacher (Ms. Ruble), his new teacher Ms. Hoffman, and the Principal Ms. Keith...It appears that Ms. Keith has an aversion to meeting with all of us in person... The climate at the school is cold. The email response from Principal Ms. Keith lacks etiquette and comes off cold, as well. I do not feel supported by the staff at [Westwood View] at this time...I would like to officially request a full evaluation from [Westwood View] at this time. (As I understand it [Westwood View] has 60 days to complete this.)"

(Tr. Vol. IV, 996:15-997:14; Respondent's Ex. SMSD-12, p. 313).

107. A PWN for Evaluation and Request for Consent was prepared on September 5, 2018. (JE-1, p. 231-234).⁷ The District proposed conducting an initial evaluation in the areas of health/motor, social/emotional status/behavioral status, academic performance, communicative status, and transition skills to determine if A.B. meets eligibility criteria as a child with exceptionality and demonstrates a need for special education services. The option to not conduct an evaluation was rejected because of the parent's written request to conduct an initial evaluation. The decision to conduct the initial evaluation was based on parent report, observational data,

⁷ The District suggested this was provided to Mrs. Bon September 5, 2021; however, no evidence was offered, either in the form of testimony or an exhibit, to support this suggestion.

medical report, early childhood data and tests scores. Mrs. B signed the consent on September 5, 2018. (Tr. Vol I, at 155:24-157:15; JE-1, p.231-234).

108. After Mrs. B signed the PWN on September 5, 2018, consenting to evaluation, general interventions were put in place in the classroom and the evaluation team started gathering data. (Tr. Vol. IV, 1008:2-13).

109. The District had 60 school days to complete the evaluation following receiving consent from Mrs. B regarding the August 29, 2018 request. (Tr. Vol. IV, 999:4-8; Respondent's Ex. SMSD-12, p. 313). The required timeline to complete the evaluation began on September 5, 2018. (Tr. Vol. I, at 157:5-19; JE-1, at 234).

110. Ms. Ostby testified she was aware that A.B. was on the Children's Mercy Hospital waiting list to evaluate A.B. for the possibility of autism, but the pending medical evaluation did not hinder the District's evaluation process. (Tr. Vol. II, 446:19-447:4). Ms. Ostby further testified the District could make an eligibility determination without the results of the medical diagnosis. (Tr. Vol. II, 447:1-4).

111. Ms. Ostby testified she had completed hundreds, probably thousands, of evaluations over the course of 31 years. (Tr. Vol. IV, 990:9-11). Ms. Ostby was responsible for organizing and facilitating the A.B. evaluation process and was a member of A.B.'s evaluation team. (Tr. Vol. II, 443:3-8, 442:23-443:9; Vol. IV, 1023:7-9). Ms. Ostby testified when she read Mrs. B's August 29, 2018 letter, Ms. Ostby responded by wanting to get the team together, listen to Mrs. B's concerns, and then plan the evaluation from there. (Tr. Vol. IV, 996:15-22, 998:10-13; 999:20-1000:7; Respondent's Ex. SMSD-12, p. 313).

September 5, 2018 Evaluation Team Meeting

112. The evaluation team consisting of Mrs. B, Ms. Ostby, Dr. Wiseman, Ms. Keith, Ms. Hoffman, the behavior support teacher, the speech language pathologist, and possibly the occupational therapist met for the first time on September 5, 2018. (Tr. Vol. IV, 1006:8-22). It was at this meeting that Mrs. B received and executed the PWN consenting to A.B.'s evaluation. (Tr. Vol. IV, 1006:23-25)

113. At the September 5, 2018 evaluation meeting, the evaluation team first allowed Mrs. B to voice her concerns and then allowed Ms. Hoffman to voice her concerns. The evaluation team reviewed recent observational data and various team members provided their input. The team - including Mrs. B - determined that new data and additional information was needed in the areas of fine motor and sensory; social, emotional, and behavioral status; academic performance; communication; and transition skills. (Tr. Vol. II, 443:21-444:9; Vol. IV, 1002:15-1003-25; JE-1, pp. 231- 234).

114. Right after the evaluation meeting was finished, Ms. Ostby emailed Mrs. B the Parent Rights Booklet. The Parent Rights Booklet goes over procedural safeguards; timelines that need to be met; what a parent's rights are if they disagree; how to file for due process; how to request mediation; the right to revoke consent; and it explains all their options when it comes to participation in the special education identification and evaluation process. (Tr. Vol. IV, 1005:25-1006:7, 1007:1-1008:1).

115. Mr. McCarthy testified he attended and kept notes of the September 5, 2018 evaluation team meeting. (Tr. Vol. II, 478:7-21, 480:20-482:5; Petitioner's Ex. 514). Mr. McCarthy testified that toward the end of the notes he had written "MOM LEAVES," indicating that all subsequent notes reflect discussions after the parent left the meeting. (Tr. Vol. II, 479:22-480:19; Petitioner's Ex. 514).

116. Mr. McCarthy testified that after Mrs. B left the September 5, 2018 meeting, Ms. Keith expressed concerns about "other areas" in which A.B. may very well have difficulties, including music class, where A.B.'s sensory issues seemingly triggered his behavior. (Tr. Vol. II, 479:22-481:19; Petitioner's Ex. 514). Mr. McCarthy testified District staff also discussed Autism Specialist Karen Dallas as a potential resource but decided she would only be brought in if Dr. Wiseman deemed it necessary. (Tr. Vol. II, 481:3-482:2). Ms. Dallas was not brought in to assist with the evaluation. (Tr. Vol. II, 483 :4-6).

117. The information discussed outside the presence of Mrs. B at the September 5, 2018 meeting included topics that Mr. McCarthy, as a practicing school psychologist, would convey to parents, noting that if the discussion involved a decision requiring additional consent from the parent prior to acting, he would mention that to the parents before anything was done. (Tr. Vol. II, 483:17-484:13).

118. An initial evaluation looks at first-time eligibility for a student. An initial evaluation has general education interventions data either prior to going to the initial or it is done simultaneously while the team conducts the initial evaluation. (Tr. Vol. IV, 1001:8-1002:2).

119. Dr. Wiseman testified that the purpose of evaluating a student is to determine if that student has a qualifying disability as well as to gather information that can later be used to formulate goals. (Tr. Vol. II, 414:7-20). A disability category for a student does not necessarily limit the supports that the student receives. (Tr. Vol. II, 414:21-415:1-3).⁸

120. Ms. Ostby testified that in the State of Kansas, a two-prong test is used to determine whether a student is eligible for special education services. The first prong of the test looks at exceptionality; the second prong of the test looks at need. After conducting an initial evaluation, either using response to intervention or strengths and weakness, the team takes that data and compares it to one of the categories in the exceptionality, prong one (1). Then prong two (2) looks at need - does the student demonstrate a need for special education services or specially designed

⁸ The transcript section referenced at Vol. II, 414:21 starts out "SIT important..." Upon reviewing the entirety of the questioning and answers, it appears it should read "Is it important..."

instruction. The District must have data to support indicators on both prongs for a student to be considered eligible for special education in the State of Kansas. (Tr. Vol. IV, 991:25-992:17).

121. Ms. Ostby testified that a student cannot be found eligible based on a medical diagnosis alone. The same requirements are needed for an initial evaluation, whether they have a medical diagnosis or not. Certainly, the medical diagnosis will be considered as part of the data, but a medical diagnosis alone without data is insufficient. (Tr. Vol. IV, 995:25-996:6).

122. Ms. Ostby testified that both the IDEA and Kansas law require multiple data points during an evaluation: data from general education interventions, which provides a rich source of information; medical history; interview of the parent, teacher and student, when appropriate; interview of any past teachers; observations in the classroom and across school settings, if needed; test scores; and behavioral rating. The District strives to have a variety of data to look at when doing an initial evaluation because a convergence of data is required. (Tr. Vol. IV, 994:23-995:24).

123. The District conducted an FBA as part of the initial evaluation for A.B. because there was a reason to suspect A.B.'s behavior might be interfering with his progress in the general education classroom. (Tr. Vol. I, 188:16-19; Vol. IV, 993:7-14, 1031:2-8).

124. Dr. Weigand testified the purpose of an FBA is to determine the function of behaviors. (Tr. Vol. I, 188:20-189:21, 196:5-10).

125. Dr. Wiseman conducted the first FBA of A.B. beginning in fall 2018. (Tr. Vol. II, 411:17-25).

126. Ms. Koertner testified an adequate FBA will be based upon observations, clear description of the target behavior, and antecedent/behavior/consequence data, as well as teacher and parent interviews. (Tr. Vol. V, 1219:12-17).

127. Ms. Ostby testified that generally, to conduct an FBA, the District will collect baseline data through a parent report and teacher observation. Then a person on the team, typically the behavior support teacher, will observe the student and obtain more data. Then all the data is analyzed to determine a target behavior. Additional data is collected within the classroom, ABC data, as well as other data. The District would want to obtain a student interview, teacher interview, review of history, what behavior interventions have been tried in the past, what has and has not worked, whether there is any unique medical information, developmental information, and parent input. (Tr. Vol. IV, 993:15-994:10).

128. Dr. Weigand and Ms. Ostby both testified that to determine why a student exhibits challenging behaviors, evaluators need to collect ABC data. (Tr. Vol. I, at 164:11-165:8; Tr. Vol. IV, 993:15-994:10). Without correct ABC data for each occurrence, evaluators are not developing a complete picture of why the behavior is being exhibited. (Tr. Vol I, at 166:25-167:4).

129. Target behavior is the behavior that is interfering or that they need to figure out the function of it or why the student is engaging in that behavior. (Tr. Vol. IV, 994:11-15).

130. If the target behavior is redefined midway through the FBA process, the team should indicate the changed definition in the evaluation and not combine the data. (Tr. Vol. IV, 1071:4-1072:3).

131. The September 10, 2018 daily behavior report provides: "Target Behavior: Direction following - The student will complete a given direction with no more than 4 verbal prompts," whereas October 2018 daily behavior sheets thereafter provided "Following directions and completing my work with fewer than 3 prompts." (JE-1, pp. 236, 350-362).

132. Ms. Shields testified the first time she became aware of A.B. as a student was toward the beginning of the school year when Ms. Keith, the principal, pulled A.B.'s cumulative file and discussed it with her. (Tr. Vol. II, at 249:7-23). Ms. Keith mentioned A.B. did not qualify for services before entering kindergarten. Ms. Shields stated she believed that Ms. Keith discussed A.B. with her to put it on her radar as being something they need to be ready for. (Tr. Vol. II, 250:19- 20, 251:3-17). Ms. Shields testified her discussion with Ms. Keith is the type of communication she has to ensure she satisfies the District's Child Find obligation. Those kinds of communications lead to subsequent evaluations and ultimately to the delivery of special education services to eligible students. (Tr. Vol. II, 258:13-22).

133. On September 10, 2018, Ms. Shields sent an email to Ms. Breford stating, in part: "What I have heard through the grapevine, he could possibly be on the spectrum." (Tr. Vol. II, 252:16-253:13; Petitioner's Ex. 49).

134. Ms. Hoffman testified that as of September 17, 2018, she noticed A.B. was exhibiting atypical behavior. A.B. refused to do work, scribbled all over it or ripped it up; refused to be a part of any type of instruction; did not want to sit with the group; did not listen to reading instruction; did not listen to math instruction; struggled with following directions; and didn't go where he was supposed to be. (Tr. Vol. II, 280:17-281:7). Ms. Hoffman testified A.B. presented challenges she did not know how to handle and "[A.B.] had challenges that I needed support to figure out how to handle." (Tr. Vol. II, 300:13-18).

135. The special education team worked with Ms. Hoffman to help create the daily behavior sheets that were used for A.B. (Tr. Vol. II, 265:13-25).

136. Ms. Ostby testified that Ms. Hoffman filled out daily behavior reports, and Dr. Wiseman used Ms. Hoffman's data to fill out the ABC information in her FBA Data Collection sheets. (Tr. Vol. IV, 1011:22-1012:12, 1021:25-1022:6, 1066:13-23; JE-1,p. 648).

137. Ms. Ostby testified the daily behavior reports failed to collect ABC data. (Tr. Vol. IV, 1066:24-1068:14). Ms. Koertner testified she looked through Ms. Hoffman's daily reports "to get the gist, but I didn't - they weren't ABC data sheets, or they weren't about antecedent/behavior/consequence." (Tr. Vol. V, 1222:23-1223:8).

138. From August 2018 through October 2018, data for a Student Progress Monitoring Graph for First Sound Fluency recorded for A.B. showed that he was making progress at First Sound Fluency. On three out of four data points, A.B. was above the "aimline," and he scored at or above the benchmark goal on the last two data points (taken end of September and beginning of October 2018). (JE-1, p. 208).

139. From September 12, 2018 through January 18, 2019, the District collected data on forms titled "FBA Data Collection."⁹ The form instructed: "PLEASE USE WHEN DISRUPTIVE BEHAVIOR IS PRESENTED (i.e., noise making, talking to students, throwing papers, throwing supplies, talking loudly)." (JE-1, pp. 648-668).

140. The FBA Data Collection Sheets were memorialized daily. The classroom teacher was taking data every single day and then the data was transferred to the ABC data sheets either that same day or within a day or two. (Tr. Vol. IV, 1013:23-1014:9; JE-1, p. 644-691).

141. Dr. Weigand testified she had concerns about the FBA Data Collection sheets and stated none of the described behaviors addressed A.B.'s primary target behavior of "not following directions." (Tr. Vol. I, at 164:4-166:25; Pet. Ex. 503, at 9-10).

142. Dr. Weigand's report concluded the FBA Data Collection sheets were generic forced choice data sheets, meaning the information collected must fit into the forced choices for the observed antecedent, behavior, or consequence, or be separately described under the "other" category. (JE-1, pp. 648-668; Petitioner's Ex. 503, at 10).

143. Beginning on September 6, 2018 and continuing through May 21, 2019, Daily Behavior Notes and Clipboard Sheets with Today's Goal were recorded for A.B. The Daily Behavior Reports monitored A.B.'s day and noted behavioral incidents (such as disrupting group instruction, not completing work, not following directions), as well as desired behaviors (such as following directions, participating in group time, completing his work), and whether or not A.B. completed a think sheet. Beginning on November 1, 2018, the Daily Behavior Reports included a column to track use of the "buddy room". See (JE-1, p. 346). The Clipboard sheets kept track of daily goals and whether or not A.B. followed directions, was on task, or displayed any unwanted behaviors. (JE-1, p. 235-639).

⁹ Initially, the team collected data from September to November 2018; however, Mrs. B felt as if the data did not accurately portray A.B. so the team agreed to go back and conduct additional data collection and analysis. (Tr. Vol. IV, 1014:10-1015:1; JE-1, pp. 644-91).

144. Beginning on September 12, 2018, additional data was collected as part of the evaluation, including:

- Parent Interview on November 1, 2018.
- Functional Behavioral Assessment Data Collection on:
 - o Sept 12, 13, 18, 24, 25, 26, 28;
 - o Oct 1, 2, 3, 5, 9, 15, 16, 22, 23, 25, 26, 29;
 - o Nov 15, 16, 27, 28, 29;
 - o December 3, 4, 6, 7, 10, 11, 12, 13, 14, 17;
 - o January 7, 9, 10, 11, 14, 17, 18.
- Functional Behavioral Assessment Observation created by Dr. Wiseman on September 20, 2018 in reading and PE.
- Daily Behavior Reports & Clipboard Sheets, p. 27-48; data collected on Sept 12, 13, 14, 18, 21, 24, 25, 26, 28; Oct 1, 2, 3, 4, 5, 9, 15.

145. Beginning on September 12, 2018, a spreadsheet titled "AB Data Destroyer Spreadsheet" was created to record A.B.'s data. The data collection charts consisted of data recorded regarding A.B.'s Following Directions Data; A.B.'s Behavior by Subject; Frequency of A.B.'s Behaviors; A.B.'s Following Directions Data; Frequency of Behaviors per Day; Frequency of Target Behaviors; Frequency of Behaviors per Day; Incidents of Target Behavior by Setting; Escalated Incidents in Gen. Ed. & Unstructured Settings; Target Behavior Incidents by Subject; Frequency of Behaviors per Day; Frequency of Behaviors per Day. Data was collected during the 2018/2019, school year on: Sept 12, 18, 24, 30; Oct 6, 12, 18, 24, 30; Nov 5, 11, 17, 23, 29; Dec 5, 11, 17, 23, 29; and Jan 4, 10, 16. (JE-1.049 (*excel spreadsheet*)).

146. Beginning on September 12, 2018, an additional spreadsheet titled "AB Frequency Data Spreadsheet" was created to record data regarding the frequency of A.B.'s behaviors. (JE-1.050 (*excel spreadsheet*)).

147. Beginning on September 12, 2018 through January 16, 2019, data collection for A.B. was also recorded as A.B. Frequency of Refusal Behavior. The target behavior was, "Refusal - a response to a given direction that does not match what was being asked of [A.B.]. This could include ignoring the direction, completing work how he wanted to do it and/or saying 'no' to a given direction." Other behaviors observed included disruption (noise making, wondering room, and/or messing with other's materials), verbal aggression (calling peers/teachers names), property destruction (tearing up work or classroom materials), physical aggression (hitting or throwing objects), and inappropriate peer interactions (rough housing). Overall, from September 12, 2018 through January 16, 2019, there were sixty-nine (69) incidents of refusal; twelve (12) incidents of disruption; one (1) incident of verbal aggression; five (5) incidents of property destruction; three (3) incidents of physical aggression; and three (3) incidents of inappropriate peer interaction. The data points showed that the incidents were more common in September 2018 and were less common by January 2019. (JE-1, p. 642).

148. On September 12, 2018, a spreadsheet titled "AB Deep Data Spreadsheet" was created to record A.B.'s data. Data recorded included Incidents of Target Behavior by Setting; Escalated Incidents in Gen. Ed. & Unstructured Settings; Incidents and Removals by Subject; and Frequency of Target Behaviors. Data was collected from 09/12/18-01/18/19. (JE-1.052 (*excel spreadsheet*))

149. The classroom teacher collected data daily and transferred the data to ABC data collection sheets for the FBA. ABC data collection sheets are used to further analyze the data that was collected. The sheets were then given to Dr. Wiseman and Mrs. B. (Tr. Vol. IV, 1011:22-1012:12, 1014:2-7; JE-1, p. 648-668). The ABC data collection sheets show A.B.'s action, reaction and antecedent behavior. For instance, a behavior would occur in the classroom setting. The trigger for the behavior was a request from an adult. A.B.'s response to that trigger was work refusal and then, Ms. Ostby is assuming, aggression. Then A.B. was asked to leave the classroom because of the aggression and go to the buddy room. (Tr. Vol. IV, 1013:6-16; JE-1, p. 648-691).

150. Ms. Hoffman reported on A.B.'s daily behavior sheets if he was sent to the buddy room. (Tr. Vol. II, 268:9-17). The ABC data collection sheets indicated that A.B. was sent to the buddy room a total of eight times from September 12-October 22, 2018. (Tr. Vol. IV, 1011:22-1012:19; JE-1, p. 648).

151. On September 17, 2018, Dr. Wiseman sent an email to Ms. Hoffman discussing the implementation of a reinforcement plan and use of daily behavior sheets to help A.B. with the home to school communication. (Tr. Vol. II, 278:2-16; Petitioner's Ex. 50).

152. Ms. Hoffman testified it took A.B. about three months to adjust and adapt to his routine. (Tr. Vol. II, 287:23-25). Before adjusting and adapting to the routine, A.B. did not complete much work; minimally participated in the classroom; and, although he was in the classroom, A.B. did not appear fully engaged in the instruction. A.B. was sent to the buddy room "A couple of times" because he failed to follow directions. In the beginning, A.B.'s connections with his peers were minimal, and he might not have even felt that he did not have a friend in the class. (Tr. Vol. II, 288:1-14).

153. Ms. Hoffman testified that in the classroom she saw significant improvements in A.B.'s behavior, his ability to follow directions, and his willingness to complete work. It was not perfect, but Ms. Hoffman does not expect any kindergartener to always follow directions. Nonetheless, she noticed a significant difference in A.B.'s behavior from the beginning of the year to the end of the year. By the end of the year, A.B. would sit down and do his math worksheet, come to meet with the small group in reading, and complete one or two literacy center activities. Ms. Hoffman testified based on her observations in the classroom, A.B. was making progress. (Tr. Vol. II, 289:1-15).

154. In August and September 2018, A.B. underwent several assessments via station's Indicators of Progress (ISIP) to measure his reading ability. ISIP measures a child's ability in critical areas of reading. Ability scores are used to show reading growth throughout the school

year. On September 28, 2018, ISIP generated a "Student Summary Handout Report" detailing the results of those assessments. As of the report date, A.B. was reading at a tier-3 level, which meant he was at significant risk of not meeting grade-level expectations. Among other things, the assessments indicated that A.B. struggled with phonemic awareness, vocabulary, and letter knowledge and that he had ongoing difficulty with listening comprehension. (JE-1, p. 699-700). Mrs. B testified she received notification from the District that A.B. was going to be entered into a group of students to receive instruction from a reading teacher. (Tr. Vol. III, 574:17-575:1).

155. The Socially Savvy Checklist's rating system provides the following ratings:

0: Rarely or never demonstrates the skill

1: Has demonstrated the skill but only on a few occasions

2: Can demonstrate the skill but does not do so consistently

3: Consistently demonstrates this skill

N/A: Not applicable due to setting or because child compensates in other ways.

(Tr. Vol. II, 290:4-10; JE-1, p. 701). The Socially Savvy Checklist recommends the evaluator should observe the child in a social setting for at least a two (2) week period and the ratings should be based on the observations. (JE-1, p. 701). The final page of the Socially Savvy assessment represents a graph of the preceding pages of the checklist. (JE-1, p. 708).

156. Each iteration of the evaluation completed by the District in the 2018-2019 school year indicated Ms. Hoffman and a speech-language pathologist completed the Socially Savvy Assessment and had observed A.B. over the duration of the first quarter of school (Tr. Vol. II, 296:3-297:2, 297:20-298:4; JE-1, pp. 802, 824, 881, 1151). Ms. Hoffman testified she would rate the student in the listed skills, but that it was common for the speech-language pathologist to interpret the data. (Tr. Vol. IV, 412:18-413:15).

157. A Socially Savvy Checklist completed for A.B. in October 2018 indicated A.B. received ratings of "1" for eight items (mostly in classroom/group behavior), a "2" for 35 items, a "3" for 35 items, and a "4" for no items.¹⁰ (JE-1, p. 701-708). The October 2018 Socially Savvy did not include a completed graph for the areas of Social Language or Classroom/Group Behavior. (Tr. Vol. II, 281:16-283:21; JE-1, pp. 701-710).¹¹

158. A second Socially Savvy Checklist was created for A.B.; however, it is impossible to determine when the second survey was completed or who completed it. (JE-1, pp. 711-720).

¹⁰ It appears the evaluator(s) did not complete A.B.'s Socially Savvy Checklist correctly. The form allows the evaluator to record ratings for up to four (4) observations, as indicated by the columns numbered 1-4. A.B.'s evaluator(s) utilized the numbered columns to indicate a rating for each skill, even though the column numbers did not match the rating scale.

¹¹ In reviewing the record, the October 2018 Socially Savvy survey was missing pages 14 and 15. At the end of the October 2018 survey there are two (2) pages marked pages 14 and 15. (JE-1, pp. 709-710). These are different from the pages 14 and 15 that were included as part of the second Socially Savvy survey. It would appear these are the missing pages from the October 2018 survey and contain the information that was noted as missing. However, no effort was made to explain this or provide more information during the hearing.

159. A fall 2018 parent-teacher conference was held. The teacher's notes for the fall 2018 parent-teacher conference reflect the following:

- a. Reading: AB. showed great growth with letter and sound identification and that they would continue to work with sight words.
- b. Math: AB. recognizes the numbers they have studied with ease and counts to 100 without error.
- c. Writing: AB. creates imaginative drawings that tell a story and that they will continue to work on adding writing to match pictures.
- d. General Comments: "AB. is a creative, bright friend in class and they enjoy the knowledge and stories he continues to share." The teacher noted she was proud of all he has accomplished.
- e. DIBELS for Math: AB. scored above the composite goal (85/26);
- f. DIBELS for Reading: AB. scored below the composite goal (5/26).

(JE-1, p. 837).

160. A first quarter assessment was completed for AB. (JE-1, pp. 838-839). The first quarter assessment noted that A.B.: could write his name legibly; could identify upper- and lower-case letters and sounds for A, T, S; knows the capital letter P; knows sight words "I" and "a"; could provide rhyming words; and would name the first sounds in a few words. (JE-1, p. 838). The "school behaviors" section of the first quarter assessment noted that AB. was still working on several behaviors, including the following: raising his hand to speak; listening carefully; following directions; keeping his hands and feet to himself; sitting correctly on the carpet; and finishing assigned tasks. (JE-1, p. 839).

161. Mr. McCarthy was the member of the evaluation team responsible for conducting the Woodcock-Johnson Test of Academic Achievement for AB. (Tr. Vol. II, 465:18-24; 468:16-20; Petitioner's Ex. 515). Mr. McCarthy administered the Woodcock-Johnson Test of Academic Achievement for AB. (Tr. Vol. II, 465:18-24). AB. exhibited behaviors that impeded the successful administration of the assessment. (Tr. Vol. II, 466:15-467:9).

162. Mr. McCarthy felt competent to administer the assessment and provide the results to a licensed psychologist for review. (Tr. Vol. II, 466:12-14).

163. Mr. McCarthy cannot speak to what went into the placement of his results into AB.'s evaluation document because his involvement was to administer the assessment and provide the results to Ms. Ostby. (Tr. Vol. II, 477:8-12).

164. Dr. Wiseman conducted an FBA and looked at other social-emotional components during A.B.'s evaluation process during the kindergarten year. The social-emotional components were comprised of rating scales, which included the BASC-3 and a Socially Savvy checklist. (Tr. Vol. II, 411:19-412:10).

165. Dr. Wiseman sent Mrs. B a parent interview form for the FBA. (Tr. Vol. IV, 1008:22-1009:17). On November 1, 2018, Mrs. B completed the parent interview as part of the evaluation process. Her responses indicated A.B. told her he was sent out of the classroom frequently, to the principal's office, the nurse's office, Mr. Sheahan's office downstairs, or Ms. Flint's room. Mrs. B conveyed that A.B. seemed fearful and scared, other children told her that A.B. was the "bad kid" of the class, and the removals increased A.B.'s behavior problems. (Tr. Vol. IV, 1009:25-1010:19; JE-1, p. 645).

166. On November 5, 2018, a PWN was sent to Mrs. B scheduling a meeting for November 26, 2018 to review the evaluation, determine eligibility, and develop an IEP. (Tr. Vol. IV, 1015:2-24; JE-1, pp. 729-732).

167. On November 6, 2018, Ms. Hoffman provided Dr. Wiseman a copy of A.B.'s progress monitoring data.¹² The data points showed A.B. was above the benchmark goal for First Sound Fluency in October 2018. A.B. was above the "Aimline" for Phoneme Segmentation Fluency. (JE-1, p. 736).

168. On November 9, 2018, Ms. Hoffman completed a Children's Mercy Hospitals and Clinics Division of Developmental and Behavioral Sciences teacher questionnaire for purposes of A.B.'s pending medical autism evaluation. (Tr. Vol. II, 285:20-286:15; JE-1, pp. 737-755). Ms. Hoffman noted A.B. was receiving reading interventions two and a half hours per week. (JE-1, p. 743). Ms. Hoffman also noted A.B. was well below benchmark on DIBELS reading; had trouble listening and following directions; defied adults; and, had problems with body control, starting and completing tasks, and staying in directed areas. (JE-1, p. 743). Ms. Hoffman stated A.B. "has troubles making appropriate social connections with peers and detecting other's emotions...he is resistant to any activities he doesn't want to do and [it] has taken about 3 months for him to start to adjust to class structure." (JE-1, p. 743). Ms. Hoffman wrote "[A.B.] has made noticeable progress socially and behaviorally in school. It has taken him about 3 months to adjust/adapt to the routine and his peers. However, he is still far from typical Kindergarten behavior." (Tr. Vol. II, 287:5-15; JE-1, pp. 748-755). The far-from-typical behavior consisted of refusing to do work, struggling with following directions, connecting with peers, having conversations, and working through problems with peers. (Tr. Vol. II, 287:5-15). A.B.'s non-adaptation consisted of failing to complete the majority of his work; minimal classroom participation; lack of engagement in instruction; not following directions, resulting in being sent to the buddy room; and lack of peer

¹² This was asserted by the District as a proposed finding of fact; however, the supporting exhibit does not indicate whether it was sent, to whom, by whom, or when.

connections. (Tr. Vol. II, 288:1-14). A.B. did not feel like he had a friend in the class. (Tr. Vol. II, 288:1-14).

169. Dr. Weigand testified the BASC-3 is designed to identify areas of concern regarding problem behaviors, inattention, depression, and anxiety. (Tr. Vol. I, at 168:6-169:6). Dr. Weigand also testified the BASC-3 is a good screening predictor of autism and executive function abilities. (Tr. Vol. I, at 169:9-170:16).

170. On November 9, 2018, Ms. Hoffman completed a teacher rating scales of the BASC-3 form for A.B. (Tr. Vol. II, 293:12-22; JE-1, pp. 745-746, 756-757).

171. The parent and teacher complete lengthy questionnaires as part of the BASC-3. (Tr. Vol. I, at 165:6-15, 169:9-18; JE-1, pp. 800, 870-71, 878).

172. On November 14, 2018, Mrs. B completed a BASC-3 questionnaire at the request of the District. (Tr. Vol. III, 579:18-580:8; JE-1, pp. 758-794).

173. Per the parent BASC-3 input, A.B. was "at risk" in the following categories: hyperactivity, aggression, externalizing problems, anxiety, depression, internalizing problems, social skills functional communication, activities of daily living, and adaptive skills. (JE-1, p. 870-71). A.B. fell within the clinically significant range in the following categories: atypicality, withdrawal, and behavior symptoms index. *Id.* The overall adaptive composite was in the "at risk" range. *Id.* A.B.'s executive functioning parent score was also "at risk." (JE-1, pp. 766-67).

174. Per Ms. Hoffman's BASC-3 input, A.B. was "at risk" in the following categories: hyperactivity, conduct problems, anxiety, depression, and internalizing problems. (Tr. Vol. II, 295:4-19; JE-1, p. 871; Petitioner's Ex. 503, at 11-12). A.B. fell within the "clinically significant" range in the following categories: aggression, externalizing problems, atypicality, withdrawal, behavior symptoms index, adaptability, social skills, and study skills. *Id.*

175. Dr. Weigand testified executive functioning skills are those functions that enable us to get through our day. In the classroom environment, executive functions allow a student to locate materials, organize, plan how long it will take to complete an activity or transition to another, and schedule matters. (Tr. Vol. I, at 170:20-172:20; Petitioner's Ex. 503, at 11-13).

176. Dr. Weigand testified A.B.'s "at risk" score for executive functioning could indicate a skill deficit, i.e., it may be that he doesn't have the skills to perform certain tasks and not that he is behaviorally acting out or being noncompliant. (Tr. Vol. I, at 171:1-172:20; Petitioner's Ex. 503, at 12-13).

177. Dr. Weigand identified a separate portion of Mrs. B's BASC-3 questionnaire which scored A.B. as "clinically significant" in the areas of Developmental Social Disorders and Autism Probability. Dr. Weigand testified it was her opinion this result was another red flag as to the possibility of autism as a large proportion of children scoring in this range have or later obtain

an autism diagnosis. (Tr. Vol. I, 169:10-170:25, 178:20-179:13; JE-1, pp. 758-794; Tr. Vol. III, 582:1-6; Petitioner's Ex. 503, at 12).

178. A.B.'s BASC-3 resulted in very high percentile scores, greater than 96 and 83 percent of the normative population in some areas and "would warrant a future concern in follow-up" according to Dr. Weigand. (Tr. Vol. I, at 169:10-170:16; JE-1, pp. 870-71; Petitioner's Ex. 503, at 13). Dr. Weigand testified the complete report of Mrs. B's BASC-3 questionnaire provides that A.B.'s scores related to behaviors and developmental social disorders, "usually warrants follow-up" by the evaluation team. (Tr. Vol. I, 164:10-170:16; JE-1, pp. 758, 764-65, 767). Dr. Weigand also testified the report indicated follow-up may be necessary as it related to the following results: adaptive skills, externalizing problems, internalizing problems, executive functioning. (*Id.*).

179. Mrs. B testified that despite her concerns A.B. had autism, the District did not inform Mrs. B A.B. scored in the clinically significant range for developmental social disorders and autism probability in the BASC-3 assessment. (Tr. Vol. III, 582:1-23; JE-1, p. 766).

180. District members of A.B.'s evaluation team members met prior to evaluation team meetings involving A.B.'s parents, to make sure the employee-members were on the same page before presenting information to the parents.¹³ (Tr. Vol. II, 415:17-417:11). One such meeting occurred on November 12, 2018. (Tr. Vol. II, 416:11-417:11; Petitioner's Ex. 67). Dr. Wiseman stated the purpose of the November 12, 2018 meeting was to "discuss A.B.'s eval. and make sure we know what we are going to do with the information that's been evaluated...." (Petitioner's Ex. 67).

181. Dr. Wiseman could not recall whether the team members made an eligibility determination at the November 12, 2018 meeting. In a November 13, 2018 e-mail from Dr. Wiseman to Ms. Hensler, Dr. Wiseman wrote that the team members concluded they were likely not "going to qualify [A.B.]" and that "Kathy O[stby]" would be calling Mrs. B to discuss the same. (Tr. Vol. II, 417:17-418:17; Petitioner's Ex. 72). Dr. Wiseman sent this e-mail before Ms. Hensler had input the Socially Savvy results into A.B.'s evaluation, and before Ms. Hensler had determined whether A.B. needed speech services. (Petitioner's Exs. 72,73).

182. Less than three hours after Dr. Wiseman communicated the team members' conclusions from the November 12, 2018 meeting, Ms. Hensler advised Dr. Wiseman and Ms. Ostby "I don't think I'm going to qualify [A.B.] for speech/language." (Tr. Vol. II, 419:9-420:11; Petitioner's Ex. 73).

¹³ Parties, during the hearing, often referred to meetings at this stage of the process as an IBP team meeting; however, no decision had been made regarding the evaluation so an IEP team had not been established.

183. On November 15, 2018 at 11:14 a.m., Ms. Ostby emailed Mrs. B a draft evaluation.¹⁴ The draft evaluation did not include assessment results for Motor, Reading, and more details in "Assessment Results" for Communication. (JE-1, pp. 795-805).

184. On November 15, 2018 at 3:21 p.m., Ms. Ostby again emailed Mrs. B a draft evaluation.¹⁵ The draft evaluation did not include assessment results for Motor, Reading, and more details in "Assessment Results" for Communication. (JE-1, pp. 806-816).

185. Dr. Weigand testified that she found A.B.'s evaluation documents confusing. There were multiple iterations of documents that had the same date or lacked any date at all and were not labeled as drafts or adopted documents. (Tr. Vol. II, 396:19-397:19). There were at least four (4) different versions of the November 20, 2019 IEP. (Tr. Vol. II, 397:20-398:19; JE-1, pp. 1612-1669; Respondent's Ex. SMSD-12, pp. 5360-5375).

186. Dr. Weigand testified and concluded in her report that the FBA Data Collection sheets had missing data. Dr. Weigand pointed out that only 62 percent of the 79 behavioral episodes had complete data, rendering them unreliable for making conclusions regarding why the behavior is occurring. (Tr. Vol. I, at 164:11-16, 167:5-24; Tr. Vol. IV, 1068:23-1070:4; JE-1, p. 648; Petitioner's Ex. 503, at 10).

187. The District's FBA had several iterations, including December 18, 2018, February 13, 2019, and February 25, 2019 versions. (JE-1, pp. 886-890, 1061-1072, 1157-1162; Petitioner's Ex. 139).

188. Dr. Weigand testified that the FBA Data Collection sheets collected between September 12, 2018 through January 18, 2019 were missing 38 percent of the sought-after data and not consisting of ABC data at all, are the source of the underlying data informing the FBAs. (Tr. Vol. I, at 192-193:9; Tr. Vol. IV, 1011:22-1012:12, 1021:25-1022:6, 1066:13-23; JE-1, p. 648).

189. Dr. Yell testified that the assessment is the foundation upon which the IEP is developed and to the extent the assessment is wrong, probably everything else is going to be wrong. (Tr. Vol. VI, 1546:20-23).

190. Dr. Weigand testified that depicting correct data in an evaluation is important because the team will use data to determine which interventions to put in place. Interventions based on inaccurate data may be ineffective and could result in the incorrect conclusion that the student is not responding to an intervention, when in fact the intervention is not designed to result in the desired behavior from the start. (Tr. Vol I, at 160:25-161:13).

¹⁴ The District proposed a finding of fact that this happened; however, the supporting exhibit contains no information to support the claim.

¹⁵ The District proposed a finding of fact that this happened; however, the supporting exhibit contains no information to support the claim.

191. On November 26, 2018, the draft evaluation was updated to include assessment results for Motor, Reading, and more details in "Assessment Results" for Communication. Several individuals were identified as participants on the draft evaluation, including Dr. Wiseman, Ali Bivona (instructional coach), Ms. Hoffman, Mrs. B, and the speech-language pathologist. The evaluation incorporated the results from the general education interventions instructional review whereby A.B.'s progress was monitored weekly using DIBELS. A.B. received general education interventions in following classroom rules, directions, and work completion. Data was taken daily on his ability to follow directions and complete work. Visual supports, reinforcement system, social stories, schedules sensory and activity breaks, options for assignments and work area and warnings for transition were the interventions that were put in place for A.B. The evaluation incorporated the assessments that were given to A.B. for the areas of: social/emotional (*i.e.*, BASC3, FBA, parent and teacher interviews, observations, review of file); academics (*i.e.*, Woodcock-Johnson IV Test of Achievement, Curriculum Based Measurements, Number Sense Screener, observations, parent interview, teacher interview, review of records); communication (*i.e.*, Socially Savvy Survey & Test of Pragmatic Language); and fine motor (*i.e.*, Observation, teacher interview, informal fine motor assessment). (JE-1, pp. 817-828).

192. On November 26, 2018, a draft FBA was created for A.B. The target behavior was direction refusal: "not following a specific direction given by adult or ignoring a direction and engaging in preferred activity." Indirect and descriptive assessment methods were conducted during the FBA. Evaluators and staff collected data using ABC data, behavioral observations, review of records, and interviews with staff and parents. (JE-1, pp. 829-833).

193. The FBA included information from a teacher interview with Ms. Hoffman. Ms. Hoffman stated A.B. has made significant improvements to his behavior since beginning school and that he has responded well to the visual supports, verbal praise, and does best when he is given choices and is primed for transitions and changes to schedules. Ms. Hoffman shared A.B. had a hard time initiating play with peers and he will often ask her to help him navigate those conversations; Ms. Hoffman has been modeling that for him and having him practice appropriately interacting with his classmates. (JE-1, pp. 829-830).

194. The FBA stated the previous behavior interventions were positive reinforcement, scheduled activity and sensory breaks, choices provided, daily behavior sheets, first/then visuals, count down system, and providing directions in a variety of ways. (JE-1, p. 830).

195. The FBA dated November 26, 2018 also included data collected from Ms. Bivona's observation of A.B. on August 30, 2018, as well as Dr. Wiseman's observations of A.B. on September 20, 2018, and again on November 1, 2018. (JE-1, pp. 830-831).

- a. In August 2018, Ms. Bivona observed as A.B. disruptively talked to his neighbors after several reminders not to talk during instruction; sat at a safe seat during workshop time and colored with crayons; followed directions to turn in work; during literacy centers, threw toys and books around the room; threw

connecting cubes around the art center; and turned stools from the teacher's table upside down. (JE-1, p. 830).

- b. In September 2018, Dr. Wiseman observed as A.B. sat in his own, preferred location during a whole group lesson; ignored a given direction to get a book for their whole group reading lesson; redirected; failed to comply when provided the choice of where to sit. (JE-1, p. 830).
- c. In November 2018, Dr. Wiseman observed A.B. for 20 minutes. During that time, A.B. was on task 70% of the time. He was verbally redirected five times and verbally reinforced for appropriate behavior twice. (JE-1, p. 830).

196. The November 26, 2018 FBA included a section recapping the ABC Data collected over 16 days from September 12 to October 15, 2018. The FBA's summary of ABC Data included the following notes:

- a. During the 16 data days, A.B. met the aim goal of 80% (11 out of 16 days).
- b. A.B. averaged 84% on his daily behavior sheets.
- c. On five out of 16 days, A.B. had to visit the buddy room because he either acted aggressively or he had to be redirected more than three times.
- d. A.B. failed to meet the aim goal of 80% during morning work, reading, specials, and math.
- e. A.B. had 28 recorded instances of work refusal in the regular education setting, 10 instances of aggression, and four instances of ruining his assigned work.

(JE-1, pp. 830-831).

197. The November 26, 2018 FBA Summary of Data stated:

In reviewing the data collected during the evaluation period, A.B.'s behaviors were higher in the core subjects (reading/math), as well as during specials time when A.B. has various adults working with him and different expectations than his regular classroom environment. In evaluating the remarks on A.B.'s daily sheets, it appears that the function of A.B.'s behavior is to escape or avoid undesired worktasks.

(JE-1, pp. 832).

198. The FBA's section on behavior intervention recommendations and strategies provided:

Direct teaching of replacement behaviors; teach social skills to increase positive peer interactions; warnings for transitions and changes to schedule; teach problem solving and processing routines for when he's frustrated; schedule sensory breaks; and prompts to utilize pre-taught coping strategies.

(JE-1, pp. 832-833).

199. The first evaluation team meeting was scheduled for November 26, 2018. There was a snow day on November 26, 2018. (Tr. Vol. III, 585:2-16; JE-1, pp. 733-735). Ms. Ostby tried to immediately reschedule the November 26, 2018 meeting for November 28, 2018, but Mrs. B was not available. The District attempted to reschedule for December 1, 2018. However, on November 28, 2018, Mrs. B said that she was already booked up for the next two weeks. Mrs. B suggested December 5 or 6, 2018, and the meeting was scheduled for December 6, 2018, at 10:30 a.m. (Tr. Vol. IV, 1015:2-24; Tr. Vol V, 1099:16-1100:20, 1101 :10-22.; JE-1, pp. 733-735 and 840-843).

200. On December 1, 2018, a PWN was prepared stating that the November 26, 2018 meeting was not held due to inclement weather, and that the team agreed to meet on December 6, 2018 to review initial evaluation results to determine if A.B. meets eligible criteria as child with exceptionality and demonstrates a need for services. (JE-1, p.840-843).

201. Prior to the December 6, 2018 meeting, Mrs. B hired an educational advocate, Rand Hodgson, to help her navigate the special education process. (Tr. Vol. III, 669:22-670:8).

December 6, 2018 Evaluation Team Meeting

202. The evaluation team, including Mrs. B, met on December 6, 2018. (JE-1, pp. 840-841). Dr. Wiseman testified the team's discussions focused on the evaluation documents, and not whether AB. was a child with exceptionality. (Tr. Vol. II, 420:20-421:16).

203. Mrs. B testified the team reviewed one iteration of a Confidential Educational Evaluation dated November 26, 2018 at the December 6, 2018 meeting, and had a lot of "back and forth" regarding discrepancies in the data. (Tr. Vol. III, 586:14-588:2; JE-1, pp. 817-828).

204. According to testimony provided by Ms. Ostby, the draft Confidential Educational Evaluation set forth the General Education Intervention Instructional Review, which detailed the following:

- a. AB. received general interventions in reading or early reading skills. AB. participated in K-PALs, which uses literacy activities to improve early reading

skills especially for students who are below benchmark in phonemic awareness, phonics, and fluency. (Tr. Vol. IV, 1025:5-12; JE-1, p. 818).

- b. Regarding progress on First Sound Fluency, A.B. came into school in August with no such fluency. Interventions were implemented, and A.B.'s progress was monitored using the DIBELs for sound fluency. The data show that A.B. made above typical progress in First Sound Fluency. (Tr. Vol. IV, 1025:13-20; JE-1, p.818).
- c. The dots reflect A.B.'s progress monitoring data. The four lines are the pathways of progress, which show his progress or the future trajectory of his progress and assist in evaluating a student's rate of growth compared to other students with the same levels of initial skills. If a data point is above the blue line, then it means well above typical progress; and, if it is above the green horizontal line, then it means typical progress. A data point falling in the yellow area is below typical progress, and anything under the red line is well below progress. (Tr. Vol. IV, 1025:19-1026:21; JE-1,p. 818).
- d. Kathy Ostby testified that the data show that through "October [2018] with the K-PALs intervention, [A.B.] had made some pretty good progress" on First Sound Fluency. (Tr. Vol. IV, 1026:18-21).
- e. The data relating to his daily behavior, as reflected in the daily behavior chart, showed that A.B. had not demonstrated a significant decrease or increase in behaviors despite the implementation of interventions that were being used in the classroom during the data collection period. His behaviors were steady. (Tr. Vol. IV, 1027:9-17; JE-1, pp. 818-819).

205. Ms. Ostby testified the Anecdotal Information section of the Confidential Educational Evaluation was developed with information taken from A.B.'s grade card and comments that the teacher might have made. That section reflects that A.B. received an "improving" in English, language arts, and art. In personal development, A.B. was rated as "needs improving." (Tr. Vol. IV, 1027:18-25; JE-1, p. 819).

206. Dr. Weigand concluded the evaluation reports did not discuss areas of weakness; rather, they described these issues in terms of an "emerging" skill. However, the information available was insufficient to inform under what conditions the skill was emerging or whether the skill was developing. (Tr. Vol. I, at 174:25-176:20; JE-1, pp. 801-02, 824-25, 881-82; Pet. Ex. 503, at 13-14).

207. Classroom Accommodations reflect the interventions put into place by Ms. Hoffman within the general education environment to help A.B. be successful. (Tr. Vol. IV, 1028:1-7; JE-1, p. 819).

208. The Norm Referenced, Standardized Achievement Data section referred to various assessments that kindergarteners take, including the DIBELs Indicators of Early Reading Benchmark Assessments, which is comprised of seven measures aimed at measuring early reading skills. A.B. did one for sound fluency. A.B.'s reading scores were below the expected levels. Another assessment that kindergarteners take is the DIBELs Math Benchmark Assessments. It looks at different math skills. On the math assessment, all of A.B.'s scores were extremely high for a kindergartner except for number identification fluency. (Tr. Vol. IV, 1028:8-23; JE-1, p. 819-820).

209. Under the Motor section there is a typo that "no additional data" was needed because new data was collected. Ms. Ostby testified the occupational therapist worked with A.B. and determined that his fine motor skills were not discrepant from his peers. Ms. Ostby further testified the occupational therapist did recommend some things. (Tr. Vol. IV, 1030:12-22; JE-1, p. 821).

210. The BASC-3 results displayed in the evaluation reviewed at the December 6, 2018, meeting were the same BASC-3 results described in the findings of fact, paragraphs 173-174. Mrs. B testified that this portion of the evaluation document was hard to read during the evaluation team meeting on December 6, 2018. Moreover, the Confidential Educational Evaluation discussed at the meeting did not include the results for the areas of Developmental Social Disorders and Autism Probability in which A.B. was scored "clinically significant". (Tr. Vol. III, 588:3-589:12; JE-1, pp. 817-828, 871, 758-795).

211. The Confidential Educational Evaluation reviewed at the December 6, 2018 meeting summarizes the Woodcock-Johnson reading assessment completed by Mr. McCarthy.¹⁶ (Tr. Vol. III, 591 :24-592:3; JE-1, p. 823).

212. Mr. McCarthy identified the narrative following the Woodcock-Johnson scores in the December 18th evaluation as something he wrote. (Tr. Vol. II, 498:13-499:7; JE-1, p. 879). Mr. McCarthy's narrative and test results also appear in the November 26, 2018, evaluation iteration, which is the evaluation reviewed at the December 6, 2018, meeting that included Mrs. B. (Tr. Vol. III, 591 :24-592:3; JE-1, pp. 823, 879).

213. Mr. McCarthy's privately retained Woodcock-Johnson write-up is noticeably different than the November 26, 2018, and December 18, 2018, evaluation report summaries of the Woodcock-Johnson:

- a Broad Reading: Mr. McCarthy's write-up had a score of 78, seventh percentile, "very low." The November 26th December 18th evaluations displayed a score
- of 78, no percentile, and "low." (Petitioner's Ex. 515; JE-1, pp. 823, 879).

¹⁶ Mr. McCarthy retained his write-up of A.B.'s Woodcock-Johnson after leaving the District and produced it and other documents in response to Petitioners' subpoena. (Tr. Vol. II, 467:10-468:18).

- b. Basic Reading: Mr. McCarthy's write-up had a score of 71, third percentile, "extremely low." The November 26th and December 18th evaluations displayed a score of 71, no percentile, and "low." *Id.***
- c. Reading Fluency: Mr. McCarthy's write-up had a score of 76, fifth percentile, and "very low." The November 26th December 18th evaluations do not describe any reading fluency scores. *Id.***

214. Mr. McCarthy could not explain why his write-up was different than the evaluation. (Tr. Vol. II, 477:1-20, 497:3-498:8). In his current role as school psychologist, Mr. McCarthy inputs the percentiles and classifications in his student evaluations. (Tr. Vol. II, 477:22-478:6).

215. Mr. McCarthy's narrative provides, in part, that A.B.'s scores "would tend to indicate that he shows significant deficits with his overall reading capabilities," and described that A.B. refused to participate on several subtests. (JE-1, p. 823).

216. Mrs. B testified she had expressed concerns at the evaluation team meeting regarding A.B.'s ability to read, and that the assessor was unable to even complete the assessment because of A.B.'s behaviors. (Tr. Vol. III, 592:4-593:13). Mrs. B testified she was not privy to A.B.'s percentile scores, categorization of "very low" and "extremely low," or reading fluency scores depicted in Mr. McCarthy's privately retained Woodcock-Johnson write-up. (JE-1, pp. 817-829). Mrs. B testified Ms. Ostby told her Ms. Ostby would retest A.B. herself and asked about using M&M's as a reward to help get A.B. through the test. (Tr. Vol. III, 592:4-593:13).

217. The Confidential Educational Evaluation documented two general education observations by Dr. Wiseman. The first observation occurred on September 20, 2018, for 30 minutes, and the second observation occurred on November 1, 2018, for 20 minutes. Dr. Wiseman's observations in the November 15th and 26th evaluation iterations were limited to the general education environment. (JE-1, p. 820). A separate observation by Alison Bivona was also noted in the evaluation. (JE-1, p. 820).

218. Dr. Weigand testified that in her opinion Dr. Wiseman's observations were of insufficient duration and taken months apart, were not in all areas of the school environment, and did not give a clear picture of how much instruction A.B. was losing. (Tr. Vol. I, at 161:14-162:19; JE-1, pp. 795-805).

219. The Confidential Educational Evaluation reviewed at the December 6, 2018 meeting summarizes the "Socially Savvy" Assessment to evaluate A.B.'s communication status, in part as demonstrating "[o]verall, A.B. is presenting with some really nice social skills [b]ecause he has made progress in this area and with his skills emerging, social skills can continue to be addressed within the general education setting as opportunities present themselves." (JE-1, pp. 825).

220. Dr. Weigand testified she observed that A.B.'s scores on the Socially Savvy varied throughout all the domains it measured, some demonstrating inconsistencies with a skill set. (Tr. Vol. I, 174:25-20; JE-1, pp. 709-720).

221. The Confidential Educational Evaluation reviewed at the December 6, 2018, meeting provides a "summary and conclusions" of A.B.'s evaluation. (JE-1, p. 826). The following provisions of the summary and conclusions page of the evaluation demonstrate that the District concluded A.B. did not qualify for special education:

- a. "... social skills can continue to be addressed within the general education setting with the general education teacher."
- b. "His needs are being met within the general education classroom."
- c. "A.B.'s behavior is not significantly discrepant from his peers."
- d. "A.B.'s skills are not discrepant from same age peers."

(JE-1, p. 826).

222. Behavior data depicted in A.B.'s evaluations originate from the FBA. (JE-1, pp. 818-819, 830-831).

223. Ms. Ostby testified the data from daily behavior sheets was used as part of the analysis of data for the FBA because the target behavior was following directions. (Tr. Vol. IV, 1021:25-1022:6, 1067:21-25, 1070:8-9).

224. Ms. Ostby testified that during the evaluation team meeting Mrs. B raised concerns about the daily note sheets. Mrs. B observed that the classroom teacher was supposed to mark if A.B. followed or failed to follow a direction and do so during every subject or every 30 minutes; however, there were times when the teacher would check "yes, he followed the direction," but then would include an anecdotal that suggested he had not actually followed the direction. So, there were some inconsistencies there. (Tr. Vol. IV, 1019:23-1020:15; JE-1, p. 236).

225. Ms. Ostby testified the daily behavior sheets tracked A.B.'s response to directions; the number of times he failed to follow directions; whether he followed directions or not; and notes reflecting consequences and antecedent that may aid. It was done through anecdotal instead of forced choice. (Tr. Vol. IV, 1020:12-1021:13, 1067:2-7; JE-1, p. 236).

226. Ms. Ostby testified the daily behavior sheets were a way to collect data. The District had also put some interventions in place within the classroom they were tracking. They used social stories that were reviewed periodically throughout the day. A.B. had a reinforcement program, a special location in the classroom, a first-then schedule, and other visual supports. (Tr. Vol. IV, 1020:12-15, 1021:10-24; JE-1, p. 236).

227. Ms. Ostby testified if data would lead them to think they did not have the right behavior targeted, then maybe they could redefine the target behavior midway through the FBA process. Ms. Ostby also testified that following directions remained the target behavior for the FBA completed for A.B. (Tr. Vol. IV, 1070:5-1071:3).

228. Ms. Ostby testified that if the definition of the target behavior changed, then she would expect something would be included to show the definition and state that data was now being taken for that target behavior; however, that did not occur for A.B. Furthermore, Ms. Ostby testified that the data would not be combined. (Tr. Vol. IV, 1071:4-1072:3).

229. One concerning behavior exhibited by A.B. was not following directions. Dr. Weigand testified that she believed the Confidential Educational Evaluation studied whether A.B. was following directions, the converse of the concerning behavior. (Tr. Vol. I, at 159:13-160:5; JE-1, pp. 795-805, 817-828, 872-885).

230. Dr. Weigand testified the Confidential Educational Evaluation iterations purport to document "A.B.'s Daily Behavior," but in her review actually aggregate data in weeks, reducing the sensitivity of the data. Further, they measure behavior in terms of percentages, but are not grounded in an understandable measure. (Tr. Vol. I, at 159:5-160:24; JE-1, pp. 796, 819; Pet. Ex. 503, at 11).

231. Mrs. B testified the evaluation team attendees were not acknowledging A.B.'s robotic tone and speech during the December 6, 2018, meeting, and she asked team members to reconsider that. (Tr. Vol. III, 593:14-23).

232. Ms. Ostby testified Mrs. B's concerns were about the FBA and Mrs. B did not feel the FBA represented A.B.'s behavior or gave a complete picture of A.B. (Tr. Vol. IV, 1019:8-19).

233. Mrs. B testified the behavior summary in the evaluation contradicted A.B.'s daily behavior reports and statements of Ms. Hoffman, as well as Mrs. B's observations. (Tr. Vol. III, 591:9-23).

234. The summary and conclusions page, as complimented by the District's internal emails preceding the December 6, 2018 meeting and discussions at the December 6, 2018 meeting, indicates that District evaluators determined A.B. did not qualify for services or have a disability. (Tr. Vol. III, 590:12-591:23, 592:15-593:13; Findings of Fact 101-103).

235. Ms. Ostby testified that in looking at all of the data, she felt A.B. "was likely to be eligible for special ed" as far back as the December 6, 2018 evaluation team meeting and "the team did feel like we had enough data to make a determination. (Tr. Vol. IV, 1035:19-1037:12). Ms. Ostby further testified that the team "didn't get past the functional behavior assessment before we started having - trying to, I guess, remedy or figure out where the breakdown was with what

information [the District] had gathered on the FBA and what Mrs. B thought the FBA should look like." Ms. Ostby testified the team could have concluded the evaluation on December 6, 2018; however, the team delayed an eligibility determination to address Mrs. B's concerns and get her input into the evaluation. (Tr. Vol. IV, 1037:1-1038:13). Ms. Ostby testified she did not intend for the data summary and conclusions in the November 2018, draft educational evaluation to suggest A.B. was not eligible. (Tr. Vol. IV, 1034:14-25; JE-1, p. 826).

236. The team did not make an eligibility determination on December 6, 2018. (Tr. Vol. II, 420:20-421:10). Ms. Ostby testified the team could not get past the FBA due to a breakdown with the information that had been gathered and what Mrs. B thought the FBA should look like. (Tr. Vol. IV, 1037:9-21). The team ultimately agreed to go back and do further analysis of the behavioral data through January 18, 2019. (Tr. Vol. IV, 1014:10-1015:1, 1019:2-19, 1035:12-18; Tr. Vol. V, 1098:12-18).

237. Ms. Ostby testified it is lawful to extend an eligibility deadline beyond 60 days (i) if a student moves, (ii) a parent has not made a student available for an evaluation, or (iii) the parent and school district agree to the extension. The District felt it had lawfully extended 60-day eligibility deadline insofar as it and Mrs. B, in fact, agreed to extend the deadline. (Tr. Vol. IV, 1017:15-25, 1019:2-7; JE-1, p. 234).

238. Dr. Yell testified a school must fully inform a parent of all information relevant to the activity for which consent is sought, and consent is only provided if the parent understands and agrees in writing to the carrying out of the activity for which consent is sought and the consent describes that activity. (Tr. Vol. VI, 1544:11-20).

239. Dr. Yell testified unless the parent agrees to extend the evaluation, the school district must evaluate the child within sixty (60) days of receiving parental consent to determine eligibility for special education services. (Tr. Vol. VI, 1545:3-13)

240. Ms. Ostby testified that at the December 6, 2018 evaluation team meeting Mrs. B consented to the extension of the evaluation of A.B. because Mrs. B was upset about the FBA. (Tr. Vol. IV, 1015:25-1016:3, 1019:2-7).

241. No one at the December 6, 2018 meeting objected to continuing the meeting to conduct further analysis of the behavioral data and review more closely A.B.'s reading skills. (Tr. Vol. IV, 1016:24-1017:6; JE-1, p. 733-735 and 840-843).

242. Mrs. B was not concerned about the extending the evaluation beyond 60 days. (Tr. Vol. III, 726:16-727:3, Respondent's Ex. SMSD-10, p. 26).

243. Mrs. B testified that at the end of the December 6, 2018 meeting, Ms. Ostby asked Mrs. B to sign a handwritten note on the back of a September 5, 2018 PWN, which reads: "Shawnee Mission School District & Parent agreed to extend evaluation" and back date it because of the weather. The document Mrs. B signed did not provide any explanation of the proposed

extension beyond the handwritten note. (Tr. Vol. III,593:24-594:10; JE-1, pp. 231-234). Mrs. B further testified she understood her signature to signify the agreement to extend A.B.'s evaluation because the team was "supposed to meet on that 11-28 day and it was a snow day and nobody could meet,so we did it on the 6th." (Tr. Vol. III,593:24-594:10; JE-1,pp. 231-234). Ms. Ostby did not "recall " requesting Mrs. B back-date her signature. (Tr. Vol. IV, 1018 :24-1019:1).

244. Dr. Weigand testified to her opinion that the Socially Savvy results,FBA data sheets, BASC-3 results, and removals all revealed red flags for the possibility of autism. (Tr. Vol. I,at 178:6-179:12).

245. Dr. Weigand testified that although the District should have and could have,it did not take the following evaluation steps: conduct additional direct observations; collect accurate ABC data,with narratives; take data on accommodations; further evaluate the classroom removals to the "buddy room," including how it impacted A.B.'s PAPE and whether it reinforced his escape-motivated behavior; look deeper into the item analysis within the BASC-3; more accurately depict the available data in behavior graphs to make the information more understandable; examine the discrepancies between staff reports and the evaluation summary, a red flag indicating more evaluation is warranted; and collect necessary data earlier. (Tr. Vol. I, at 181:24-187:7; Petitioner's Ex. 503,at 14-16).

246. On December 6,2018,after the evaluation team meeting,Ms. Ostby advised Dr. Wiseman: "Nicole We need to decide if [A.B.] qualifies or not – I think he does,and we invite Cindy [Waeckerle] to the meeting." (Tr. Vol. II, 422:11-423:14; Petitioner's Ex. 83). Dr. Wiseman responded,"I can be okay with that." *Id.* Dr. Wiseman did not know whether anyone called the Bs on December 6th or 7th to advise them of Ms.Ostby's determination. (Tr. Vol. II, 423:21-424:3). Ms. Ostby did not call the Bs to advise them of her opinion. (Tr. Vol. II, 447:5-448:18).

247. On December 6,2018 a PWN was prepared that "proposed to collect additional data regarding [A.B.'s] reading skills. It was proposed to conduct further examination of the functional behavioral assessment data." Further,it indicated that the team had met on December 6: to review initial evaluation data on [A.B.],and after discussion the team determined additional reading data was needed in order to establish his present levels of performance in reading due to lack of participation during the testing session. And that Mrs. B requested the team do further analysis of behavioral data collected because she didn't feel it accurately represented [A.B.'s] current level of functioning. The team agreed with the request and a meeting date was scheduled for 1/10/19 due to Mrs. B's upcoming surgery. (Tr. Vol. IV,1042:17-1043:21; JE-1,p. 850-853).

248. On December 7,2018 a PWN prepared amending the meeting date from January IO to January 17,2019. (JE-1,p. 861-863).

249. Mrs. B signed the December 6,2018 PWN on August 13,2019. (JE-1, p. 854-857,1237,1277-1280).

250. After the December 2018 meeting, Ms. Ostby gathered additional information about A.B.'s reading skills because the team was going to conduct further analysis of the behavior data and because A.B. did not cooperate with Mr. McCarthy on the reading assessment. A.B.'s classroom teacher,Dr. Wiseman, and Ms. Ostby broke down the behavioral data while Ms. Ostby continued to gather it. (Tr. Vol. IV,1038:14-25).

251. On December 11,2018 DIBELS were completed for A.B. A.B. mastered blending compound words,blending syllables,blending three-phoneme words,segmenting compound words,production of initial sounds. A.B.'s skill level was emerging for blending two-phoneme words. A.B. has not learned segmenting syllables,production of final sounds,segmenting two-, three-,and four-phoneme words. (JE-1, pp. 864-867). It was noted in the Testing Observations that AB. lacked focus and "needed lot redirection." (JE-1, p. 867).

252. On December 18, 2018 Ms. Ostby provided Mrs. B copies of the parent and teacher ratings for the BASC-3, the updated Confidential Educational Evaluation report and updated FBA. (JE-1,p0p. 870,871, 872-890; Respondent's Ex. SMSD-12pp. 1312-1313).

253. The updated Confidential Educational Evaluation incorporated the results from the updated General Education Interventions Instructional Review where A.B.'s progress was monitored weekly using DIBELS. (JE-1, p. 873). A.B.'s December 2018 score in First Sound Fluency was well below typical progress,while A.B.'s score in Phoneme Segmentation Fluency was above typical progress. *Id.*

254. The updated Confidential Educational Evaluation indicated A.B. received general education interventions in following classroom rules,directions,and work completion. Data was taken daily on A.B.'s ability to follow directions and complete work. Interventions were implemented to aid A.B., including visual supports,reinforcement system,social stories,schedules sensory and activity breaks,options for assignments and work area and warnings for transition. (JE-1,p. 873).

255. The updated Confidential Educational Evaluation incorporated the assessments that were given to A.B. for the areas of:

Area Evaluated	Assessment Tools
Social/Emotional:	<ul style="list-style-type: none">• BASC-3 Behavior Assessment System for Children (3rd Ed.) Assessment• Functional Behavioral Assessment• Parent interviews• Teacher interviews• Observations conducted on:<ul style="list-style-type: none">• September 20, 2018,

- November 1, 2018,
 - December 7, 2018,
 - December 11, 2018
- Academics:
- Review of file
 - Woodcock-Johnson IV (WWJ-IV) Test of Achievement
 - Curriculum Based Measurements
 - Number Sense Screener
 - Observations
 - Parent interviews
 - Teacher interviews,
 - Review of records
- Communication:
- Socially Savvy Survey
 - Test of Pragmatic Language
- Fine Motor:
- Observations,
 - Teacher interview,
 - Informal fine motor assessment

(JE-1, p. 872-890).

256. Dr. Wiseman revised A.B.'s FBA after the December 6, 2018 evaluation team meeting.

257. The December 18, 2018 FBA included the same target behavior, parent interview, teacher interview, record review, student strengths, previous behavior interventions, and observations as the November 26, 2018 FBA. In addition, there were two more observations conducted, one on December 7 and another on December 11, 2018. (JE-1, p. 886-890).

258. The December 18, 2018 FBA provided that A.B.'s target behavior was taken from September 12 through December 7 (45 data days) and A.B. was, like the last time, able to meet the aim goal of 80% of the days. A.B. also averaged 92% on his daily behavior sheet. (JE-1, p. 888).

259. The December 18, 2018 FBA's Summary of Data stated, "In evaluating the remarks on [A.B.]'s daily sheets, it appears that the function of [A.B.]'s behavior is to escape or avoid unpreferred work tasks." (JE-1, p. 889).

260. The December 18, 2018 FBA Behavior intervention recommendations and strategies included the same as those in the November 26, 2018, version and added: check often for understanding of directions; give directions in a variety of ways; consistent expectations; break assignment down into steps. (JE-1, p. 889-890).

261. The graph entitled "[A.B.'s] Following Directions Data" as set forth in the December 18, 2018 version of the FBA is the same graph entitled "[A.B.'s] Following Directions

Data" as set forth in the December 18, 2018 version of the Confidential Education Evaluation. (JE-1, pp. 874, 888).

262. Dr. Weigand testified the revised FBA contained discrepancies from the December 6, 2018 FBA. Specifically, Dr. Weigand testified the December 18, 2018 FBA analyzed "following directions", although the target behavior was "not following directions." Dr. Weigand opined the graph purporting to demonstrate the percentage by which A.B. followed directions provided percentages without any baseline and the graph purporting to demonstrate A.B.'s behavior by subject was unclear and inconclusive. (Tr. Vol. I, at 159:13-160:5, 189:22-190:22; JE-1, pp. 886-890; Petitioner's Ex. 503, at 16-21).

263. Dr. Weigand testified the December 18, 2018 and February 13, 2019 versions of the FBA provided graphs analyzing new behaviors by frequency, which did not address the behavior of not following directions and did not lead to an understanding as to why the behaviors occurred because they lacked ABC data. (Tr. Vol. I, 189:22-192:2; JE-1, pp. 886-890; Petitioner's Ex. 139, at Bates No. B CD004017-4022; Petitioner's Ex. 503, at 16-21).

264. Further, Dr. Weigand testified to her opinion that each iteration of Dr. Wiseman's FBA was founded upon the inaccurate data collected by Ms. Hoffman, which was not the ABC data necessary to develop an IEP and/or a BIP that correctly addressed A.B.'s behavior. (Tr. Vol. III, 756:21-758:19; Tr. Vol. IV, 1066:24-1068:14; Tr. Vol. V, 1222:23-1223:8;).

265. Mrs. B testified A.B. was "extremely reluctant to go to school every day" after the winter break from school. Mrs. B testified that when she picked up A.B. after school "he immediately wanted to go straight home and play Minecraft" and A.B. "no longer wanted to hang out on the playground with his buddies and stuff. If he did, they would call him the monster and run from him on the playground." (Tr. Vol. III, 595:1-20).

266. On January 11, 2019 an Acadience Reading Assessment was administered to A.B. (JE-1, p. 892-894). A.B. was well-below benchmark status in First Sound Fluency and Reading Composite Score. A.B. was below benchmark status in Phonics-Nonsense Word Fluency Correct Letter Sounds. A.B. was at or above benchmark status in Phoneme Segmentation Fluency. (*Id.*).

267. Based upon the results of the reading assessment, a letter was sent to parents, including the Bs, regarding placement of students, including A.B., in Tier 3 reading instruction. (JE-1, p. 895).

268. On January 11, 2019, Ms. Ostby provided Mrs. B a PWN scheduling a meeting for January 17, 2019, to review the evaluation, determine eligibility and develop an IEP. (JE-1, p. 896-898).

269. At the request of the Bs, Dr. Lindberg evaluated A.B. to determine his appropriate diagnosis and treatment recommendations. A.B. was 6 years old at the time of this

evaluation. (Tr. Vol. I, 22:10-24:3; Tr. Vol. III, 596:14-24). On January 16, 2019 Dr. Lindberg completed a Final Report of A.B.'s psychological evaluation. (JE-1, p. 903-907 and 908-914).

270. Dr. Lindberg concluded A.B. demonstrated persistent deficits in social communication and social interaction across multiple contexts such that an ASD, Level 2, diagnosis was appropriate. Testing results suggested A.B. exhibited average range intellectual functioning, moderately low-range adaptive functioning, deficient social perception skills, clinically significant behaviors, and deficient executive functioning. Based on her clinical observations, interactions with A.B., parent interview, and the test results, Dr. Lindberg diagnosed A.B. B with ASD, Level 2, with an accompanying language impairment, and Attention Deficit Hyperactive Disorder (ADHD). (Tr. Vol. I, at 28:17-29:10, 30:22-32:15; JE-1, pp. 908-914).

271. Dr. Lindberg testified there are three different levels of Autism Spectrum Disorder, ranging from 1 to 3. Level 1 means the child needs minimal to no support. Level 2 means a need for substantial support, and Level 3 a need for very substantial support. (Tr. Vol I, 30:22-31:25).

272. Dr. Lindberg's evaluation consisted of interacting with A.B. and using standardized measures, conducting diagnostic interviews with A.B.'s parents, and collecting information from outside sources, including the District. (Tr. Vol. I, at 24:20-25:22). Dr. Lindberg obtained the following information from the District: an evaluation report completed in 2018 and dated 11/26/18, teacher BASC3 rating scales, and teacher SNAP-IV rating scales. (Tr. Vol. I, at 25:19-26:8; JE-1, p. 909).

273. Dr. Lindberg made several programming suggestions relative to the appropriate setting, the best way to teach a child with autism, social skills training, adaptive skills, behavior management strategies, as well as some accommodations and modifications that could be implemented based on the ADHD diagnosis. These recommendations were developed through the Children's Mercy autism team. (Tr. Vol. I, 32:23-33:19).

274. Dr. Lindberg recommended establishing an IEP for A.B. that offered a variety of services and utilized the appropriate instructional setting, teaching methods, social skills and adaptive skills training, and behavior management methods. Dr. Lindberg developed these suggestions in consultation with the Children's Mercy autism team. Some of the recommendations were general recommendations for children with A.B.'s diagnosis, and others were individualized to A.B. (Tr. Vol I, 32:16-33:19, 52:9-16; JE-1, pp. 908-914).

275. Dr. Lindberg "strongly encouraged that social skill[s] training be a part of A.B.'s school day" and recommended that A.B. receive social skills training in the following categories: interpretation of others' social behavior, monitoring speech style (e.g. rhythm, rate, volume), management of social interactions (e.g. shifting, ending topics of conversation; diversity of topics; approaching others to engage in activities; accepting others' desires/wants/needs; cooperation; assertion), social awareness targeted through the explicit identification of the discrepancies between A.B.'s perception and others, and insight into his and other's feelings. (JE-1, p. 908-914).

276. Dr. Lindberg recommended A.B. have a "point person" to address executive functioning difficulties and noted he may need additional support. (JE-1, p. 913-914). Further, Dr. Lindberg's report provides behavior management suggestions, and warns of disruptive and/or challenging behavior related to individuals with autism which may be a result of misinterpretation of social interactions and/or anxiety related to a lack of social understanding, not intentional conduct.

277. Dr. Lindberg testified she believes A.B. would benefit from peer modeling opportunities and he should be mainstreamed in a school setting where he has access to typical peers. (Tr. Vol. I, 40:11-41:6).

278. Mrs. B testified she did not definitively learn and understand A.B. had autism until January 2019 when she received Dr. Lindberg's report and diagnosis. (Tr. Vol. III, 565:14-20, 674:10-21).

279. On January 16, 2019 Mrs. B emailed Ms. Ruble after Mrs. B received the results of the evaluation by Children's Mercy Hospital, diagnosing A.B. with ASD, Level 2, and ADHD. On January 17, 2019 Ms. Ruble replied to Mrs. B's response and told her she has a brother that is nonverbal and is identified on the autism spectrum. Ms. Ruble does not recall telling Mrs. B about her brother prior to that email. At the time A.B. was in her class, Ms. Ruble did not have any particular expertise in identifying students with autism. There is nothing in Ms. Ruble's experience with her brother that would give her a heightened level of knowledge about identifying autism in students. The way autism has affected Ms. Ruble's family makes her compassionate towards students and families in need and it affects the type of teacher she is, but not directly towards A.B. (Tr. Vol. IV, 932:20-23, 933:24-934:11, 939:14-940:7, Respondent's Ex. SMSD-12, p. 1468).

January 17, 2019 Evaluation Team Meeting

280. On January 17, 2019 the evaluation team reconvened to discuss A.B.'s evaluation. Mrs. B testified the Confidential Educational Evaluation reviewed by the team at the meeting had some minor changes but contained the same data summary and conclusions with an additional reading conclusion. (Tr. Vol. III, 596:20-598:6; JE-1, pp. 872-885).

281. At the January 17, 2019 meeting, the evaluation team went over A.B.'s reading data. A.B. was making some progress but he showed some weaknesses. Some of the skills where he showed weaknesses had not yet been taught. (Tr. Vol. IV, 1043:25-1044:6).

282. At the January 17, 2019 meeting, the evaluation team was ready to discuss whether AB. was eligible but they did not reach that decision. (Tr. Vol. IV, 1044:13-18).

283. At the January 17, 2019 meeting, the team discussed A.B.'s eligibility indicators. They discussed one of the categories they believed might have a data match, which was "other health impaired" (OHi). When Ms. Ostby said, "other health impaired," Mrs. B got very upset,

started to cry, and said she felt like the category of autism was more appropriate. (Tr. Vol. IV, 1044:19-1045:2).

284. Ms. Ostby testified that the decision to further delay determining if A.B. was eligible for special education services was driven by the desire to have consensus among all team members, including Mrs. B. (Tr. Vol. IV, 1046:20-23).

285. Mrs. B testified that her perception was that District staffs conclusion that A.B. did not qualify for special education services was unchanged. (Tr. Vol. III, 597:9-598:13).

286. Mrs. B testified she provided Dr. Lindberg's report to Ms. Ostby at the January 17, 2019 evaluation team meeting, and Ms. Ostby said that she needed to look it over and would set up another meeting. (Tr. Vol. III, 596:9-16, 598: 14-19). The team did not have Dr. Lindberg's report before the January 17, 2019 meeting. Rather, Mrs. B provided Dr. Lindberg's report that day and said she wanted the team to consider it. Ms. Ostby told Mrs. B the team would certainly consider it, but it would take time to put it into the initial evaluation because she had just given it to her thatday. (Tr. Vol.IV, 1045:3-10).

287. Ms. Ostby subsequently incorporated information from Dr. Lindberg's report into A.B.'s evaluation report. (Tr. Vol. IV, 1047:9-11).

288. Ms. Ostby prepared a PWN documenting the January 17, 2019 meeting. The PWN stated:

[The team] proposed to continue the meeting on 2-6 at 9:30 to review data and determine if [A.B.] is eligible and demonstrates a need for special education services. And it was proposed to do further analysis on the functional behavioral assessment On 1-17 the team, including parent, met to review data. After a lengthy discussion of data, it was determined to continue the meeting on 2-6 due to time constraints. And that Mrs. Bs had again expressed concern over the functional behavioral assessment data [C]ontinuing the meeting until 2-6 would delay determining if [A.B.] is eligible for special education services which may be viewed as a potential disadvantage. However, the team determined additional time was needed to review and discuss data in order for the team to determine eligibility.

(Tr. Vol. IV, 1045:11-1046:19; JE-1, p. 923-926).

289. On January 17, 2019, a PWN was prepared scheduling a meeting for February 6, 2019 to review evaluation data, determine eligibility, and to develop an IEP. (JE-1, p. 931-933). On January 28, 2019 Ms. Ostby prepared a second PWN scheduling a meeting for February 6,

2019 to review the evaluation, determine eligibility, and develop IEP. (JE-1, p. 973-975). Both PWNs were emailed to Mrs. B on January 28, 2019. (JE-1, pp. 933 and 975).

290. Student baseline data is necessary to develop IEP goals. (Tr. Vol. II, 425:20-22).

291. Ms. Ostby testified regarding an email purportedly sent to Dr. Wiseman on January 29, 2019. Ms. Ostby read from the email: "Yep, that might work. We just don't have a baseline. Can we pull baseline from the checklist?" Other than to suggest that the email related to A.B., no further information was elicited from the email. (Tr. Vol. IV, 1087:22-1088:4).¹⁷

292. Ms. Koertner testified that as an autism coach, she does not serve children directly, but rather supports teams who serve kids with autism. Ms. Koertner might go in and help a classroom teacher with a part of the day that is going poorly for an autistic student or help create some visuals or some structure that might help an autistic child be more successful. Ms. Koertner does mostly teamwork and team training. (Tr. Vol. V, 1104:8-16). Ms. Koertner primarily works with elementary students K through 6th grade and has a little bit of interaction with preschool children. (Tr. Vol. V, 1104:17-22).

293. Dr. Wiseman testified it was her belief as of February 1, 2019 District evaluation team members determined A.B. qualified as a child with an exceptionality under the category of autism. (Tr. Vol. II, 426:23-427:21). On February 1, 2019 Dr. Wiseman sent an email to Ms. Koertner stating, "we've got a kinder[gartner] at [Westwood View]...[A.B.] that we are qualifying under Autism. Can I put you on for consult quarterly?" (Petitioner's Ex. 119).

294. The Confidential Educational Evaluation for A.B., bearing a date of November 26, 2018 was revised in preparation for the evaluation team meeting to be held on February 6, 2019. (JE-1, pp. 993-1009)

295. The Confidential Educational Evaluation prepared for the February 6, 2019 evaluation team meeting reflects the team evaluated A.B. in the areas of Social/Emotional, Academics, Communication, and Fine Motor. The evaluation included the use of the following assessment tools: BASC-3, Parent and Teacher Interviews, Observations, Review of File, WWJ-IV Test of Achievement, Curriculum Based Measurements, Number Sense Screener, Observations, Parent Interview, Teacher Interview, Review of Records, Socially Savvy Survey & Test of Pragmatic Language, Fine Motor Observation, Teacher Interview, and Informal Fine Motor Assessment. (JE-1, p. 997).

296. The Confidential Educational Evaluation prepared for the February 6, 2019 evaluation team meeting included additional sources of information and other information relevant to the evaluation determination. The information is set forth at length in the Confidential Educational Evaluation and is incorporated herein by reference.

¹⁷ While the testimony was taken while reviewing Petitioner's Exhibit 114, there is no indication in the record that the exhibit was ever offered or admitted.

297. The Confidential Educational Evaluation prepared for the February 6, 2019 evaluation team meeting provided the following summaries of A.B.:

- a. Based on the Test of Pragmatic Language - 2 and Socially Savvy checklist, [A.B.] is showing that he either has the pragmatic skills that are appropriate for his age, or he has skills that are continuing to emerge within the general education setting. Although [A.B.] has made gains in this area and with other skills emerging, his social skills need to be addressed through specialized instruction in a small group setting.
- b. [A.B.]'s math skills are on target for his age and grade placement. His needs are being met within the general education classroom.
- c. [A.B.] demonstrates delays in consistently responding appropriately across school environments (i.e., following directions, initiating play with peers, academic settings both large and small, and unstructured settings). This hinders [A.B.]'s ability to appropriately interact with staff and peers, develop relationships, profit from instruction, and demonstrate understanding of school expectations. Data shows that A.B. demonstrates a need for specialized instruction in regulating his behavior in order to make progress across school settings in various age-appropriate environments.
- d. Results from the fine motor evaluation indicate [A.B.]'s skills are not discrepant from same age peers. His fine motor skills allow him to manage classroom tools and materials and thus complete age-appropriate fine motor tasks. Continued exposure to fine motor activities is recommended, especially to promote proper grasp. In addition, [A.B.]'s sensory processing is not significantly discrepant from peers but continued access to break items is recommended such as, but not limited to putty, therapand and figets to increase ready to learn behaviors in the general education environment.
- e. [A.B.] displayed inconsistent performance on reading assessments. His classroom performance has improved since the beginning of the school year. His performance on phonology processing and phonemic awareness assessments indicate he is able to blend compound words, bending syllables to make words, blend two and three phoneme words, segment compound words, syllables and produce initial sounds. [A.B.] demonstrated difficulty with producing final sounds, segmenting two -three phoneme words and segmenting four phoneme words with blends. His ability to access words based on phonology is in the average range when compared to same age peers. It should be noted [A.B.] was reluctant to participate during reading testing. Scores should be interpreted with caution and may not reflect represent his true capabilities. [A.B.]'s reading skills were assessed a second time in order to try

and establish his present level in early reading skills. [A.B.] entered the testing session willingly and presented himself as a cooperative and friendly kindergarten. Rapport was established easily with [A.B.], who often engaged in spontaneous conversation with the examiner. He required no redirection.

(JE-1, p. 1007).

298. The Confidential Educational Evaluation prepared for the February 6, 2019 evaluation team meeting states A.B. "Meets the criteria as a child with an exceptionality under the category of Other Health Impairment." (JE-1, p.1008).

299. On February 5, 2019 at 7:38 a.m., Ms. Ostby emailed Mrs. B the revised Confidential Educational Evaluation report for the meeting scheduled for February 6, 2019, along with a copy of the Parent's Rights document. (Respondent's Ex. SMSD-12, pp. 1682-1734). Further, Ms. Ostby advised Mrs. B that at the meeting, they would have a draft IEP with suggested goals and services for discussion by the team, including parent discussion input. (*Id.* at p. 1682; Tr. Vol. IV, 1048:11-22).

300. Dr. Dancer testified she was advised by Dr. Wiseman by email on August 7, 2019 that a proposed IEP had been written by the team on February 5, 2019 and the team "spent almost an entire meeting reviewing and discussing a potential IEP for [A.B.]." The proposed IEP was discussed for almost an hour during the meeting on February 5, 2019. The team consisted of Dr. Wiseman, Ms. Chatman, Ms. Waeckerle, and Ms. Keith, (Tr. Vol. VI, 1415:13-1416:9; Petitioner's Ex. 195).

February 6, 2019 Evaluation Team Meeting

301. On February 6, 2019, A.B.'s evaluation team met to review the evaluation, determine eligibility, and develop the IEP. (JE-1, pp. 973-975).

302. Ms. Ostby testified the team discussed A.B.'s Confidential Educational Evaluation in which it stated A.B. "Meets the criteria as a child with an exceptionality under the category of [OHI]." at the February 6, 2019 team meeting. (Tr. Vol. IV, 1050:11-1051:24; JE-1, pp. 817-828, 872-885, 993-1009).

303. Mrs. B testified Ms. Ostby indicated A.B. had the qualifying disability of OHI and Mrs. B questioned why the District would not identify A.B. under the autism category given his diagnosis. (Tr. Vol. III, 598:24-600:10). Mrs. B further testified that Ms. Ostby informed Mrs. B that she could not qualify A.B. under both OHI and autism and that they "would like to put it under OHI because he has two." *Id.* Mrs. B testified that after much back and forth, Ms. Ostby qualified A.B. under the disability category of autism. *Id.*

304. Mrs. B testified that during the February 6, 2019 meeting, Ms. Ostby said the District would collect more data and update information necessary to create goals. (Tr. Vol. III,

598:24-602:12). Mrs. B also testified that the District planned to revise the evaluation and meet another time. (Tr. Vol. III, 603 :4-11). Mrs. B testified the team did not discuss delivery of services because the team was still talking about the data. (Tr. Vol. III, 676:16-20).

305. An IEP was prepared for the meeting on February 6, 2019 stamped "Draft." The IEP contained three (3) goals for social, behavior, and communication. The IEP also provided specially designed instruction services in the special education setting for 20 minutes a day, 3 times per week; and speech services in the special education setting for 20 minutes a day, 1 time per week. (JE-1, p. 1010-1031).

306. Mrs. B testified she was not presented with an IEP at the February 6, 2019 meeting "that [she knew] of." (Tr. Vol. III, 602:13-15).

307. On February 6, 2019, Ms. Ostby provided Mrs. B a PWN scheduling a meeting for February 25, 2019 to review evaluation and determine eligibility. (JE-1, p. 1045-1047).

308. Dr. Wiseman testified it was important to identify a child under the correct category of disability. (Tr. Vol. II, 414:21-415:7). Ms. Ostby testified she did not recall District staff discouraging identifying a child under the autism category and did not remember if her supervisor warned that the school might have to provide additional services for a disabled child if that child is identified under the autism category. (Tr. Vol. II, 451:17-452:3).

309. On February 7, 2019, Ms. Ostby sent an email that read, in part: "We agreed to change exceptionality from Other Health to Autism ... Jackie said by changing it - we might have to provide more services??? But she didn't speak in the meeting when I tried to keep it OHL" (Petitioner's Ex. 129). Ms. Ostby testified that she did not think she would have written that in her February 7th email, unless she had been told that information by Ms. Chatman. (Tr. Vol. II, 453:4-8). Ms. Ostby also testified that the team was ready to change the diagnosis to autism and she could not recall what happened at the meeting that led her to try to keep the diagnosis as OHL (Tr. Vol. II, 453:9-20)

310. Dr. Yell testified it is not acceptable for schools to avoid identifying a child with a disability with the aim to avoid providing services to that child. (Tr. Vol. VI, 1550:20-25).

311. Dr. Wiseman testified she had attempted to determine the number of times A.B. had been removed from the classroom during the evaluation process. (Tr. Vol. II, 432:2-5). Dr. Wiseman "determined it was around seven times" A.B. had been removed class based upon the daily sheets maintained by Ms. Hoffman. (Tr. Vol. II, 432:6-8; 433:1-6, Petitioner's Ex. 125). According to an email sent by Dr. Wiseman on February 6, 2019 the removals she identified occurred on September 12, 18, 25, 28; October 5, and October 22. (Petitioner's Ex. 125). Dr. Wiseman testified she did not refer to any other data to track removals and did not know if specials teachers were using the office as a buddy room. (Tr. Vol. II, 432:6-434:14).

312. A review of Ms. Hoffman's Daily Behavior Reports/Daily Sheets for the period from September 10, 2018 through May 21, 2019 indicated A.B. had been removed from class a total of twelve (12) times, with two (2) of those involving being sent to the office. (JE-1, pp. 236-639).¹⁸ Only one of the removals occurred after Dr. Wiseman's email on February 6, 2019. That removal occurred on March 19, 2019. (JE-1, p. 552).

313. According to an email from Ms. Hoffman, dated February 7, 2019, "I know there were some incidents before the daily reports started where [A.B.] went to the office as a buddy room during specials." (Petitioner's Ex. 125).

314. On February 7, 2019, a PWN was created providing information from the meetings on January 17, and February 6, 2019. The PWN stated the team met to review the education/assessment data on A.B. - including evaluations and information from A.B.'s parent, current classroom assessments & observations, and teacher and staff observations - to determine whether A.B. was eligible for special education. The PWN stated the team would consider the exceptionality category of autism even though autism does not fully take into account A.B.'s other medical diagnosis of ADHD and Gene Deletion. The team agreed to update the analysis of data collected during the FBA to provide an expanded picture of A.B.'s present level of functioning and needs in area of behavior. The team agreed to consider autism as A.B.'s primary exceptionality category. (JE-1, p. 1048-1049 and 1050-1055).

315. Ms. Ostby provided Mrs. B a copy of the February 7, 2019 PWN on February 11, 2019. (JE-1, p. 1052-1055).

316. On February 13, 2019, A.B.'s FBA was updated. (JE-1, p. 1061-1072).

317. On February 13, 2019, Ms. Ostby sent an email to Mrs. B which included the following attachments: AB DRAFT Eval and FBA.pdf and AB DRAFT IEP.pdf. (Tr. Vol. IV, 1052:13-1053:15; Respondent's Ex. SMSD-12, p. 1919-1955). The Confidential Educational Evaluation reported A.B. was eligible for special education and requires special education services to receive educational benefits. The IEP was drafted by Dr. Wiseman and included a BIP. (Tr. Vol. IV, 1052:19-1053:2, 1055:16-1056:3; JE-1, p. 1104-1120, 1157-1162; Respondent's Ex. SMSD-12, p. 1919-1955).

¹⁸ It is noted that a number of the pages were duplicates of one another and some pages had handwriting that was obviously not placed by the teacher(s). It is unclear who wrote on the pages after the fact and no testimony was offered to explain the extra writing on some of the pages.

318. The draft IEP proposed the following "Measurable Annual Goals" for A.B. in the Areas Requiring Specially Designed Instruction (SDI):

<i>Area Requiring SDI:</i>	<i>Measurable Annual Goal</i>
Behavior:	Within 36 instructional [weeks], [A.B.] will attend to tasks and direction following by demonstrating the four following behaviors, eyes on teacher, following along by tracking with his finger, answering with the group, and completing his work 80% of opportunities on 4 out 5 data days.
Social:	Within 36 instructional weeks, [A.B.] will demonstrate the ability to appropriately interact with peers 80% of the opportunities by taking turns, using kind words, etc on 2 out 3 data days.
Communication:	Within 36 instructional weeks, [A.B.] will use "flexible thinking" when something unexpected happens and accept alternate options for the situation 80% of opportunities on 4 out 5 data days.

(JE-1, pp. 1036-1038; Respondent's Ex. SMSD-12, pp. 1947-1949).

319. The draft IEP proposed to provide A.B. with "20 minutes, 2 times per week of speech/language services to support his positive peer interaction goal and 20 minutes 3 times per week to receive social skills instruction addressing his flexible thinking and whole-body listening goal." (JE-1, p. 1040; Respondent's Ex. SMSD-12, p. 1951).

320. The draft IEP included proposed daily Accommodations/Modifications/Supplementary Aids and Services to be used for A.B. (JE-1, p. 1041; Respondent's Ex. SMSD-12, p. 1952). The draft IEP also included a BIP. (JE-1, pp. 1043-1044; Respondent's Ex. SMSD-12, pp. 1954-1955).

321. Dr. Weigand testified in her opinion the IEP attached to Ms. Ostby's February 13, 2019 email was not reasonably calculated to enable A.B. to make appropriate progress. (Tr. Vol. I, 217:25-218:2).

322. Dr. Weigand testified in her opinion, the data collected by the District and presented in its evaluation documents through February 13, 2019 was not accurate and sufficient to develop behavior-related IEP goals, a BIP, or behavior interventions through an IEP. (Tr. Vol. I, at 192:3-198:4).

323. On February 19, 2019, a second Socially Savvy Checklist was completed by the District for A.B.'s 2018-2019 evaluation. (JE-1, pp. 701-720 and 1079-1087). Ms. Hoffman gave

A.B. a rating of 2 on JA-7, "[s]hows others objects and makes eye contact to share interest," down from the previous rating of 3 A.B. had received on the previously completed Socially Savvy Checklist. The same was true for JA-8, "[p]oints to objects and makes eye contact to share interest." Ms. Hoffman testified A.B.'s rating reductions for these skills might have resulted from having had additional opportunities to observe A.B. in those areas so her opinion changed. (Tr. Vol. II, 290:17-23; JE-1, pp. 1079-1087). (See Finding of Fact 157 for Socially Savvy Checklist rating table).

324. Ms. Hoffman testified she had more systems in place to manage A.B.'s behaviors in February of 2019. (Tr. Vol. II, 284:18-285:8). Ms. Hoffman also testified that if A.B.'s behaviors were worse, the systems in place were not working. (Tr. Vol. II, 285:9-19).

325. As compared to the October 2018 Socially Savvy Checklist, A.B.'s scores decreased in sixteen (16) areas, and only increased in five (5) areas. (Tr. Vol. II, 284:18-285:19; JE-1, pp. 701-720, 1079-1087). Ms. Hoffman testified that she did not know why A.B.'s scores decreased from the fall to the spring, but that she "saw big improvement with [A.B.] in [A.B.'s] behavior, [A.B.'s] ability to follow directions, [A.B.'s] willingness to complete work." (Tr. Vol. II, 288:22-289:15, 292:24-293:3).

326. On February 21, 2019, Mrs. B sent an email to the District which stated:

After reviewing the educational evaluation, the functional behavioral assessment, the Behavior intervention plan, and the individual education program; we have concluded that the data in regard to the Social Savvy Assessment does not reflect what Dr. Lindberg, Ms. Hoffman's (DBR), and our own observations of our son [A.B.]'s communication and behavior skills. Furthermore, we find that Mrs. Wiseman's data from the daily behavior reports is not in line with our records and is still negligence after two attempts to fix it. Which in turn makes the functional behavioral assessment, BIP, and the IEP documents null... We are requesting an IEE at this time, February 21, 2019. I will be would be happy to discuss the IEE with you on Monday Feb 28, 2019, at our IEP meeting with our advocate in attendance.

(Tr. Vol. IV, 1056:18-1058:22; Respondent's Ex. SMSD-12, p. 2069-2106; JE-1, p. 1088).

327. Mrs. B testified she had not requested the District stop the evaluation or IEP development process while waiting on the IEE; however, Mrs. B clearly stated in her email that the "[FBA], BIP and the IEP documents" were null because "the data from the daily behavior reports is not in line with our records." Mrs. B also wrote, "if the descriptions and data in the evaluation's [sic] do not reflect our son, the supports being chosen, will not be of help for our son." (Tr. Vol. III, 606:15-18; JE-1, p. 1088).

328. On or about February 21, 2019, Mrs. B asked Ms. Hoffman to complete additional forms for A.B., including an Intensive Needs Checklist, Checklist of Existing Environmental Supports & Intensive Needs Rubric. Mrs. B requested that Ms. Hoffman complete the forms by February 25, 2019. (JE-1, p. 1091-1100).

329. On or about February 21, 2019, Ms. Hoffman completed the Intensive Needs Rubric. (JE-1, p. 1089-1090).

330. Prior to the February 25, 2019 meeting, the eligibility report was revised to add the outside evaluation and to change the exceptionality of prong one (1) to autism. Dr. Wiseman added additional breakdowns of behavior. (Tr. Vol. IV, 1052:8-12, 1053:13-18, 1054:4-9; Respondent's Ex. SMSD-12, p. 1941).

331. Ms. Ostby testified she believed there were three (3) different drafts of A.B.'s Confidential Educational Evaluation created between December 6, 2018 and February 25, 2019. (Tr. Vol. IV, 1023:14-17; JE-1, 795-828, 872-885, 938-966, 993-1009, 1104-1156).

332. On February 25, 2019, A.B.'s evaluation team again met to discuss A.B.'s eligibility. (JE-1, p. 1121-1138, 1157-1162).

333. The February 25, 2019 Confidential Educational Evaluation was the same as the previous version with the exceptions of:

- a. The "GEi Instructional Review" included a chart for "Frequency of Behaviors per Day" that had data points from September 12, 2018 through January 16, 2019. (JE-1, p. 1123, 1141).
- b. The "GEi Instructional Review" does not include: "80% was A.B.'s aimline for daily behavior"; however, it does include "Red Dotted Line-Trendline". (JE-1, p. 1123, 1141).
- c. Anecdotal Information includes: "Historical information as part of general education intervention." (JE-1, p. 1124, 1142).
- d. Observations for December 11, 2018 state: "A.B. was observed during PE class. Upon entering the gymnasium, I found A.B. wrestling on the floor with another student. He had his shirt pulled up over his head and around his neck so that his entire stomach and chest were showing. The class was playing a game where they were running back and forth across the gymnasium. A.B. did not appear to be playing the game, but instead playing wrestling with another classmate. The gym teacher went over to redirect A.B. and the other student. The class was then instructed to sit along the wall for instructions for the next game they were going to play. Instead of going to the wall, A.B. began chasing the same student around the gym and then began climbing on and sitting at the top of some risers that were

stacked along another wall. The next game started and A.B. again began chasing the student and wrestling him to the ground. The gym teacher broke the wrestling up and asked that the other student come with him. A.B. was addressed by the gym teacher and reminded not to chase and wrestle students. A.B. began swinging his jacket around in circles above his head and wondering [sic] the gymnasium while the game was going on and the teacher was attempting to talk with him. Throughout the 20-minute observation A.B. was redirected a total of 7 times. He did not actively participate in the game the class was being instructed to play for any of the observed period." (JE-1, p. 1126, 1144).

- e. Observations includes: "Teacher Interview: Classroom teacher, Emily Hoffman, shared that A.B. has a difficult time initiating play with other children. She noted that A.B. can be shy at times and would stick by her at the beginning of the year. He has since gotten better about interacting with his peers but not always in appropriate ways. He has a hard time reading the feelings of others and telling when they want him to stop doing something. She feels that A.B. connects well with adults because he has a more mature thought process. On Feb. 6th, Emily shared that A.B. will often get a topic in his head and want to talk only about that topic with peers. Recently this has included his family tree." (JE-1, p. 1126, 1144).
- f. "Exclusionary Factors" included a subsection titled "Autism" and further included "Exclusionary Factor... The team shall not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance." and "How to evaluate... The team should rule out the presence of an emotional disturbance. If the data the team collects matches the indicators for emotional disturbance, the child should be identified as a child with an emotional disturbance rather than a child with autism." (JE-1, p. 1134, 1152).
- g. It did not include the "other health impairment" language that was in the February 5, 2019 evaluation. (JE-1, p. 1134, 1152).
- h. Includes "Prong 1" and "Prong 2" indicators that were not in the February 5, 2019 evaluation. (JE-1, p. 1135, 1154).
- 1. "Prong 1 - Specific data discussion upon which the team decision was based" states: "Data shows A.B. has the following medical diagnosis: Autism Spectrum Disorder Level 2, Attention Deficit Disorder and medical or genetic condition or environmental factor (Micro-deletion 15q26.1) Data shows A.B. demonstrates deficits in pragmatic language and his ability to appropriately adjusting his behavior to varying situations across school settings. This hinders his ability to navigating large and small group settings, social interactions with peers including initiating contact, perspective taking, cooperating, sharing, turn taking and making friends. A.B. also demonstrates delays in his ability to transition in the general education classroom and across school settings. This includes his ability to self-starting, self-

direct, switch and self-monitor his behavior. These deficits significantly impact A.B.'s educational performance." (JE-1, p. 1137, 1155)

- j. "Prong 2 - Specific data discussion upon which the team decision was based" states: "Data shows A.B. demonstrates a need for specialized instruction in pragmatic language, social skills and regulating/adjusting his behavior to varying situations across school environments i.e., transitioning, following directions, self-starting, self-directing, cooperating, and self-monitoring."

(JE-1, p. 1137, 1155).

334. Although early results of reading interventions summarized in A.B.'s fall 2018 evaluation documents suggested the interventions were working, A.B.'s February 25, 2019 evaluation reflected regression-AB. scored near the "well below typical" line in first sound fluency. (JE-1, p. 1105).

335. The District members of A.B.'s evaluation team signed the Confidential Educational Evaluation report on February 25, 2019 finding A.B. eligible for special education and related services. (JE-1, p. 1121-1138, 1157-1162).

336. Ms. Ostby had the draft IEP at the February 25, 2019 meeting; however, the team did not discuss the draft IEP. Mrs. B arrived at the building with her advocate but did not come into the conference room where the team was. Ms. Chatman went out to talk with Mrs. B. After about 30 to 40 minutes, Ms. Chatman returned and advised the team that Mrs. B was upset because she thought the team was sticking with OHI and was not in any condition to attend the meeting. Ms. Chatman testified she told Mrs. B they were going to determine eligibility today and Mrs. B indicated for the team to go ahead with the meeting. (Tr. Vol. IV, 1049:20-1050:10, 1059:15-1060:1).

337. Ms. Ostby testified that as of February 25, 2019, the IEP was just a proposal and the team had not been able to talk about services because goals needed to be agreed upon and they wanted Mrs. B's input. Once goals were established, then the IEP team would talk about proposed services. The IEP team would need parental consent to start any services. (Tr. Vol. IV, 1061:22-1062:8).

338. The February 25, 2019 Confidential Educational Evaluation report identified A.B. as a child with the exceptionality of autism and indicated that he needed specialized instruction. (JE-1, pp. 1139-1156). On February 25, 2019 District staff signed the February 25, 2019 Confidential Education Evaluation.¹⁹ (JE-1, pp. 1139-1156). A PWN dated February 25, 2019 provides that A.B. met criteria as a child with an exceptionality and demonstrated a need for specialized education to meet his unique needs and for A.B. to progress in general education

¹⁹ For reasons unexplained, the Confidential Educational Evaluation report signed on February 25, 2019 retained the date of November 26, 2018.

curriculum. (JE-1, p. 1170). As the PWN was for purpose of establishing eligibility, parental consent was not required. (JE-1, p. 1169).

339. The data summary and conclusions page in the February 25, 2019 Confidential Educational Evaluation contained narratives similar to those in prior drafts, but with some revisions indicating special education needs in social skills and behavior. (Tr. Vol. IV, 1079:22-1080:23; JE-1, pp. 1135-36). The District did not add information pertaining to the second Socially Savvy Assessment conducted on February 19, 2019 to the February 25, 2019 evaluation. (JE-1, pp. 1139-1156).

340. Dr. Weigand opined that the District's failure to include the second Socially Savvy Assessment in the February 25, 2019 evaluation is a material error because that assessment would directly relate to A.B.'s IEP goals and demonstrate progress, or lack thereof, and A.B.'s February scores were worse than the first Socially Savvy Assessment scores. (Tr. Vol. I, 202:18-203:22; Tr. Vol. II, 284:18-285:19; JE-1, pp. 701-720, 1079-1087).

341. On February 25, 2019, Ms. Ostby sent the Bs a letter attaching the final evaluation report, the FBA, and five (5) PWNs dated December 1, 2018 through February 25, 2019. (Tr. Vol. IV, 1061:5-21; JE-1, p. 1102). None of the PWNs required the Bs' consent nor did they provide notice of a meeting to develop an IEP. One of the PWNs did state A.B. meets the criteria as a child with an exceptionality and special education services were necessary for A.B. to receive educational benefit. (JE-1, pp. 1240-1286). Ms. Ostby requested Mrs. B sign the evaluation report indicating agreement or disagreement with the final team recommendations. (Tr. Vol. IV, 1062:9-16).

342. On February 25, 2019, Ms. Ostby sent an email Mrs. B to let her know she was going to mail a hard copy of A.B.'s evaluation and that the final evaluation indicated A.B.'s primary exceptionality was autism. (Tr. Vol. IV, 1060:2-12; Respondent's Ex. SMSD-12, p. 2287).

343. Ms. Ostby testified A.B.'s Confidential Educational Evaluation identified all of his needs and, notwithstanding the eligibility category issue, all of the special education and related services A.B. needed were identified throughout the evaluation. (Tr. Vol. V, 1102:7-17).

344. According to Ms. Ostby, A.B.'s skills did not decline while he was in Ms. Hoffman's class during the 2018-19 school year. Ms. Ostby testified that she believed the data showed that with the supports put in place, A.B. made some progress. (Tr. Vol. IV, 1102:18-22).

345. The District stopped A.B.'s evaluation and IEP development on February 25, 2019. (Tr. Vol. II, 301:2-8; Tr. Vol. III, 608:20-609:2; Tr. Vol. IV, 1062:22-1063:11). On February 26, 2019, Ms. Hoffman sent an email to Alison Bivona providing, in part: "A.B.'s evaluation has been stopped (decided after the meeting yesterday), so I do not think he will be receiving services yet." (Petitioner's Ex. 145).

346. Mrs. B testified that after the February 25, 2019 meeting, the District did not request or convene any meetings to develop an IEP through the end of the 2018-2019 school year. (Tr. Vol. III, 608:20-609:2). Mrs. B further testified the District did not request the B's consent to implement an IEP by providing special education services to A.B. through the end of the 2018-2019 school year. (Tr. Vol. III, 609:3-16).

347. Dr. Weigand testified the evaluation process took longer than it should have, and that in her thirteen (13) years working in the Santa Fe Special Ed Public Education Department she had never experienced the continuation of an educational evaluation similar to A.B.'s. (Tr. Vol. I, 211:10-212:4; Tr. Vol. II, 365:21-366:8). Dr. Weigand further testified that regardless of whether a draft evaluation document violates the IDEA in and of itself, the length of time for an evaluation process can violate the IDEA. (Tr. Vol. II, 389: 16-24).

348. Dr. Weigand testified the District should have developed a n IEP for A.B. immediately after identifying him as a child with autism. (Tr. Vol. I, 204:17-205:7).

349. Dr. Yell testified once the District has determined a child is eligible, the District must develop and implement an IEP. (Tr. Vol. VI, 1545:17-1546:1).

350. Dr. Yell testified the school has an obligation to make reasonable and prompt efforts to obtain informed consent from the child's parents to provide special education services to the child. (Tr. Vol. VI, 1544:21-1545:2).

351. Dr. Yell further testified he believed Kansas schools were required to implement an eligible child's IEP within 60 school days, provided they have written consent from the parent(s) to do so. (Tr. Vol. VI, 1545:22-1546:1).

352. Dr. Yell testified a school does not satisfy its IEP development obligation by creating an internal draft, and it is the school's responsibility to initiate and conduct meetings to develop the IEP, with the involvement of the parent(s). (Tr. Vol. VI, 1548:19-1549:10).

353. Dr. Weigand testified the February 25, 2019 FBA was slightly rearranged but was not substantively or materially different from the February 13, 2019 version and that the February 25, 2019 FBA did not alleviate the concerns or problems Dr. Weigand had identified and opined on with regards to prior versions of the FBA. (Tr. Vol. I, 200:5-202:5; JE-1, pp. 1061-1072, 1157-1162; Petitioner's Ex. 503, pp. 9-11, 16-22).

354. On March 18, 2019, Ms. Chatman prepared a PWN in response to Mrs. B's request for an IEE. The PWN was emailed to Mrs. B on March 20, 2021. (JE-1, pp. 1179-1182). The PWN stated, in pertinent part, the following:

On February 21, 2019 you requested an Independent Educational Evaluation (IEE) for your son [A.B.]. You do not believe the information provided in the DRAFT Re-Evaluation Report and

functional behavioral assessment reflect [A.B.]'s unique situation in description and evaluation.

On February 25, 2019 Jackie Chatman, Assistant Director of Special Education, met with mom and the family's advocate to discuss the IEE request. It was decided Shawnee Mission School District would honor your request for an IEE in the areas of speech language and to conduct a new functional behavioral assessment. The district suggested a private speech therapist to conduct the speech/language portion of the IEE and also suggested one of the district's Board-Certified Behavior Analyst (BCBA), Jill Koertner, complete a Functional Behavioral Assessment. You were not comfortable determining who the individual would be to complete the speech language portion of the IEE and requested time to investigate other resources. You also requested to meet the district BCBA before agreeing Ms. Koertner would complete the functional behavioral assessment. It was agreed a meeting would be arranged for you to meet Ms. Koertner. It was also agreed at the same meeting you would provide the name of the therapist the family would like to complete the speech/language portion of the IEE. Mrs. Bs requested a meeting not be scheduled until the first week of March as her schedule would not accommodate time away from work until then. A meeting was scheduled for March 7, 2019. Mrs. Bs emailed and cancelled the meeting on March 5, 2019, asking that a new meeting not be scheduled until after the week of March 11-15.

At this date (3/18/19) Mrs. Bs has yet to agree to another meeting time.

(JE-1, p. 1180).

355. Mrs. Chatman, Mrs. B, and Ms. Koertner met in March 2019 as part of the second FBA process, and so Mrs. B could meet Ms. Koertner and decide whether it would be okay for Ms. Koertner to complete the second FBA. At the conclusion of the meeting, Mrs. B agreed to let Ms. Koertner do the FBA. Ms. Koertner thought the meeting went well. (Tr. Vol. III, 607:15-608:13; Vol. V, 1121:15-24, 1122:5-12, 1123:25-1124:2, 1125:25, 1220:15-22).

356. Mrs. B testified that during this meeting she had requested paraprofessional support for A.B. Mrs. B testified that Ms. Chatman and Ms. Koertner both responded that "there's kids way worse than A.B. that don't get paras and kids like A.B. don't get paras." (Tr. Vol. III, 623:11-624:7).

357. After meeting with Mrs. B, Ms. Koertner was tasked with conducting an FBA assessment for A.B. in March 2019. (Tr. Vol. V, 1121:11-14).

358. Ms. Koertner testified she has prepared hundreds of FBAs for students in the evaluation stage. She regularly does FBAs as part of an evaluation either before a student qualifies for an IEP, or if they are re-upping their IEP. Sometimes an IEP is already in place and she'll get called to do a reevaluation because the student might not have a BIP and they need one, in which case they would do an FBA and BIP. (Tr. Vol. V, 1108:10-23).

359. Ms. Koertner testified the function of an FBA assessment is not to classify behaviors as significant, minor, or even troublesome, but rather to identify the function of a particular behavior. No one engages in behavior that does not work for them. So, if a student does something and it works for them, the student will continue doing it, even without the thought process. Ms. Koertner testified that all day, every day our behaviors come in contact with things that work and things that do not work. And what we know is that if a behavior is continuing to occur, it is working in some way or another. That is how behavior works. Therefore, the purpose of an FBA is to determine how a behavior is working and to render it ineffective. So, we ask what the child is getting out of the behavior, or communicatively what they are trying to tell us is not working for them. And that's the purpose of an FBA. (Tr. Vol. V, 1109:10-1110:11).

360. Ms. Koertner testified the decisions of the BCBA affect what happens during the FBA process too. The BCBA can decide who to interview and how many people to interview. The point of the interview is to identify what is at issue That includes deciding first what the behavior looks like and when it presents. When a student uses a challenging behavior exclusively during classroom time, never in specials, and never at home such that the student's parents never see it, then Ms. Koertner is less likely to interview the student's mother or father or his specials' teacher. The other discretionary aspects of an FBA might include the different questionnaires that people use and the way in which you collect ABC data around what the behavior actually looks like. (Tr. Vol. V, 1112:11-1113:10).

361. Ms. Koertner testified there is a correlation between communication and behavior. The less communication you have, the less skilled you are as a communicator, the more likely you are to have challenging behaviors, particularly for students who are maybe in the self-contained autism classroom. (Tr. Vol. V, 1110:12-1110:18).

362. Ms. Koertner testified "there's no all students." Ms. Koertner testified she has students "with autism who have perfectly great language and what they need, they need help with social skills. And it would be a disservice to them to be squirreled away in a room by themselves. But then I have kiddos for whom if they were in a room with many, many kids and learning at a normal pace, we would not be providing FAPE, right. It is 100% individualized." (Tr. Vol. V, 1120:9-21).

363. Ms. Koertner testified she does an assessment of the child to find out what is known about the child to be evaluated and then designs an individualized program for each specific child based on that child's needs. (Tr. Vol. V, 1121:6-8).

364. Ms. Koertner testified there is nothing unique in doing an FBA for a child with autism. (Tr. Vol. V, 1108:24-1109:1). Ms. Koertner testified there is standard FBA template all behavior analysts use. An FBA consists of a multitude of components. The main pieces of an FBA are an indirect piece - the interview and questionnaire pieces which involve interviewing and questioning individuals in the student's environment - and the direct piece is the data collected on a day-to-day basis in the classroom - the ABC data. The interview component has many different tools that might be selected. Also, how data is collected might appear different. Ms. Koertner testified her goal is to create a data collection system that maximizes the amount of information collected, and that system is frequently going to be used by a classroom teacher who is also teaching. To create such a data collection system and do so in a way that ensures accuracy and feasibility, many factors go into its development. In the end, all of those factors are outcome determinative in terms of what the FBA looks like, so there can be significant variations in FBAs. (Tr. Vol. V, 1108:24-1109:9; 1111:2-22; 1116:2-11). Ms. Koertner testified the FBA would have both the indirect and direct pieces for students with and without autism. (Tr. Vol. V, 1108:24-1109:9).

365. Ms. Koertner testified that Dr. Wiseman's FBA referred to and analyzed collected data as "ABC data," although the data sheets did not include columns labeled as antecedent, behavior or consequence. (Tr. Vol. IV, 1066:24-1068:14; JE-1, pp. 1157-1162). Ms. Koertner testified she looked through Ms. Hoffman's daily reports utilized for Dr. Wiseman's FBA "to get the gist, but I didn't - they weren't ABC data sheets, or they weren't about antecedent/behavior/consequence." (Tr. Vol. V, 1222:23-1223:8)

366. Ms. Koertner prepared new data sheets to collect ABC data. The data Ms. Koertner tries to get for an FBA is what happened just before the behavior, what behavior occurred, and what happened just after the behavior. A data collection sheet has an antecedent, behavior, consequence and then a big open square where teachers would write out their observations in longhand. However, teaching a classroom with children while taking data on challenging behavior does not really allow teachers to take longhand notes. Therefore, Ms. Koertner made a data sheet that would include the possibilities that she could think of as antecedent plus the possibilities discussed as a behavior and consequence, so the teacher could circle the option instead of having to write out longhand what had occurred. (Tr. Vol. V, 1139:12-1140:24; JE-1, p. 1190).

367. On April 15, 2019, Ms. Koertner emailed Ms. Hoffman a spreadsheet to measure A.B.'s frequency duration data and requested Ms. Hoffman record data per Mrs. B's request for a "redo" on A.B.'s FBA. (JE-1, p. 1186-1187).

368. From April 30, 2019 through May 15, 2019, Ms. Hoffman kept data sheets regarding A.B.'s behavior. (JE-1, p. 1190-1194).

369. In addition, from April 30, 2019 through May 17, 2019, more data was collected in a spreadsheet that provided information regarding A.B.'s classroom behavior, noncompliance, vocal disruption, property disruption, antecedents, consequences, time on task, time in seat,

frequency per day for behavior, and challenging behavior percentage per activity. (JE-1.146 (*excel spreadsheet*)).

370. Ms. Koertner testified she had observed A.B. five (5) different times in the classroom. (Tr. Vol. V, 1150:18-21; JEL, pp. 1196-1201).

371. Ms. Koertner collected five (5) or six (6) different days' worth of data from A.B.'s teacher. (Tr. Vol. V, 1141:13-18; JE-1, p. 1190).

372. Ms. Koertner testified she met with Mrs. B in April 2019 to interview her as part of preparing the second FBA. (Tr. Vol. III, 608:20-23; Tr. Vol. V, 1125:21-25).

373. On May 13, 2019, Ms. Koertner emailed Mrs. B advising her that she was finishing up the FBA. On May 15, 2019, Mrs. B responded, "Great to hear you are finishing up. Yes, let's meet in person. We are scheduled for a speech evaluation tomorrow, Thursday, at 8:45. Perhaps we could meet up around noon or after noon. I am available Tuesdays and Fridays." (Tr. Vol. V, 1127:2-11; Respondent's Ex. SMSD-12, p. 2581).

374. On May 16, 2019, a Comprehensive Speech Language Evaluation was completed by Aleah Brost at Children's Mercy. (JE-1, p. 1215-1220).

375. When Ms. Koertner met with Mrs. B on May 16, 2019, Mrs. B advised she thought the data was different from the doctor's office and what the school has. (Tr. Vol. V, 1131:11-14; Respondent's Ex. SMSD-1.001 at 7 minutes, 30 seconds through 8 minutes 28 seconds).

376. During Ms. Koertner's May 16, 2019 meeting with Mrs. B, she explained to Mrs. B how she was going to define the challenging behavior based on what she saw at school and her interview with the teacher. (Tr. Vol. V, 1135:16-18; Respondent's Ex. SMSD-1.001, 30 minutes 36 seconds through 31 minutes 36 seconds).

377. Mrs. B never objected to Ms. Koertner conducting the FBA during that meeting in May 2019. (Tr. Vol. V, 1138:8-11).

378. Ms. Koertner drafted the second FBA, dated May 2019, utilizing the data that had been collected. (Tr. Vol. V, 1147:21-1148:17; JE-1, p. 1196-1201). Ms. Koertner's FBA includes the target behaviors that were identified through A.B.'s data sheets - the data that had been taken so far during the 2018/2019 school year - and Ms. Koertner's interview with his classroom teacher. Three target behaviors were identified for A.B.: noncompliance, vocal disruption and property disruption. (Tr. Vol. V, 1149:3-12; JEL, pp. 1196-1201).

379. Ms. Koertner testified there is no law or rule that sets out the minimum number of days to collect behavior data. A whole year would be too much and one day would be too little. Everyone has bad days, but Ms. Koertner was not looking for how bad the problem is, she was

looking for when it happens. Ms. Koertner can do pretty well with a minimum amount of data because if it is consistent - such as if it happens five times but all five times were right after a student was given a direction to do a math worksheet - then that is good information. (Tr. Vol. V, 1142:6-23).

380. Ms. Koertner testified she did not have any concern about the target behaviors identified as being insufficiently broad. Ms. Koertner further testified the point of an operational definition is to make it as narrow as possible and determine what it looks like when this child engages in this behavior. (Tr. Vol. V, 1150:5-12; JEL, p. 1196-1201).

381. Ms. Koertner testified, and the FBA concluded, the most frequent behavior identified for A.B. was noncompliance. (Tr. Vol. V, 1152:1-6, 23-25; JEL, pp 1196-1201).

382. Regarding A.B.'s noncompliance, Ms. Koertner observed that most often the antecedent was a direction was given, then the escape piece, and then most often the consequence was A.B. received a fair amount of attention when the teacher tried to redirect him back to what he is supposed to be doing. (Tr. Vol. V, 1157:12-18; JEL, p. 1196-1201).

383. Ms. Koertner determined the function of A.B.'s noncompliance is primarily escape for non-preferred tasks and, secondarily, access to preferred tasks. Likely predictors are a difficult or non-preferred task being presented or having to leave a preferred item or activity. (Tr. Vol. V, 1159:10-15; JEL, p. 1196-1201).

384. For vocal disruption, the primary and likely function is attention because they saw it most often happened when A.B. was not getting a lot of adult attention, and they sometimes saw some vocal disruption secondarily when A.B. was engaged in non-preferred tasks, so the secondary function is escape. (Tr. Vol. V, 1159:16-22; JEL, p. 1196-1201).

385. Property destruction by A.B. barely occurred. Ms. Koertner testified she believes property destruction occurred only once. (Tr. Vol. V, 1158:6-10; JE-1, p. 1196-1201).

386. Ms. Koertner testified her FBA for A.B. "is skewed toward a BIP at the end" of the report. The purpose of a BIP is to create a plan to help students be more successful and to help staff be more consistent. If it is not written down, staff may all be responding differently. The BIP provides how to help A.B. be more successful and how to delineate it such that the reading teacher, the math teacher, and the PE teacher are all doing it the same way. (Tr. Vol. V, 1169:20- 1170:4; JE-1, p. 1196-1201).

387. Ms. Koertner created a BIP for A.B. in May 2019. The BIP provided interventions to use when A.B. exhibited noncompliance or property disruption. The BIP outlined replacement behaviors such as role playing, use of visuals, daily reminders of appropriate ways to get attention, Further, the BIP provided reinforcers and motivation system (token board). (JE-1, p. 1211-1213).

388. The second FBA completed by Ms. Koertner in May of 2019 was emailed to Mrs. B multiple times. Dr. Dancer emailed Mrs. B a copy of the May 2019 FBA on August 7, 2019, October 25, 2019, and November 23, 2019. (Tr. Vol. V, 1189:15-21, 1255:14-20; Respondent's Ex. SMSD-12, pp. 3022-3025, 4636-4637; JE-1, pp. 1196-1201).

389. On May 23, 2019, Ms. Chatman sent an email to Mrs. B. (Respondent's Ex. SMSD-12, p. 3024-3025). Ms. Chatman inquired about the speech evaluation conducted by Children's Mercy Hospital. Ms. Chatman requested a copy of the speech evaluation to incorporate the results into A.B.'s IEP. Ms. Chatman also advised Mrs. B that Ms. Koertner had completed the FBA. Ms. Chatman notified Mrs. B that Ms. Dumolien had been named the District's Director of Special Education. Ms. Chatman advised that an IEP team meeting would need to be held in August of 2019, once the team members returned from summer break since it was so late in the school year.

390. In the Spring of 2019, there was a parent/teacher conference for A.B. (JE-1, p. 1229). It was noted that A.B. had progressed in reading with his letter/sound identification and continued to practice and was working in his reading small group also. In Math, A.B. had shown great knowledge of number sense and writes numbers neatly and is working to complete his math worksheets with less support. For Writing, A.B. was forming his letters neatly, creating creative and detailed pictures, and was working on holding his pencil the correct way. DIBELS for Math scored above the composite goal (99/72); and for Reading scored below the composite goal (81/122).

391. A.B.'s Second Quarter Assessment noted A.B. could write his name legibly. A.B. could also identify upper- and lower-case letters and sounds for A, O, S, and T; and knew capital and lower-case letters C, H; knew capital letter I and N; knew capital letter and sound of letter P; and knew the sound of letter H. A.B. knew sight words "I" and "a". A.B. could provide rhyming words. (JE-1, p. 1230).

392. Ms. Hoffman testified that in looking at A.B.'s grade reports for the 2018-2019 school year, it looked like A.B. was doing fairly well overall and had made progress throughout the course of the school year. (Tr. Vol. II, 298:24-299:22). In the fourth quarter, for example, A.B.'s overall score for English Language Arts skills reflected that A.B. met expected progress toward outcomes in most areas and two areas showed exceptionally good progress toward outcomes, which demonstrated improvement over the year. (Tr. Vol. II, 299:16-22; JE-1, p. 1232). The report card showed that A.B. made progress from the beginning of the year to the end of the year.

393. Mrs. B maintained that at the end of A.B.'s 2018-2019 school year, he was significantly behind his peers. He was perseverating very badly and was not reading. (Tr. Vol. III, 609:17-610:5).

Riley ABA and Autism Center, Summer 2019

394. Mrs. B testified she felt A.B. was "completely behind his classmates" and needed to "get caught up" with his peers so she sent A.B. to Riley ABA and Autism Center over the summer of 2019. Mrs. B testified she did this because she wanted A.B. "to have a chance." (Tr. Vol. III, 609:17-610:16).

395. Sara Riley of Riley ABA and Autism Center evaluated A.B. in May 2019 and developed goals to address A.B.'s deficits and areas of need. (Tr. Vol. II, 526:3-528:7). Ms. Riley asserted that the evaluation report completed at Riley ABA and Autism Center accurately represented A.B.'s level of functioning as of May 2019. (Tr. Vol. III, 528:14-17; Petitioner's Ex. 523).

396. Ms. Riley's assessment documented deficits for A.B. in the areas of joint attention, greetings, social play, social communication, adaptive, and community. (Petitioner's Ex. 523, at 4-6). The assessment provides goals in these same categories, and documents baseline data for each. (*Id.*, at 6-8) A.B. had a baseline of 0 percent in two joint attention goals, three social play goals, five social communication goals, and five adaptive goals. (*Id.*)

397. Dr. Dancer testified she has been a part of hundreds of IEP teams. (Tr. Vol. V, 1252:11-14).

398. Ms. Dumolien provided Dr. Dancer with a working file that belonged to the former coordinator, Ms. Chatman. Prior to July of 2019, Dr. Dancer was not involved with A.B. (Tr. Vol. V, 1252:15-21, 1253:19-22).

399. Dr. Dancer testified that when she started with the District in July of 2019, there was a draft IEP for A.B., but it was not signed off on. (Tr. Vol. V, 1369:8-1).

400. On July 15, 2019, Mrs. B sent an email to Ms. Dumolien in which she indicates she is sending the District a copy of speech IEE completed on A.B. by Children's Mercy Hospital and requested an IEP meeting with the Westwood View team to discuss A.B. before school started on August 12, 2019. (Respondent's Ex. SMSD-12, pp. 3023-3024).

First Grade: 2019-2020 School Year

401. On August 1, 2019, Dr. Dancer and Ms. Keith exchanged email communications about how to progress on A.B.'s IEP. (Tr. Vol. VI, 1413:11-14; Petitioner's Ex. 182).

- a. On August 1, 2019, Ms. Keith emailed Dr. Dancer and said, "I wanted to bring this student to your attention as mom is a hard parent for Westwood View. We did not complete his evaluation last year and we need to make sure we get on this first thing. She already has an advocate and is very difficult to please." (Tr. Vol. VI, 1412:8-14; Petitioner's Ex. 182).

b. On August 1, 2019, Dr. Dancer responded to Ms. Keith asking, "Can you provide some clarification? Did mom not provide IEE results, or did our SMSD team not complete an evaluation? Our action plan would be totally different depending on the situation." (Tr. Vol. VI, 1412:15-21; Petitioner's Ex. 182).

c On August 1, 2019, Ms. Keith replied to Dr. Dancer and said, "We completed the evaluation but agreed to providing an outside evaluation since she did not agree with our results... We were waiting for mom to provide her results so we could complete the IEP services needed." (Tr. Vol. VI, 1411:11-18, 1412:22-1413:6; Petitioner's Ex. 182).

402. On August 2, 2019, Mrs. B emailed Dr. Dancer and asked if she could get the IEE FBA from Dr. Dancer and to set up a time to meet before school starts. (Tr. Vol. V, 1254:4-12; Respondent's Ex. SMSD-12, pp. 3022-3025).

403. On August 6, 2019, Dr. Koertner sent A.B.'s FBA to Dr. Dancer. (Tr. Vol. VI, 1371:23-1372:6; Petitioner's Ex. 188).

404. On August 7, 2019, Dr. Wiseman sent Dr. Dancer an email stating a proposed IEP had been written on February 5, 2019. Ms. Wiseman informed Dr. Dancer the meeting had lasted for almost an hour and most of the time was spent discussing A.B.'s proposed IEP. (Tr. Vol. VI, 1415:13-1416:9; Petitioner's Ex. 195).

405. On August 7, 2019, Dr. Dancer sent an email to Mrs. B advising she was working to schedule an IEP team meeting and asking to "chat" with Mrs. B so that Dr. Dancer could "fill in some missing pieces" and be "all caught up." (Tr. Vol. V, 1254:21-1255:10; Respondent's Ex. SMSD-12, p. 3022).

406. On August 7, 2019, Dr. Dancer emailed a copy of the IEE FBA to Mrs. B and scheduled a time to meet. (Tr. Vol. V, 1255:11-20; Respondent's Ex. SMSD-12, pp. 3022-3025).

407. Dr. Dancer met with Mrs. B on August 8, 2019. (Tr. Vol. V, 1256:4-9; Respondent's Ex. SMSD 1.002 (audio recording)).

a. Dr. Dancer asked Mrs. B if the team had sent the eligibility report and the draft IEP to her previously and Mrs. B responded the team had done so. Dr. Dancer understood that Mrs. B had seen the draft IEP prior to meeting with her on August 8, 2019. (Tr. Vol. V, 1258:14-1259:4; Respondent's Ex. SMSD 1.002 at 5m 33s - 6m 29s).

b. Mrs. B told Dr. Dancer she was dissatisfied with the FBA and in her opinion, it did not describe A.B. accurately. (Tr. Vol. V, 1259:12-22; Respondent's Ex. SMSD 1.002 at 7m 6s - 7m 47s).

- c. Mrs. B expressed her appreciation of Briarwood. Mrs. B was not happy with Westwood View or the way the principal communicates. Mrs. B stated there should be new staff members there. (Tr. Vol. V, 1262:2-24; Respondent's Ex. SMSD 1.002 at 19m 29s - 21m 4s).
- d. Mrs. B indicated she believes she has requested a paraprofessional. Mrs. B suggested the evaluation was tied to the subsequent request for granting of the paraprofessional. (Tr. Vol. V, 1264:15-1265:6; Respondent's Ex. SMSD 1.002 at 25m 52s - 26m 9s).
- e. Dr. Dancer went over the IEP sent to Mrs. B earlier in the year. Mrs. B said she had reviewed that IEP and she agreed with all of it except the FBA. Mrs. B was aware there were speech services in the IEP for 20 minutes per week. (Tr. Vol. V, 1265:7-21, 1266:6-10; Tr. Vol. VI, 1417:21-23; Respondent's Ex. SMSD 1.002 at 26m 50s - 27m 56s).
- f. Dr. Dancer explained to Mrs. B the difference between a medical plan and a school plan. Dr. Dancer testified there is a misconception about medical model versus educational model. When Dr. Dancer works with parents, she tries to explain that while they certainly respect and want to consider a medical person's opinion and recommendations that often times a student looks different in their educational setting and ultimately the IEP team can consider those recommendations and input, but then they need to determine what is most appropriate in the educational setting. (Tr. Vol. V, 1266:11-1267:23; Respondent's Ex. SMSD 1.002 at 30m 35s - 32m 41s).
- g. Dr. Dancer and Mrs. B discussed the FBA. Mrs. B was disappointed that the FBA did not ultimately indicate the need for a paraprofessional. (Tr. Vol. V, 1268:6-17; Respondent's Ex. SMSD 1.002 at 35m 58s - 36m 36s).
- h. Dr. Dancer suggested to Mrs. B that they could have an IEP meeting for A.B. as soon as the following day. (Tr. Vol. V, 1268:18-20; Respondent's Ex. SMSD 1.002 at 35m 58s - 36m 36s).

408. Mrs. B testified she perceived that Dr. Dancer was confused as she looked at A.B.'s file, and that Dr. Dancer described A.B.'s situation as "kind of a mess or whatever." (Tr. Vol. III, 610:23-611:16).

409. Dr. Dancer testified she was attempting to get background information during the meeting with Mrs. B to find out "why the [IEP] process didn't move forward last spring [2018-19 school year]" and trying to "look for a pathway of moving forward." (Tr. Vol. VI, 1259:6-11).

410. During the meeting with Dr. Dancer, Mrs. B expressed concern about A.B.'s removal from the classroom without her knowledge. (Tr. Vol. VI, 1261:15-23; 1372:24-1373:7).

411. On August 8, 2019, after her meeting with Mrs. B, Dr. Dancer sent an email to Ms. Keith, Ms. Guerry and Ms. Wiseman because she wanted to address Mrs. B's concern for A.B. being sent out of the general education classroom. (Tr. Vol. VI, 1413:15-16, 1414:7-18; Petitioner's Ex. 197).

412. A.B.'s IEP team did not meet on August 9, 2019 because Mrs. B wanted to invite her advocate who was not available. (Tr. Vol. V, 1268:25-1269:5).

413. On August 12, 2019, a Reading Benchmark Scores Table for First Grade was created for A.B. (JE-1, p. 1235-1236). A.B. was only at or above the benchmark in one area. The remaining areas A.B. was below or well below the benchmark. (*Id.*).

414. On August 12, 2019, Mrs. B sent an email to Dr. Dancer and requested a copy of the IEP. (Tr. Vol. V, 1277:3-6; Petitioner's Ex. 203).

415. By letter to Dr. Dancer dated August 13, 2019, Mrs. B advised the District that she enrolled A.B. at Riley ABA over the summer. (JE-1, pp. 1237-1238).

416. On August 13, 2019, Mrs. B sent the District a letter outlining her concerns regarding the evaluation documents dated February 25, 2019. Mrs. B noted she had provided the District with a copy of the May 16, 2019 Comprehensive Speech Language Evaluation completed by Aleah Brost at Children's Mercy Hospital, and an invoice for same. Mrs. B noted she has received the IEE FBA completed by Ms. Koertner. Mrs. B stated she understands the District is approving an IEP for A.B. in the primary category of Autism. Mrs. B listed her "dissenting comments" regarding the Evaluation, FBA, and BIP. Mrs. B made allegations that Ms. Hoffman was verbally and physically intimidated into not admitting A.B. needed 1:1 help from her to understand and complete his work. Mrs. B's letter stated the educational evaluation had "no revised content of Dr. Lindberg's diagnosis." Mrs. B's letter further stated, "I continue to disagree with the documentation and the interpretation of the data collected/created by Ms. Hoffman and Dr. Wiseman for the FBA." Further, Mrs. B expressed her desire that Dr. Wiseman no longer be a part of A.B.'s team. Mrs. B indicated she was signing off on paperwork "not because I agree with it 100% but, to forward and get [A.B.] the services he needs to be a successful student and citizen." Finally, Mrs. B provided the following enclosures with her letter:

- a. A copy of Ms. Ostby's February 25, 2019 letter.
- b. The December 1, 2018 PWN with an "X" through the consent page. (JE-1, p. 844-847, 1237, and 1281-1284).
- c. A signed copy of the December 6, 2018 PWN. (JE-1, p. 854-857, 1237, 1277-1280).

- d. The January 17, 2019 PWN (regarding continuing the meeting to February 6, 2019 and Mrs. B's concerns regarding the FBA data) with an "X" through the consent page. (JE-1, p. 927-930, 1237, 1273-1276).
- e. The February 7, 2019 PWN with an "X" through the consent page. (JE-1, p. 1056-1059, 1237, 1269-1272).
- f. The February 25, 2019 Confidential Educational Evaluation with a dissenting opinion. (JE-1, p. 1139-1156, 1237, 1241-1258).
- g. The February 25, 2019 FBA. (JE-1, p. 1163-1168, 1237, 1259-1264).
- h. The February 25, 2019 PWN. (JE-1, p. 1173-1176, 1237, 1265-1268); and
- i. Invoice from Children's Mercy for May 2019, Evaluation. (JE-1, p. 1237, 1285-1286).

(Tr. Vol. V, 1277:21-25, 1278:16-19, 1278:20-25, 1279:1-5; JE-1, p. 1237-1286).

417. The District did not begin providing services to A.B. because the PWNs signed by Mrs. B did not request parental consent to provide services to A.B. (Tr. Vol. II, 392:2-396:18; Tr. Vol. III, 612:2-614:25, 728:25-730:5; JE-1, pp. 1237-1286).

418. Dr. Dancer testified that following Mrs. B's August 13, 2019 letter, A.B.'s team scheduled a meeting for September 20, 2019. However, Dr. Dancer was ill that day, so the meeting was rescheduled for October 1, 2019. (Tr. Vol. V, 1280:10-23).

419. On August 13, 2019, Dr. Dancer sent Mrs. B a draft IEP dated February 6, 2019, as well as the BIP. (Tr. Vol. III, 611:17-22, 615:1-20; Tr. Vol. V, 1276:23-1277:12; JE-1, pp. 1287-1299; Petitioner's Ex. 203). Dr. Dancer did not attach a PWN requesting the B's parental consent to begin providing special education services to A.B. *Id.*

420. Ms. Helzer testified that her concern about the speech portion of the draft IEP sent to Mrs. B lacked "present level based data based on [A.B.'s] current levels of functioning." (Tr. Vol. IV, 876:14-877:20; Petitioner's Ex. 242).

421. Mrs. B testified the draft IEP lacked any of her input, lacked information regarding District staff observations, did not reference or consider the speech IEE or the District's second FBA completed in May 2019, and utilized goals she thought were from A.B.'s kindergarten year. (Tr. Vol. III, 615:18-616:24; JE-1, pp. 1287-1299).

422. Dr. Weigand testified she felt the IEP provided to Mrs. B on August 13, 2019 contained an immeasurable behavior goal, like the IEP drafted on February 13, 2019. (Tr. Vol. I,

218:3-219:21). Dr. Weigand testified it was her opinion the August 13, 2019 version was not reasonably calculated to enable A.B. to make appropriate progress. (Tr. Vol. I, 219:18-21).

423. Dr. Dancer informed Mrs. B the District had to work off the IEP draft from the prior school year, and the District would collect new data moving forward and propose changes on an ongoing basis, via PWNs. (Tr. Vol. III, 616:25-617:12).

424. On August 15, 2019, Dr. Dancer emailed Mrs. B and confirmed she was adding documents to A.B.'s file. Further Dr. Dancer confirmed Mrs. B had received and reviewed the proposed IEP. Dr. Dancer informed Mrs. B she could sign consent to begin the implementation of the IEP; however, Dr. Dancer told Mrs. B she also saw the benefit of having the IEP meeting to get everybody around the table to discuss his educational supports because they can't implement the IEP without Mrs. B's consent. (Tr. Vol. VI, 1416:10-1417:2, 1417:13-15, 1418:2-7; Petitioner's Ex. 207).

425. On August 21, 2019, Dr. Dancer sent an email to A.B.'s IEP team advising that Mrs. B would like to meet to discuss A.B.'s proposed IEP. Dr. Dancer stated, "This may be a difficult meeting because as you know, the goals were written last spring." (Tr. Vol. VI, 1382:2-7, 1420:15-1421:18; Petitioner's Ex. 208).

426. On August 22, 2019, Billie Varuska, a paraprofessional for the District, completed an observation of A.B. (JE-1, p. 1301). A.B. had to be prompted multiple times to begin his work. A.B.'s teacher provided one-on-one instruction to A.B. and A.B. was only asked to complete one problem, while the remainder of the class completed several. It was noted that A.B. did complete his work, showed it to another student, and then showed it to the teacher. (*Id.*)

427. In response to an email from Ms. Waeckerle, on August 24, 2019, Ms. Judd emailed Ms. Waeckerle and Ms. Keith regarding A.B.'s behaviors in the classroom. Ms. Judd noted that A.B. seemed to be listening and would approach later and comment for most activities. A.B. was doing some of the assignments but there was an element of negotiation. Ms. Judd must stay with A.B. to get the task completed and whisk it away or it will be destroyed. Ms. Judd usually was able to salvage one language arts and one math assignment each day. Ms. Judd described her report of A.B. as "sounds terrible, but I'm really okay with it. I think he is doing okay - given all of his eccentricities." (Tr. Vol. IV, 808:1-12, 810:14-21; Petitioner's Ex. 213).

428. Ms. Kramer testified A.B. was participating in her Westwood View Tier 3 reading group, having begun in the Fall of 2019, A.B.'s p¹ grade year. (Tr. Vol V, 1238:8-18)

429. Ms. Kramer testified that a Tier 3 intervention in the elementary level means that a student is well below benchmark or well below grade level in reading. They provide a pull-out intervention time for 30 minutes to support students who need a little extra individualized time in small group (typically does not exceed five students) with their grade level peers, that just need extra support in reading. (Tr. Vol. V, 1236:9-23).

430. Ms. Kramer testified that she attended an IEP meeting for A.B. She provided support to A.B., but not through his IEP. (Tr. Vol. V, 1239:1-5). At the IEP meeting Ms. Kramer attended, she told the team: A.B. was responding to interventions; She was seeing his numbers increase; His data points were looking nice; and, Tier 3 support was what A.B. needed. Ms. Kramer testified that in her professional recommendation she did not think A.B. needed additional reading support outside of what she was providing. (Tr. Vol. V, 1239:9-23). Ms. Kramer testified that the Tier 3 supports were working for A.B. When she graphed his data through progress monitoring - which was done weekly or biweekly depending on if A.B. was in the building on that day - the data showed a steady increase with being able to identify sounds, being able to identify and read nonsense words, so the data was improving. (Tr. Vol. V, 1239:24-1240:1). Ms. Kramer also told A.B.'s team that she thought he could read based on working with him, listening to him read, and being a part of the intervention process. (Tr. Vol. V, 1240:11-18).

431. Ms. Kramer testified that A.B. made progress from the time she started working with him through when COVID hit in March 2020. (Tr. Vol. V, 1240:23-1241:5).

432. Ms. Waeckerle testified that during the 2019-2020 school year, A.B. frequently refused academic requests from adults. (Tr. Vol. IV, 807:10-20). Ms. Waeckerle testified that "was typical A.B., that he refused a lot of requests from adults, especially academic requests." (*Id.*).

433. On September 12, 2019, A.B. was sent to the office for 30 minutes for being obscene in the hallway. Mrs. B was notified via phone, then visited with A.B. and Ms. Judd later in the day to discuss social stories and suggestions. A.B. returned to class and integrated back into the classroom setting and completed his work without further difficulties. (JE-1, p. 1303).

434. On September 12, 2019, Ms. Waeckerle provided Mrs. B a PWN scheduling a meeting for September 20, 2019 to review data and determine eligibility. Later, Ms. Waeckerle realized she had checked the incorrect box and on September 13, 2019 emailed Mrs. B a corrected PWN for the September 20, 2019 IEP team meeting indicating the meeting was to develop an IEP. (Tr. Vol. IV, 805:6-18; Petitioner's Ex. 220; JE-1, p. 1304-1306 and 1307-1309).

435. On September 12, 2019, a PWN was provided rescheduling the meeting to develop an IEP from September 20, 2019 to October 1, 2019. (JE-1 p. 1310-1312).

436. On September 12, 2019, Mrs. B provided Dr. Dancer social stories that had been provided to her by Sara Riley at Riley ABA & Autism Center. (JE-1, p. 1313-1351).

437. On September 16, 2019, Mrs. B sent a letter to Dr. Dancer regarding additional parental concerns. Mrs. B stated she had reviewed the February 6, 2019 draft IEP and provided parental concerns: no parental input; concerns about bullying; PE concerns; info on present level is vague; goals are not personally related to A.B. Mrs. B stated she wants statistical data for measuring progress on goals. Mrs. B provided options for short term goals and benchmarks. Mrs. B was concerned with the Least Restrictive Environment (LRE); requested an am/pm

check-in person for A.B., with this person serving as a point person; stated A.B.'s needs demand more than 20 minutes a day three times per week; requested 45 minutes daily in the classroom direct teaching of goals in cooperation with his teacher, Mrs. Judd, between 8:10 a.m. and 9:55 a.m. by SPED staff. Mrs. B further requested 30 minutes a day, 5 times a week for speech/language instruction. Mrs. B also provided a list of requested accommodations. (JE-1, p. 1352-1357).

438. Dr. Dancer testified that the District's interpretation of Mrs. B's September 16, 2019 parent concern letter was there were goals she was proposing for the IEP team to consider. (Tr. Vol. VI, 1447:16-20).

439. Dr. Dancer testified the District was not obligated to accept the suggestions for goals in Mrs. B's September 16, 2019 parent concerns letter; however, the team wanted to reach an agreement with Mrs. B. (Tr. Vol. VI, 1462:18-1463:1).

440. An agenda was prepared for A.B.'s September 20, 2019 IEP meeting. (JE-1, p. 1358).

441. On September 16, 2019, Individualized Healthcare Plans were created for A.B. (JE-1, p. 1359-1364).

442. According to a September 17, 2019 email from Ms. Waeckerle to Ms. Guerry, Mrs. B had expressed that she wanted goals for reading and writing, and Ms. Waeckerle acknowledged the district did not have any current information regarding A.B.'s reading and writing. (Petitioner's Ex. 232).

443. On September 19, 2019, a Time on Task Observation was completed of A.B. while he was in the Library. Aside from being prompted to put his arms back in his shirt sleeves, A.B. followed directions and completed his project. (JE-1, p. 1369).

444. On September 25, 2019, a PWN was emailed to Mrs. B scheduling a meeting for October 1, 2019, to develop an IEP for A.B. The PWN was signed and dated by Mrs. B on October 1, 2019. (JE-1, 1373-1375).

October 1, 2019 IEP Meeting

445. On October 1,2019,A.B.'s IEP team met to develop an IEP,review the BIP,and to obtain consent for initial placement and services. The meeting was recorded. (JE-1,p.1377; Respondent's Ex. SMSD-12, 1.003 (*audio*)). This was the first IEP team meeting held by the District following the eligibility determination in February 2019. (Tr. Vol. V,1298:23-1299:1).

446. The individuals who were part of A.B.'s October 1,2019 IEP team were: Mrs. B,Ms. Waeckerle,Dr. Dancer,Ms. Guerry,Ms. Keith,Ms. Koertner,Ms. Judd,and Liz Meitl, parent advocate. (JE-1,p. 1390-1402 at p. 1402).

447. During the October 1,2019 IEP team meeting,the team reviewed and considered a version of a proposed IEP that listed "IEP Team Meeting Date[s]" of February 6,2019 and October 1, 2019. (JE-1,pp. 1390-1403). The proposed IEP indicated that A.B.'s behavior impeded his learning or the learning of others, and proposed to address the behaviors by accommodations, goals,and a behavior intervention plan. (Id.).

448. According to Dr. Dancer,the IEP team wanted to start providing services as soon as possible because A.B. was a child identified with an exceptionality. However,prior to the October 1,2019,meeting,the Bs had not consented to providing any specialized instruction to A.B. (Tr. Vol. V,1296:15-23).

449. District staff testified there were many different versions of the IEP with revisions and "wordsmithing," all to reach an agreement with the Bs. (Tr. Vol. V,1185:20-24).

450. In reviewing the February 6,2019 and October 1,2019 draft IEPs,no material changes were made to the PLAAFP or Goal and Objective sections of the October 1, 2019 draft IEP. However, the Special Education and Related Services to be Provided section set forth different services to be provided to A.B. from what had been proposed in the February 6, 2019 version. (JE-1,pp. 1287-1299,1403-1415).

451. The October 1, 2019 proposed IEP did include a BIP that appeared to be identical to the BIP Dr. Wiseman drafted using her FBA data,and did not seem to include any of the data obtained or the suggestions from Ms. Koertner's FBA. (Tr. Vol. V,1224:8-1225:10; Petitioner's Ex. 139,at Bates No. BCD004034-35; Petitioner's Exs. 257,283; JE-1,pp. 1414-1415).

452. The IEP team was able to discuss the A.B.'s social skills need but was not able to get to the other services or goals recommended or proposed. (Tr. Vol. V,1296:24-1297:4).

453. The IEP team discussed addressing A.B.'s reading needs through a Tier 3 intervention. (Tr. Vol. V,1283:25-1284:7; Respondent's Ex. SMSD 1.003 at 5m 44s - 8m 57s). The IEP team determined the Tier 3 intervention could be provided to A.B. five days a week. Mrs. B indicated she did not object to the Tier 3 intervention. (Tr. Vol. V,1285:3-12; Respondent's Ex. SMSD 1.003 at 10m 27s - 12m 3s).

454. Mrs. B told the IEP team that A.B. is great in math and social studies. (Tr. Vol. V, 1287:5-7; Respondent's Ex. SMSD 1.003 at 12m 59s - 15m 30s).

455. Mrs. B requested to have a point person for A.B. that would intercept A.B. first thing in the morning, making sure he was in a good space, reinforcing some of those appropriate social skills, and ensuring that he is ready for the day. (Tr. Vol. V, 1288:25-1289:2, 1289:17-1290:10; Respondent's Ex. SMSD 1.003 at 33m 21s - 38m 35s).

456. Mrs. B requested that a paraprofessional be assigned to A.B. multiple times during the meeting, including the specific request for 45 minutes in the morning. (Tr. Vol. V, Tr. 1286:3-13; 1292:20-22, 1293:7-10; Tr. Vol. VI, 1429:10-13; Respondent's Ex. SMSD 1.003 at 12m 59s - 15m 30s; at 40m 38s - 42m 33s).

457. Through collaboration, the IEP team agreed that A.B. would benefit from 50 minutes in the morning to work on executive functioning skills. The team identified Ms. Grover, a certified special educator and long-term substitute at Westwood View, as the individual who would serve in this capacity. (Tr. Vol. V, 1172:21-1173:7; 1181:3-8; 1304:3-7).

458. Mrs. B asked Ms. Judd to fill out a rating scale that Mrs. B had found. The scale was a weighted distribution sheet that sometimes the state will work with buildings or districts to determine paraprofessional allocation. (Tr. Vol. V, 1290:22-1291:7; Respondent's Ex. SMSD 1.003 at 33m 21s - 38m 35s).

459. Mrs. Judd told the IEP team about A.B.'s improvement with participation and listening in the classroom. (Tr. Vol. V, 1295:6-17; Respondent's Ex. SMSD 1.003 at 54m 30s - 55m 18s).

460. Towards the end of the October 1, 2019 meeting, Dr. Dancer explained revocation of consent to Mrs. B. Dr. Dancer wanted Mrs. B to be aware that the IEP team could take the IEP piece by piece to gain consent for those items that the team agreed upon. Dr. Dancer wanted to make certain that Mrs. B was aware that parents can revoke consent for special education services at any time. (Tr. Vol. V, 1295:18-20; Respondent's Ex. SMSD 1.003 at 1h 6m 5s - 1h 8m 7s).

461. Dr. Weigand testified it was her opinion the October 1, 2019 IEP was not reasonably calculated to enable A.B. to make appropriate progress. (Tr. Vol. I, 220:19-221:15).

462. The October 1, 2019 draft IEP was not consented to or approved by Mrs. B. (JE- 1 pp. 1378-1389) Mrs. B testified she did not consent to the entire IEP proposed on October 1, 2019. (Tr. Vol. III, 619:15-620:5).

463. On October 1, 2019, a PWN was provided to and signed by Mrs. B. Section "B. Initial services and placement" are checked. Under Section 1, "Description of the action proposed or refused," it says, "The IEP team, including Mrs. B, agree [A.B.] will begin to receive special

education services in the area of social/emotional/behavioral and executive functioning. He'll receive push-in support in the general ed classroom for 50 minutes daily." Under Section 2, entitled "Explanation," it says, "Based on parent concern, teacher feedback, and student performance, the IEP team agrees [A.B.] requires special education support in the area of social/emotional/behavior." It is further noted under Section 5 of the PWN "The team will continue to work through the proposed IEP and build consensus around other proposed services." (Tr. Vol. V, 1300:10-1301:13; JE-1, pp. 1424-1428).

464. Once Mrs. B signed the October 1, 2019 PWN, A.B. could begin receiving special education services. (Tr. Vol. V, 1303:1-14; JE-1, p. 1427).

465. On October 1, 2019²⁰ a PWN was prepared and provided to Mrs. B scheduling an IEP meeting for October 17, 2019, to develop A.B.'s IEP. (JE-1, p. 1436-1438). Mrs. B signed the PWN on October 1, 2019. (*Id.*).

October 17, 2019 IEP Team Meeting

466. A.B.'s IEP team met again on October 17, 2019 as a continuation of the October 1, 2019 meeting to discuss A.B.'s IEP, including goal changes/additions. During the October 17, 2019 meeting, the team mainly focused on A.B.'s BIP and a token chart. Mrs. B wanted the team to implement Lego and edible token boards for A.B. (Tr. Vol. V, 1304:14-16, 1305:1-18; JE-1, p. 1511, 1522).

467. Ms. Koertner testified that a motivation system is important, and it does not matter what the token board looked like. Ms. Koertner testified if A.B. had a history with a particular token system, the District was happy to use it at school because he already knows how it works. (Tr. Vol. V, 1177:1-16; JE-1, p. 1512-1515).

468. On October 17, 2019, a PWN was provided to the Bs regarding a proposed "change in services." The team agreed to implement a token board provided by Mrs. B to give positive reinforcement to A.B. consistently across school settings. Further, the PWN stated: "The team will continue to work through the proposed IEP and build consensus around other proposed services." (Tr. Vol. V, 1177:1-6, 1306:15-19; JE-1, p. 1513).

469. On October 17, 2019, a PWN scheduling a meeting for November 11, 2019 to continue developing A.B.'s IEP was provided to Mrs. B. Mrs. B signed this PWN. (JE-1, p. 1519-1521).

470. Mrs. B provided Ms. Waeckerle an editable Lego token board and a Daily Behavior Data Sheet on October 17, 2019. (JE-1, p. 1522-1545 and 1546-1547).

²⁰ While the PWN is dated October 1, 2019, the Delivery section indicates Ms. Guerry delivered the PW to Mrs. B on September 25, 2019.

471. After the meeting on October 17, 2019, a note was sent to the special teacher that said "[A.B.] is going to have a token board for every class. Each special's teacher will receive a board, so we are consistent throughout the day with our reinforcement system. [AB.] was introduced to this system over the summer and it was very effective. Mrs. B would like to schedule time with everyone to train them during parent/teacher conferences." (Tr. Vol. V, 1178:20-25, 1306:20-1307; JE-1, p. 1548).

472. On October 21, 2019, Ms. Koertner sent an email to AB.'s team that included two possible data sheets they could use and asking the team to weigh in on which data sheet they thought would be best. Ms. Koertner asked the team members, including Mrs. B, to weigh in on whether they felt the data sheet would cover the things they had discussed in the meeting. She advised the social skills data sheet would go on the back of whichever sheet the team ultimately decided to use. Usually, Ms. Koertner would not ask a parent if they liked the data sheet, because data sheets are generally internal. However, during the meeting, the team discussed all the things they wanted to catch, and, in this scenario, Ms. Koertner was especially seeking out Mrs. B's feedback. (Tr. Vol. V, 1181:9-1182:22; Respondent's Ex. SMSD-12, p. 4637).

473. On October 25, 2019, Mrs. B replied to Ms. Koertner's October 21, 2019, email, asserting that the people who should comment on the proposed data sheets are Mrs. Judd and Mrs. Grover because she trusted "their opinion 100% and will back them." (Tr. Vol. V, 1182:1-22; Respondent's Ex. SMSD-12, p. 4636-4637).

474. By email dated October 25, 2019, Ms. Waeckerle advised Ms. Koertner that baseline data was needed for AB.'s IEP goals. (Tr. Vol. IV, 815:2-16; Petitioner's Ex. 280).²¹

475. As of October 25, 2019, it has been noted that AB.'s perseveration moved to his eye; he began poking his eye. (Tr. Vol. IV, 815:17-21; Petitioner's Ex. 280).

476. Dr. Dancer testified regarding an email sent on October 25, 2019 from Mrs. B to Ms. Koertner that said, "Pulled directly from my parent concerns letter these are the annual goals that accurately reflect my priorities and the state standards for advancement to second grade. The 3 sub goals that we discussed as a top priority for Mrs. Judd and that Mrs. Grover is to work on with [AB.] are highlighted in green." (Tr. Vol. VI, 1442:20-1443:3; Respondent's Ex. SMSD-12, p. 4737).²²

477. On October 25, 2019, Ms. Koertner emailed Mrs. B a copy of the Draft BIP and a copy of the May 2019 FBA Ms. Koertner asked for any feedback Mrs. B would like to

²¹ While the Petitioner characterized this as the District not having any baseline data, the alternative is that Ms. Waeckerle was requesting that the baseline data be provided to her, so it could be included in developing the IEP goals. This was never clarified by the parties.

²² In reviewing both the official record received from the Hearing Officer, as well as the copy of the record certified by the parties, the RO is unable to find the specific page of Respondent's Exhibit SMSD-12, p. 4737, that is referenced by the District and ultimately by the Hearing Officer in the July 23, 2021 Decision.

provide regarding the BIP. (Tr. Vol. V, 1189:15-21; JE-1, p. 1552; Respondent's Ex. SMSD-12, p. 4636-4637).

478. In an October 28, 2019, email to Ms. Koertner, Ms. Waeckerle reiterated her concern that "we have no data to support a reading goal" for A.B. (Petitioner's Ex. 287).²³

479. The IEP team started taking data in the classroom on the three target behaviors (noncompliance, vocal disruption, property disruption) because they wanted to see if the BIP was working. If A.B. exhibited a target behavior, they wanted to intervene using the BIP and then see if the target behavior got better. (Tr. Vol. V, 1179:11-20).

480. From October 2019 through March 2020, the District collected additional data regarding A.B., including:

- a. ABA Data Sheet to obtain baseline data (JE-1, p. 1554-1555);
- b. A.B. Behavior Chart measuring compliance, work engagement, orients towards speaker, chorale responding, raising hand, uses paper appropriately, and property disruption (JE-1, p. 1556);
- c. Data Collection Charts measuring time, activity, follows directions vs. noncompliance, engages in work, orients towards speaker or materials, answer or respond with group, raises hand, uses paper appropriately, and property disruption (JE-1, p. 1557 and 1558);
- d. Ms. Waeckerle kept logs of classroom data regarding A.B.'s classroom behaviors, such as following directions v. noncompliance, eyes on teacher, track with finger, answer with group, complete work/engages in work, shift topics, diversify topics, approach to others (JE-1, p. 1439-1503 and 1747-1777); and,
- e. From October 15, 2019 through December 19, 2019 data was collected and graphed for A.B. (JE-1.189 (*excel spreadsheet*)).

481. On November 1, 2019, Ms. Waeckerle sent an email to Stephen Hillyer requesting that Mr. Hillyer observe A.B. because Ms. Grover expressed concern about A.B.'s fine motor skills. (Tr. Vol. IV, 824:1-18; Petitioner's Ex. 298). Ms. Waeckerle testified that she did not know if the fine motor observation occurred. (Tr. Vol. IV, 824:9-825:2).

482. On November 10, 2019, Ms. Waeckerle emailed Mrs. B a draft IEP, dated November 11, 2019 noting the original IEP date was October 1, 2019. (JE-1, p. 1559-1570; Respondent's Ex. SMSD-12, pp. 4858-4874).

²³ Other than to testify to the contents of the email, no testimony was offered to explain the context of this email. Was there no data or did the data simply not support establishing a reading goal?

November 2019 IEP Team Meetings

483. The next IEP team meeting occurred on November 11, 2019. (Tr. Vol. V, 1308:23-1309:6; JE-1 pp. 1583-1586).

484. The District revised the October 1, 2019 proposed IEP and circulated an IEP version dated November 20, 2019. (Tr. Vol. III, 621:10-17; Respondent's Ex. SMSD-12, pp. 5360-5375).

485. On November 11, 2019, a PWN was prepared proposing new goals being added to A.B.'s IEP, as well as other goals being discontinued based on collection of new data addressing current behavior concerns. The team did not feel the goals on the initial IEP were going to adequately meet A.B.'s needs and after collecting data on several behavior concerns, new goals and accommodations are being proposed. Data used for the basis of the proposed action were data, observation, and teacher and parent reports. An electronic notation indicated that Mrs. B consented to the PWN. Ms. Waeckerle emailed this PWN to Mrs. B on November 11, 2019. (JE-1, p. 1575-1578; Respondent's Ex. SMSD-12, pp. 4858-4874).

486. On November 11, 2019, another PWN was prepared proposing a modification to B.B.'s IEP to provide communication (speech) services two (2) times per week for 20 minutes based on identified communication needs in his Spring 2019 evaluation reports. The PWN also stated, "The team will continue to work through the proposed IEP and build consensus around other proposed services." Mrs. B signed this PWN on November 11, 2019. (Tr. Vol. V, 1309:7-13; JE-1, p. 1583-1586).

487. By November 11, 2019, there had been various incremental implementations of C.B.'s IEP: 50 minutes of "push-in support" in the morning, consented to on October 1, 2019; use of token board(s), consented to on October 17, 2019; and communication (speech) services two (2) times per week for 20 minutes, consented to on November 11, 2019. (Tr. Vol. V, 1309:14-21; JE-1, pp. 1425, 1513, 1584).

488. On November 11, 2019, Ms. Waeckerle hand-delivered a PWN to Mrs. B scheduling a meeting for November 20, 2019 to discuss possible changes in A.B.'s IEP. Mrs. B signed this PWN on November 20, 2019. (JE-1, p. 1590-1592).

489. Ms. Helzer testified she began providing speech services for A.B. on November 11, 2019. (Tr. Vol IV, 881:13-17).

490. On November 11, 2019, Ms. Keith sent an email to Ms. Judd that said, "95% - Libby will continue to pull him on A and C days and share data at our next 11-20 meeting date. If we can be diligent with the above instruction for six to eight weeks, then we can review to see if additional reading support is needed." Ms. Kramer testified this is the normal progression of reading instruction for Tier 3 eligible students. Ms. Kramer testified she normally tracks progression for students in her Tier 3 group, and if Tier 3 is not working, then they meet as a team

and reevaluate the intervention that they have in place. Ms. Kramer testified she applied that methodology to A.B.;they did not-need to meet because he was still making progress. (Tr. Vol. V,1248:11-1250:4;Respondent's Ex. SMSD-12, p. 4907).

491. On November 18,2019,Ms. Waeckerle sent an email to Dr. Dancer regarding the September 16,2019, parent concern letter. (Petitioner's Ex. 318). Ms. Waeckerle states,"Lori Grover and I reviewed the parent letter again to determine what new goals we could use that we felt were appropriate for his needs at school. Two social goals were added,and the behavior goal was revised per mom's request. They are attached. I just need to correct mistakes and add the State Standards,etc." (Tr. Vol. VI,1437:23-25,1438:1-14;Petitioner's Ex. 318).

492. Ms. Koertner testified that the development of A.B. 's IEP goals was interactive amongst the team and with Mrs. B. (Tr. Vol. V,1213:6-9).

493. Ms. Koertner also testified that while the IEP team was creating and revising A.B.'s IEP, they were also taking data to create a new baseline for A.B. (Tr. Vol. V,1189:8-14).

November 20, 2019 IEP Team Meeting

494. On November 20,2019,the IEP team met again to discuss A.B.'s IEP. (JE-1,pp. 1590-1592). The following team members were in attendance: Mrs. B, Ms. Waeckerle,Dr. Dancer,Ms. Guerry,Ms. Keith,Ms. Koertner,Ms. Judd,Ms. Meitl,Ms. Grover,Ms. Helzer,(Tr. Vol. V,1311:11-17;JE-1,p.1611).

495. The November 20, 2019, IEP provides a "Measurable Annual Goal" for communication: "Within 36 instructional weeks,after being taught pre-planned strategies,A.B. will identify the situation,what strategies he could use to assist him,what adults could assist him in the problem-solving process in 80% of opportunities on 4 out 5 [sic] data days." The Goal includes three (3) short-term Objectives or Benchmarks to be measured through data collection. The Socially Savvy checklist was used to formulate the baseline for A.B.'s communication goal. (Tr. Vol. V, 1317:9-17, 1318:18-1319:3; JE-1, p. 1618; Ex. SMSD-12, p. 5367). A.B.'s communication goal states the "State Standards" are "Standard 1: The student will acquire knowledge,attitudes,and interpersonal skills to understand and respect self and others. Benchmark 2: The student will acquire and use interpersonal skills." Those are preferred components of an IEP goal. (Tr. Vol. V,1316:10-11,1316:20-1317:4; JE-1,p. 1618;Respondent's Ex. SMSD-12, p. 5367). A.B.'s communication goal states progress will be reported quarterly,which is standard in the state of Kansas. (Tr. Vol. V,1319:15-23; JE-1,p. 1618;Ex. SMSD-12,p. 5367).

496. The November 20,2019,IEP provides a social goal of: "Within 36 instructional weeks, A.B. will be able to increase his emotional skills by the following objectives: [(1)] identifying various emotional states in self and why he may be feeling a particular emotion; [(2)] identifying various emotional states in others and why he/she might be feeling a particular emotion; [(3)] identifying a calming strategy to provide an appropriate response to a particular emotional state; [(4)] utilizing a calming strategy to provide an appropriate response to a particular

emotional state." The criteria for tracking was 50% on four (4) out of five (5) data days. The Socially Savvy checklist was used to formulate the baseline for A.B.'s social goal. The IEP measured progress through data collection sheets; again, that can be determined by the person providing the service. On objectives 1, 2, 3 and 4, they are broken down into more particularized analysis. There is no percentage baseline to explain what it meant for A.B. to "increase" his social emotional skills. (Tr. Vol. V, 1320:17-16; JE-1, p. 1620; Respondent's Ex. SMSD-12, p. 5369).

497. The November 20, 2019 IEP's social goal is based on language proposed by Mrs. B in her September 16, 2019, parent concerns letter. (Tr. Vol. VI, 1450:5-10; Respondent's Ex. SMSD-12, p. 4737²⁴; JE-1, p. 1620).

498. The November 20, 2019 IEP provides for a second social goal of: "Within 36 instructional weeks, [A.B.] will develop social understanding skills by demonstrating the following objectives." The short-term objectives in the second social goal are: 1) Engaging in appropriate social play; 2) Engaging in appropriate turn taking skills; 3) Engaging in cooperative social interactions (i.e., Story Time, large group work, projects with peers) by considering others perspectives and engaging as a team; and 4) Identifying appropriate social rules and codes of conduct for various social situations." The criteria are 50% on four out of five data days. Again, the objectives are incorporating the short-term objectives listed. Data collection is the method of monitoring progress. Behavioral data from the 2018-2019 school year was used to formulate the baseline for this social goal. (Tr. Vol. V, 1323:3-18; JE-1, p. 1622; Respondent's Ex. SMSD-12, p. 5371).

499. The November 20, 2019 IEP's second social goal is based, at least in part, on language proposed by Mrs. B in her September 16, 2019 parent concerns letter. In Mrs. B's September 16, 2019 parent concerns letter, under "Short term goals and benchmarks", states, "1. _____ will develop social understanding skills as measured by the benchmarks listed below." (Tr. Vol. VI, 1452:14-22; JE-1, pp. 1352-1357 and p. 1622).

500. The November 20, 2019 IEP provides a behavior goal of: "Within 36 instructional weeks [A.B.] will increase his ability to function appropriately within the school environment by receiving a rating of 2 out of 3 on the following objectives. The rating scale included: N/A= Not applicable 1= Did not meet expectations 2= some expectations met 3= met consistently." The objectives are incorporating the short-term objectives listed. The criteria for this goal are three out of three on four out of five data days. (Tr. Vol. V, 1321:20-1322:18; JE-1, p. 1621; Respondent's Ex. SMSD-12, p. 5370). The short-term objectives set out in the behavior goal are: 1) [A.B.] will demonstrate the following on-task behaviors: orienting toward the teacher/speaker/materials, following the directions given (e.g. getting out the appropriate materials, writing name on paper, etc.), and responding to question through written response, raising hand to volunteer, or participating in chorale responses, completing modified work data collection/observation; 2) When [A.B.] receives correction on his work or if his work is too challenging he will use one of the following strategies: ask for a break, ask for help, or ask for an appropriate outlet for his

²⁴As was noted earlier, this exhibit was not included in either of the records provided to the RO.

frustration (e.g. non-work paper that he can rip or a sensory toy) data collection/observation; and 3) Given visual/verbal cues (copy of revised schedule) and the opportunity to know of changes in advance, [A.B.] will accept major changes in routine/schedule (e.g. new activities or missing regularly scheduled activities) by exhibiting appropriate behaviors when the change occurs. (Tr. Vol. VI, 1453:17-24; Respondent's Ex. SMSD-12, p. 4737²⁵; JE-1, p. 1621).

501. The November 20, 2019 IEP's Behavior goal is based on language proposed by Mrs. Binher September 16, 2019 parent concerns letter. (Tr. Vol. VI, 1450:5-10; Respondent's Ex. SMSD-12, p. 4737²⁶; Respondent's Ex. SMSD-12, p. 5370; JE-1, p. 1620).

502. Dr. Dancer testified the IEP team aligned the goals proposed in the IEP with the State's expectations for certain areas, as set forth in the State's Standards. (Tr. Vol. V, 1316:14-19; JE-1, p. 1617; Respondent's Ex. SMSD-12, p. 5366-5371).

503. Dr. Dancer testified short-term objectives and benchmarks set forth in the IEP are not a requirement for a student unless they are on the dynamic learning map (DLM). A.B. is not on the DLM. However, there are teams who include the short-term objectives and benchmarks to make sure that they are staying on the right track as far as timelines and making sure that the goals are appropriately ambitious. The short-term objectives and benchmarks help them know what kind of progress they should be looking at within that time frame. (Tr. Vol. V, 1318:1-17).

504. Dr. Dancer testified a service plan chart on an IEP includes components required by the state: what the service is, the duration of the service, the frequency, the setting services will be provided, the begin date, the end date, and the provider. (Tr. Vol. V, 1323:19-1324:3).

505. A.B.'s November 20, 2019 IEP includes a service plan chart. (Tr. Vol. V, 1323:19-21; JE-1, p. 1623; Respondent's Ex. SMSD-12, p. 5372).

506. A.B.'s November 20, 2019 IEP's "Educational Placement" (analysis for LRE) states, "[A.B.] will receive specially designed instruction in the general education setting and speech instruction in the special education setting. The team feels the benefits of this instruction outweigh any harmful effects of missing time in the general education setting." (Tr. Vol. V, 1324:20-1325:5; JE-1, p. 1623; Respondent's Ex. SMSD-12, p. 5372).

507. Ms. Koertner testified the team concluded A.B. should receive instruction in the regular classroom because to get a good picture of how A.B. is progressing on the IEP goals, he needs to be around peers. A.B.'s placement inside the regular classroom was due to his goals regarding executive function, but also because Mrs. B was adamant those goals be worked on in the classroom. (Tr. Vol. V, 1199:23-1200:15; JE-1, p. 1612-1626). Peer modeling was important for A.B. A.B. is aware of and interested in his peers, so having him in the classroom with peers, particularly with peers who are engaging in appropriate social skills, appropriate

²⁵ As was noted earlier, this exhibit was not included in either of the records provided to the RO.

²⁶ As was noted earlier, this exhibit was not included in either of the records provided to the RO.

language, and appropriate behavior, is important. (Tr. Vol. V, 1200:16-1201:8; JE-1, pp. 1612-1626).

508. At the November 20, 2019 IEP team meeting, Mrs. B requested the addition of a reading goal. (Tr. Vol. III, 622:2-9). The District declined the requested reading goal, finding it was "not warranted at this time." The team further indicated "[A.B.] is currently making adequate progress in reading with general education reading intervention supports." (JE-1, pp. 1677-1681).

509. Mrs. B testified she had requested the District provide additional paraprofessional support for A.B. during math in the afternoon after Ms. Judd expressed A.B. was having behavior problems after coming back from lunch. (Tr. Vol. III, 622:2-623 :5). Mrs. B testified the District denied the requested paraprofessional support, saying that the way Ms. Judd described it "it was like a want and not a need." (Tr. Vol. III, 622:2-623:5).

510. Most of PLAAFP information contained in A.B.'s November 20, 2019 IEP is from A.B.'s kindergarten year. (Tr. Vol. VI, 1387:13-24; Respondent's Ex. SMSD-12, pp. 5360-5375 at 5364).

511. The PLAAFP informing A.B.'s social goal was pulled from Dr. Wiseman's fall 2018 FBA. (Tr. Vol. VI, 1390:17-1395:2; JE-1, p. 1016; Petitioner's Ex. 324, Respondent's Ex. SMSD-12, pp. 5360-5375).

512. On the November 20, 2019 IEP, one of A.B.'s social goals say "goal ended 11-20-19" because the IEP team took the IEP that was proposed in the spring and modified and edited it.²⁷ The social goal was originally proposed in the Spring 2019 and after continued conversations, the IEP team determined the goal would not be implemented. (Tr. Vol. V, 1315:17-1316:9; Tr. Vol. VI, 1388:9-13; JE-1, p. 1617; Respondent's Ex. SMSD-12, p. 5366).

513. Dr. Dancer testified the team finalized A.B.'s IEP on November 20, 2019, which contained a communication goal, two (2) social goals and a behavior goal. The IEP included the special services of daily specially designed instruction for fifty (50) minutes and speech language therapy two (2) times a week for twenty (20) minutes. (Tr. Vol. V, 1312:7-9; JE-1, pp. 1612-1626).

514. Ms. Dumolien testified that A.B.'s IEP placement is at the least restrictive end on the placement continuum at the very beginning. He receives services in the general education setting with the caveat of those services that he receives for speech, where it goes into the special education setting a couple of times a week. (Tr. Vol. VI, 1489:2-12).

515. In a PWN dated November 20, 2019, the District proposed to implement the November 20, 2019 IEP and BIP. The November 20, 2019 PWN states, "The IEP team met to continue to review proposed goals, Behavior Intervention Plan (BIP), accommodations, and Mrs.

²⁷ There was no IEP adopted on November 11, 2019. The references to "goal ended November 11, 2019" simply reflects the ongoing creation of an IEP for A.B.

B's concerns. The team agreed to the addition of two social goals, an updated behavior goal, and the addition of accommodations. Mrs. B requested the team consider adding a reading goal and additions to existing accommodations." (Tr. Vol. VI, 1438:20-1439:6; JE-1, p. 1678).

516. On November 21, 2019, Ms. Waeckerle emailed Mrs. B the revised IEP. Respondent's Exhibit SMSD-12, pp. 5360-5375).

517. A.B.'s BIP was finalized on November 20, 2019. Ms. Koertner emailed Mrs. B a copy of the final BIP, along with the FBA write-up, on November 23, 2019.²⁸ (JE-1, p. 1670-1672).

518. Mrs. B signed the November 20, 2019 PWN and provided written parental consent to begin A.B.'s special education services on December 2, 2019, implementing the November 20, 2019 IEP and BIP. (JE-1, pp. 1677-1680). The entire team, including Mrs. B, agreed to A.B.'s IEP, including the goals and services, as of December 2, 2019. (Tr. Vol. II, 439:15-19; JE-1, p. 1677-1680).

519. Mrs. B testified that although she had participated in the November 20, 2019 IEP team meeting and development as a starting point, she remained concerned that the November 20, 2019 IEP was informed by the evaluation from the prior school year, a concern she discussed with Dr. Dancer, and which was never alleviated. (Tr. Vol. III, 610:23-612:23; 624:8-20). Dr. Dancer testified that many of Mrs. B's suggestions for goals and objectives were not incorporated into A.B.'s IEP by the District. (Tr. Vol. VI, 1462:9-1463:23). Mrs. B testified that Dr. Dancer asked Mrs. B to trust her and told her that the District was trying to collect all new data to address that issue. (Tr. Vol. III, 624:8-20).

520. Dr. Dancer testified three (3) of the four (4) goals in the November 20, 2019 IEP were taken from Mrs. B's parent concerns letter and the goals she proposed. Mrs. B made recommendations that the team revised and adopted. Everyone at the IEP meeting believed that the IEP goals were appropriately drafted. (Tr. Vol. VI, 1455:1-12).

521. Dr. Dancer testified the IEP team used goals proposed by Mrs. B in a good-faith effort to collaborate with Mrs. B and to make sure she felt like she was part of the IEP team in a way that they could move forward with the IEP. (Tr. Vol. VI, 1464:18-23).

522. Dr. Dancer testified the District desires to work with parents on IEP goals; however, in the end goals can be proposed and decided upon by the "educational decision-maker," i.e., the District. (Tr. Vol. VI, 1421:22-1422:6). Dr. Dancer further testified the District is obligated to develop measurable goals, regardless of parental participation, and the District has an obligation to measure the goals pursuant to the IEP. (Tr. Vol. VI, 1462:9-17; 1464:4-9).

²⁸ This is based upon a proposed fact submitted by the District; however, no proof of the email appears to have been offered or admitted as evidence.

523. Ms. Helzer testified that she was concerned about the goals in A.B.'s IEP: "The concern was that [Ms. Hensler] didn't write the draft. I didn't write the draft. And my concern specifically was that there was no data in that goal, no present level-based data based [sic] on his current levels of functioning. Again, the evaluation was done a year prior and your data will change based on student needs and present levels a lot, especially over the course of a year." (Tr. Vol. IV, 876:20-877:25).

524. Mrs. B testified she had requested copies of the data collection sheets being kept monitoring A.B.'s progress, but the District did not provide them. (Tr. Vol. III, 624:21-625:10).

525. Dr. Weigand testified it was her opinion that the November 20, 2019 IEP remained "not reasonably calculated based on the immeasurability of the goals" and the behavior goal was ineffective to measure A.B.'s behavioral responses. (Tr. Vol. I, 222:21-223:8; 224:2-226:12; Tr. Vol. II, 379:12-23, 381:21-383:4, 398:25-399:22; Petitioner's Ex. 503, at 29-33).²⁹ Dr. Weigand further testified it was her opinion that the November 20, 2019 IEP was not reasonably calculated to enable A.B. to make progress appropriate in light of his circumstances. (Tr. Vol. I, 226:13-16).

526. Dr. Yell testified that if a student's present levels are wrong, the school could have committed both a procedural and substantive error. (Tr. Vol. VI, 1549:14-17). Dr. Yell testified that goals are the mechanism for determining if a child has made progress and a goal must be measurable. Dr. Yell further testified that a goal that is not measured "certainly procedurally probably would" violate FAPE and substantive "probably if there's no measurement at all of the goal." (Tr. Vol. VI, 1549:18-1550:10).

527. Ms. Helzer testified A.B. did very well with her after she started providing him speech/language services. Initially, A.B. tested the limits to see if Ms. Helzer was consistent in her expectations. Once they established Ms. Helzer was consistent, and she gave A.B. some control within the sessions as to what order of things to do, A.B. did very well. (Tr. Vol. IV, 882:5-12). Ms. Helzer testified she did not have any concerns about A.B.'s progress on his communication goal. He made progress, and, in many areas, Ms. Helzer saw exemplary progress. Ms. Helzer testified she saw A.B.'s socialization skills improve. (Tr. Vol. IV, 882:18-883:4).

528. Ms. Waeckerle testified A.B.'s refusal behaviors continued after the November 20, 2019 IEP was in place. (Tr. Vol. IV, 833:17-25). Ms. Koertner testified the team did not see progress in terms of A.B.'s completing schoolwork presented by his teacher. Ms. Koertner testified "We saw a decrease in challenging behavior. We did not see as good an increase in responding to work, in doing his work." (Tr. Vol. V, 1197:16-1198:1, 1216:15-20). In a January 7, 2020 email Ms. Waeckerle conveyed to District staff, including Dr. Dancer, that A.B. was "continuing to refuse to do any work when Lori [Grover] is present not to mention when she leaves. Most of

²⁹ It is noted that the page of JE-1 Dr. Weigand was reviewing during her testimony about A.B.'s behavior goal (Tr. Vol. I, 224:2-226:12) was from a draft of the IEP dated November 11, 2019. The November 20, 2019 IEP that was reviewed by the IEP team and ultimately approved by Mrs. B is found in evidence at Respondent's Ex. SMSD-12 pp. 5360-5375. The behavior goal Dr. Weigand testified to at JE-1 p. 1662 ended on November 20, 2019 and was not part of the IEP that was ultimately approved. (Respondent's Ex. SMSD-12 p. 5368).

the time, he would prefer to do nothing versus getting a reward." (Tr. Vol. VI, 834:5-835:7; Petitioner's Ex. 343).

529. On January 3, 2020, Ms. Waeckerle provided Mrs. B a copy of the Progress Report on AB.'s four IEP goals. (JE-1, p. 1681-1683).

530. Ms. Waeckerle testified that Ms. Grover reported in the January 2020 timeframe that AB. was continuing to be AB., meaning he was still refusing to do work. (Tr. Vol. IV, 849:15-21).

531. On January 8, 2020, Acadience Data Management - Acadience Reading Assessment Results was created for A.B. (JE-1, p. 1685-1687). AB.'s December 31, 2019 reading score reflected AB. was in the 17th percentile as compared to his peers, the same percentile score in AB.'s September 28, 2018 testing. (Tr. Vol. V, 1243:22-1246:3; Petitioner's Ex. 339; JE-1, pp. 699 and 1687).

532. AB. qualified for Tier 3 reading supports again in January 2020. (Tr. Vol. V, 1243:3-21; JE-1, p. 1684). Ms. Kramer sent a letter to AB.'s family on or about January 8, 2020 advising that AB. would benefit from being placed in Tier 3: grade level curriculum with "additional, more targeted support." (JE-1, p. 1684).

533. The IEP team members engaged in an email conversation on January 9, 2020 in which concerns were voiced that AB. was unable to read. Ms. Waeckerle suggested the reading testing was skewed because an iPad read questions to him, and that:

"He needs a lot of help however, because he cannot read anything on the page. I feel that this is at least part of the reason he's not completing work in the classroom. After working with him for 2 days, he may, in fact, need a reading goal????"

(Tr. Vol. IV, 836:6-838:8; Petitioner's Exs. 343, 346).

534. Ms. Waeckerle testified that when she spoke with Ms. Judd and expressed her concern regarding proposing adding a reading goal to AB.'s IEP, to let her know that A.B. could not read the directions, Ms. Judd said, "Cindy, no one in my class reads the directions. I read them to them." (Tr. Vol. IV, 838:14-20).

535. District staff did not communicate or suggest AB. needed a reading goal or express concerns regarding AB.'s fine motor skills to the Bs during the spring 2020 semester or any time thereafter. (Tr. Vol. III, 627:14-25; Tr. Vol. IV, 838:24-839:1). Ms. Waeckerle did not raise this concern at the January 31, 2020 IEP team meeting that included Mrs. B. (Tr. Vol. V, 1246:24-1247:10).

536. Dr. Dancer testified there was no data to support immediate implementation of afternoon paraprofessional support for A.B. (Tr. Vol. V, 1336:14-1337:19; 1347:11-20). Ms. Waeckerle sent a January 16, 2020 email to Ms. Keith that reads: "As challenging as this will be, I think A.B. needs more support. He's always willing to do his work when he comes up, he just needs help." (Tr. Vol. IV, 845:11, 845:16-21; Petitioner's Ex. 357).

537. Ms. Koertner testified she converted the BIP into a "fidelity checklist" to make sure that it was being implemented properly. (Tr. Vol. V, 1202:6-20; JE-1, p. 1740).

538. Ms. Koertner testified that some of the pieces of the BIP will need to be adjusted according to the student's needs. Ms. Koertner testified that BIPs should have a constant watermark that says "draft" because BIPs are data-based. If a team has implemented a BIP for two or three weeks and it is not working, then the team can change the BIP as needed. (Tr. Vol. V, 1232:11-21).

539. On January 23, 2020, Ms. Waeckerle expressed concerns about A.B.'s fine motor skills, describing in an email that "[h]e writes like a 3-year-old-multiple reversals and does not know how to hold his pencil properly," and requesting Mr. Hillyer commence an Occupational Therapy (OT) evaluation. (Tr. Vol. IV, 839:7-840:4; Petitioner's Ex. 372).

540. In response to Ms. Waeckerle's OT evaluation request, the District's school psychologist, Ms. Guerry, informed District staff that Mr. Hillyer could not conduct a formal evaluation without parental consent, and "[g]iven that his initial evaluation was completed less than a year ago, and that we just received consent to begin providing services, I am not recommending we initiate any evaluation of any sort at this time." (Petitioner's Ex. 377).

541. The District publishes a "Reevaluation Guidance" to its employees that instructs a reevaluation "should not occur more frequently than once a year." (Tr. Vol. IV, 843:17-844:19; Petitioner's Ex. 543).

542. The November 26, 2018 version of the Confidential Educational Evaluation references an evaluation of A.B.'s fine motor skills, meaning the evaluation had to have occurred prior to November 26, 2018. (JE-1, p. 821). This would have been more than one (1) year prior to Ms. Waeckerle's request for an OT evaluation. (Tr. Vol. III, 591:24-592:3).

543. Mrs. B testified that on January 22, 2020, A.B. informed her that he had been leaving his general education room during math. (Tr. Vol. III, 628:1-24; Pet. Ex. 359). Mrs. B emailed the school, expressing concerns that A.B. was being sent from the room in violation of his IEP and BIP, and this reinforced his escape behavior. *Id.* A.B. went to Ms. Waeckerle's room three times to complete math assignments for approximately 15 to 20 minutes. Ms. Waeckerle helped A.B. with his math once and her para helped A.B. with his math twice. (Tr. Vol. IV, 811:4-18, 812:7-10).

544. Ms. Waeckerle responded to Mrs. B's email. (Tr. Vol. IV, 803:1-18; Petitioner's Ex. 359). Ms. Waeckerle's email provides, in part: "He has been responding to the additional instruction and experiencing success. He has been very willing and cooperative when doing his work once he gets the one-on-one instruction." (*Id.*)

545. In a January 23, 2020 internal District email, Ms. Waeckerle requested guidance from Dr. Dancer and others, indicating A.B. was "very content to sit and do absolutely nothing. No reward, most of the time, is motivating even when given multiple choices. He has stated that rewards are used to brainwash him to do his work. He's not buying in." (Petitioner's Ex. 360).

546. Ms. Waeckerle testified she believed the motivational system in place was not working, and that A.B. was not making adequate progress. (Tr. Vol. IV, 848:21-849:1).

547. On January 23, 2020, Ms. Waeckerle sent Mrs. B an email agreeing with Mrs. B's suggestion that the IEP team meet because "[t]he current plan is no longer effective." (Petitioner's Ex. 364). Mrs. B testified that prior to this email, she had not been advised the current plan was no longer effective. (Tr. Vol. III, 630:5-23, 632:10-14).

548. On January 30, 2020, Ms. Waeckerle sent Mrs. B yet another email explaining she had no prior knowledge of A.B. 's leaving his general education classroom to come to her special education classroom, and: "I began checking with other teachers that have him throughout the day. Other teachers reported that on many occasions he was not engaged in their classroom. I called a team meeting to address how we could modify the current plan that seemed no longer effective." (Tr. Vol. III, 631:14-632:2; Vol. IV, 849:22-23; Vol. IV, 850:2-12; Petitioner's Ex. 393). Prior to this email, the District had not advised Mrs. B that A.B. was not engaged in the classroom. (Tr. Vol. III, 632:10-15).

January 31, 2020 IEP Team Meeting

549. On January 31, 2020, A.B.'s IEP team met to discuss Mrs. B's concerns about the IEP Progress Report, BIP, a paraprofessional for math, and communication; strengths and successes; current behavior observations; and, ideas/plan for moving forward. (Tr. Vol. III, 635:11-13; JE-1, p. 1743 and 1744).

550. Mrs. B submitted a proposed agenda for the meeting on January 31, 2020, as well as some information and questions that she wanted to have addressed during that meeting. (JE-1, p. 1744). At the meeting, Mrs. B requested paraprofessional support for A.B. during math from 12:15 to 1:45 p.m. "in light of recent events" which involved A.B. receiving support outside of his classroom completing his math. (Tr. Vol. III, 633:2-4; JE-1, pp. 1779-1783). The District denied Mrs. B's request for a paraprofessional during math for two (2) reasons described in a March 10, 2020 PWN: (1) "it was determined it was the time of day rather than the academic subject A.B. exhibits difficulties in, and (2) paraprofessional support during math was not A.B.'s least restrictive environment." (JE-1, pp. 1779-1783).

551. At the January 31, 2020 meeting, the team discussed defining the terms "break," "reinforcement," and "reset" within the BIP because there was confusion as to what those terms meant. (Tr. Vol. III, 635:17-636:14; Tr. Vol. V, 1207:8-18; 1208:25-1209-1; Petitioner's Ex. 461). Ms. Koertner agreed to define the terms and provide definitions to the team and Mrs. B. (Tr. Vol. V, 1227:21-1228:23; Petitioner's Ex. 461).

552. Dr. Dancer testified that during the January 31, 2020 meeting, the IEP team discussed: progress reports; clarification on who was providing data; who was writing reports; clarification on what a "check-in" is; clarification on what a "break" is; and A.B.'s progress in math. Dr. Dancer testified that Mrs. B requested clarification on some issues but was also complimentary of the team for the progress A.B. had been making and that they were noticing at home as well. (Tr. Vol. V, 1328:12-24).

553. Regarding A.B. being sent to Ms. Waeckerle's room, Ms. Koertner testified the team had discussed A.B. having a point person to go talk to when he was heightened. Ms. Koertner suggested there may have been a miscommunication and perhaps the team sent A.B. to Ms. Waeckerle as A.B.'s point person to "deheighten." (Tr. Vol. V, 1208:11-25).

554. The IEP team also discussed the behaviors the BIP addressed to ensure everyone was clear on how to respond when a behavior is presented, and if there was a disciplinary action Mrs. B was to be notified and communicated with. (Tr. Vol. V, 1332:13-1333:3; SMSD 1.005 at 25m 28s - 27m 36s).

555. Mrs. B provided some positive affirmations regarding certain areas of the IEP, the services, and to the team. The meeting ended on a positive note. Mrs. B stated A.B. was making progress. Mrs. B asked for more open communication. Mrs. B expressed appreciation for Ms. Judd and Ms. Grover. Mrs. B said Westwood View was an amazing school. Dr. Dancer testified she felt the team had addressed Mrs. B's concerns and felt like they were continuing to move on in a positive direction. (Tr. Vol. V, 1334:19-1335:21; Respondent's Ex. SMSD 1.005 59m 23s - 1h 1m 13s).

556. Dr. Dancer testified that during the January 31, 2020 IEP team meeting, Mrs. B expressed appreciation for Mrs. Judd's ABA analysis and Mrs. Judd's effort to determine whether A.B. needed behavioral support in the afternoon for a skill-based need for math academics or whether he needed behavior reinforcement motivation. Based on Mrs. Judd's data and Mrs. B's request, the team wanted to explore providing some type of adult support in the afternoon. (Tr. Vol. V, 1336:20-1337:19).

557. Dr. Dancer testified she had subsequent conversations with Mrs. B about assigning a paraprofessional to A.B. in the afternoon. Dr. Dancer testified that although Mrs. B specifically wanted the paraprofessional to cover math the IEP team did not have any data that indicated math was an issue. Rather, the IEP team had some anecdotal and observational information indicating A.B. was running out of steam, getting tired, and exhibiting some difficulties in the afternoon. The IEP team's proposal was to gather data to pinpoint what A.B.'s

need was by assigning adult support at different times in the afternoon. (Tr. Vol. VI, 1430:14-1431:5).

558. Mrs. B initially indicated she wanted Ms. Grover to be the afternoon paraprofessional. Dr. Dancer testified Ms. Grover was not available because she was assigned to another building in the afternoon. (Tr. Vol. V, 1431:17-24).

559. Dr. Dancer testified the District had initially identified Ms. Varuska to provide afternoon paraprofessional services to A.B. (Tr. Vol. VI, 1431:25-1432:3). Ms. Waeckerle testified the only times that Ms. Varuska was initially available to work with A.B. was between 12:20-12:50 and 2:20-2:35 p.m. (Tr. Vol. IV, 854:13-855:5).

560. After the January 31, 2020 IEP team meeting, Ms. Koertner learned that although A.B.'s motivation system was not working, District staff were not reaching out to her for assistance as they should. (Tr. Vol. V, 1209:6-18).

561. On February 4, 2020, Dr. Dancer sent Mrs. B an email stating the District was looking at staff schedules to provide afternoon support for A.B. Dr. Dancer proposed a time that would be beneficial according to Mrs. Judd. (Tr. Vol. V, 1338:1-5; Respondent's Ex. SMSD-12, p. 6436).

562. On February 6, 2020, Mrs. B responded to Dr. Dancer's email. (Respondent's Ex. SMSD-12, p. 6437). Mrs. B said, "I took a few days to think about your offer. As I stated in the meeting, whoever works with [A.B.] needs to have a sped background. In fact, what would be fair, appropriate, and consistent would be to have Mrs. Grover work 1:1 with [A.B.] for the entirety of Math. (12:15-1:45 p.m.: Math.) Because, I have compromised in the past and it led to the IEP violation, I am limited on my ability to compromise further." (Tr. Vol. V, 1338:10-21).

563. After the District identified A.B.'s need for additional afternoon support, the District proposed paraprofessional support as a trial intervention between 12:20-12:50 p.m. and 2:20-3:05 p.m. (Respondent's Ex. SMSD-12, p. 6632; Petitioner's Ex. 397).

564. On February 12, 2020, Ms. Waeckerle and Ms. Keith rearranged Ms. Varuska's Westwood View schedule so that she could be available for two different times in the afternoon to provide the trial intervention to A.B. (Tr. Vol. VI, 1459:1-9, 1460:10-17; Petitioner's Ex. 397).

565. On February 18, 2020, Mrs. B emailed the District stating, "Hello all, I have put together a PDF below that outlines my formal complaint for an IEP violation and I am requesting an investigation in to the leadership and practices by Principal Kathy Keith, at Westwood View Elementary School." Mrs. B included a typed-written "B Formal Complaint" with the email. (Tr. Vol. VI, 1474:18-24; Respondent's Ex. SMSD-12, p. 6597-6609). Mrs. B's complaint stated, "As you will see in the email correspondence, we have a leadership and accountability problem in regard to our Principal Kathy Keith. This is not the first time I have encountered conflict with Mrs. Keith." (Tr. Vol. VI, 1475:10-17; Respondent's Ex. SMSD-12, p. 6597-6609). Mrs.

B goes on to state, "Let me say this letter is a formal complaint for principal Kathy Keith at Westwood View Elementary." (Tr. Vol. VI, 1475:21-24; Respondent's Ex. SMSD-12, p. 6597-6609).³⁰

566. In addition to the removals investigated by KSDE, the District pulled A.B. from his general education classroom and did not inform the Bs. Internal District emails explain that the Bs were not informed because "nothing was in writing"- "...I don't ever remember telling Lori [Grover] to pull him. I think she did this because she wanted to get to know him. I don't think however it was a big deal. She won't moving forward and nothing was in writing." (Tr. Vol. IV, 812:11-814:6; Petitioner's Ex. 273).

567. On February 19, 2020, Ms. Guerry sent an email to Mrs. B and District employees confirming the period after lunch is a challenge for A.B., but she did not necessarily believe it was the subject matter. Ms. Guerry proposed to start by offering two different times a paraprofessional educator could provide some support as a trial. The IEP team wanted to keep data on the adult's intervention to see what they could learn from the intervention - whether it worked, or it didn't, and determine the level of support A.B. needed. Further, if he responded to the afternoon adult assistance trial intervention the IEP team would have additional data of the amount of need A.B. required. (Tr. Vol. V, 1340:15-1341:8; Respondent's Ex. SMSD-12, p. 6632).

568. While Mrs. B wanted paraprofessional support for A.B. during math, the amount of time the District proposed for an adult to work with A.B. was more than just math.³¹ The IEP team proposed a total of 60 minutes, which would have been longer than the math section. (Tr. Vol. V, 1342:15-1343:2).

569. Dr. Dancer and Ms. Guerry met with Mrs. B on February 27, 2020 to discuss the adult intervention issue. They discussed the IEP team's proposal and tried to address Mrs. B's concerns regarding the proposal. Mrs. B was concerned about the assignment of Ms. Varuska as the adult to provide the afternoon intervention because Mrs. B wanted somebody with a special education background. Mrs. B wanted to meet Ms. Varuska before she agreed to the IEP team's proposal. Dr. Dancer testified she and Ms. Guerry assured Mrs. B that while Ms. Varuska was not a certified teacher, she would be trained by Ms. Koertner who is a BCBA. Dr. Dancer testified she and Ms. Guerry were trying to work with Mrs. B to gain consensus and move forward with helping A.B. (Tr. Vol. V, 1344:6-1345:5, 1345:16-22).

570. Dr. Dancer testified Mrs. B told Dr. Dancer she wanted to participate in the training of Ms. Varuska. (Tr. Vol. VI, 1432:10-22).

571. Dr. Dancer testified the afternoon adult intervention proposal was consistent with the kind of incremental approach that A.B.'s IEP had progressed on all the way along. The IEP team was proposing to try a new intervention and see how it worked. (Tr. Vol. V, 1346:12-18).

³⁰ While Mrs. B emailed her complaint to the District on February 18, 2020, the letter and Fonnal Complaint Request Fonn are both dated February 12, 2020. (Respondent's Ex. SMSD-12 pp. 6597-6601).

³¹ The RO notes that during the October 1, 2019, IEP meeting, Mrs. B told the IEP team that A.B. was great in math. (Tr. Vol. V, 1343:3-1344:5).

572. Dr. Dancer testified assigning a paraprofessional one-on-one with a student raises an LRE concern. The IEP team would want to ensure there was data to substantiate intervention. It does not matter whether the paraprofessional was provided in the general education classroom. It is an additional placement of services and as such must be data driven. Further, afternoon adult support had not previously been subject to evaluation. (Tr. Vol. V, 1346:19-23).

573. On March 3, 2020, Mrs. B sent an email to Dr. Dancer, Ms. Keith, and Ms. Guerry, stating: "I was also told that we would all meet together so we could be on the same page. Mrs. Grover communicating with Billie, Jill and myself. I feel like you are excluding me. Part of my agreement with Dance [sic] and Guerry for an aide that is not qualified to work with SPED students was to be part of an open process, meeting together and my approval of the training and aide. Why are you suddenly closing this information off to me?" (Tr. Vol. VI, 1466:6-16; Respondent's Ex. SMSD-12, pp. 7002-7009). "I believe you are assuming that with just a brief individual meet up with Billie, that I am going to approve her to work with [A.B.]. That is not what we discussed. You are assuming that, by making a meeting to train her, without my consideration. I specifically asked you to have a meeting to see how she engaged with Mrs. Judd, Mrs. Grover, Jill, and myself. You and Laine said that we would have a meeting this week, so that I could ask questions with Mrs. Judd, Mrs. Grover and Jill. You then send me info that you are meeting to train Billie and mention that I can run into Billie when I drop [A.B.] off in the mornings. You are not asking to put [A.B.] with an aid that has no history or education in regards to Autism or ABA therapy. You are pushing it through and disregarding my consideration. Can you see my point of view? I think you need to find a qualified sped para to work with [A.B.] in the afternoon. I cannot count on your word or to follow thru on [A.B.'s] compensatory education. I am really shocked that you are doing this. It does not seem like your normal friendly self. Am I missing something?" (Tr. Vol. VI, 1467:20-1468:20; Respondent's Ex. SMSD-12, pp. 7002-7009).

574. On March 10, 2020, Ms. Guerry emailed Mrs. B a PWN. The PWN states that on January 31, 2020, the IEP team met and discussed A.B.'s progress and Mrs. B's request for paraprofessional support during math. The IEP team left the meeting agreeing options for additional support would be reviewed and presented to Mrs. B. On February 19, 2020, Mrs. B was presented with options for trial intervention for a push-in paraprofessional during designated times in the afternoon. The District rejected Mrs. B's request for an immediate assignment of a full-time paraprofessional support during math as it was determined the time of day rather than the subject matter was when A.B. exhibits difficulties. The team proposed an initial trial intervention to assess how A.B. responds, assess A.B.'s progress, and to help inform team if additional support should be added to A.B.'s IEP. The PWN stated, "At this time, [A.B.] is in his least restrictive environment, however the team will review data from the proposed trial intervention to determine later potential additions to his IEP." The PWN was marked to indicate that parental consent was not required. Mrs. B did not sign this PWN. (Tr. Vol. V, 1347:17-1349:25; Tr. Vol. VI, 1456:17-1458:25; JE-1, p. 1779-1782; Respondent's Ex. SMSD-12, pp. 7002-7009).

575. The trial intervention of adult afternoon support for A.B. was never implemented. (Tr. Vol. VI, 1498:11-14).

576. Dr. Yell testified he did not believe the trial intervention proposal violated the IDEA because it was the parent's idea, and the parents did essentially consent to it. (Tr. Vol. VI, 1534:16-1535:5).

577. Ms. Dumolien testified a PWN is required before providing services or a change in placement. (Tr. Vol. VI, 1481:9-11). Ms. Dumolien testified it was her belief the District did not need parental consent to implement the paraprofessional trial intervention. (Tr. Vol. VI, 1497:1-6).

578. Dr. Dancer emailed Ms. Guerry seeking to have a PWN prepared to let Mrs. B consent or not consent. (Petitioner's Ex. 418).

579. On March 11, 2020, Mrs. B filed a complaint with the Kansas State Department of Education (KSDE) where she identified the issue as, "By allowing the student to leave the classroom during math in order to complete his work in the resource room, the district encouraged escaping behavior, violated the student's IEP, LRE, and his behavior intervention plan." Mrs. B raised parental concerns regarding (1) A.B. being sent from his general education classroom to Ms. Waeckerle's special education resource room, and (2) denial of afternoon paraprofessional support. (Tr. Vol. VI, 1478:21-1479:3; Petitioner's Exs. 495 and 497).

580. On March 13, 2020, Ms. Waeckerle transmitted A.B.'s IEP Progress Report for the third (3rd) quarter (Progress Report) to Mrs. B. (Tr. Vol. IV, 827:3-11; Petitioner's Ex. 446).

581. The March 13, 2020 Progress Report indicates AB. is making adequate progress on Goal 2 (communication). (Tr. Vol. V, 1352:13-15; Petitioner's Ex. 446).

582. As it relates to A.B.'s IEP Social/Emotional "Measurable Annual Goal 5," the Progress Report provides, in part: "AB. is able to identify the emotion in himself, identify the emotion in others, identify a calming strategy, and use a calming strategy 53% of the time on observed data days." (Petitioner's Ex. 446). These benchmarks are reflected on data collection sheets, scoring AB. on a scale of "1=Did not meet expectations," "2=some expectations met," and "3=met expectations." (JE-1, pp. 1457-1503, 1748-1775).

583. For Measurable Annual Goal 5, from December 6, 2019 through March 11, 2020, the goal data sheets reflect the following scores:

- a. Identify the emotion in himself: Nine "1s," five "2s," and four "3s"
- b. Identify the emotion in others: No scores taken

- c. Identify a calming strategy: Ten "Is"
- d. Utilize a calming strategy: Eight "Is" and one "2"

(JE-1, pp. 1457-1503, 1747-1775).

584. Ms. Grover was one of the collectors of the data sheets. (Ms. Helzer, the speech pathologist, collected the data for the communication goal.) (Tr. Vol. VI, 1403:7-16; JE-1789-1792).

585. Ms. Grover determined that A.B. was progressing on the four categories of social-emotional development at a rate of 53% of the time on observed data days. (Tr. Vol. IV, 829:1-8, 829:15-17, 830:13-18; Petitioner's Ex. 446).

586. According to the data sheets provided, it appears the District collected goal progression data for A.B. during only a 50-minute period in the morning. (Tr. Vol. IV, 831:11-832:7; JE-1, pp. 1457-1503, 1747-1775). When presented with the data collection sheets, Ms. Waeckerle testified that she could not determine how Ms. Grover reached the 53 percent reflected in A.B.'s progress report. (Tr. Vol. IV, 828:2-830:12).

587. On the March 13, 2020 Progress Report for the Behavior Measurable Annual Goal 6, it says, "[A.B.] is able to practice learning behaviors such as: following directions, being on task, or completing his work, 64% of the time on observed days. He continues to need help in asking for a break and utilizing his break card. [A.B.] is improving on communicating when he needs help with an assignment if prompted by the teacher. For example, when the teacher asked if [A.B.] needed help, he replied "its hard." During another observation, when [A.B.] was completing morning work the word "Thursday" was written for him to write down. He struggled however, with reading the teacher's handwriting and asked for clarification of the word and for it to be re-written." (Petitioner's Ex. 446).

588. Ms. Waeckerle testified she had concerns the information collected by Ms. Grover was insufficient and testified she did not know whether Ms. Grover revised her data collection method after those concerns arose. (Tr. Vol. IV, 832:23-833:7).

589. The Progress Report included quantitative data such as, "[A.B.] now correctly names pictures containing the sounds at least 75% accuracy in the beginning, middle and end." and "[A.B.] is able to interact appropriately with his peers 90% of the time." Further, Ms. Grover included her name on the entries for March 13, 2020 to clarify who was writing that progress report. (Tr. Vol. V, 1352:16-1353:19; Petitioner's Ex. 446).

590. Dr. Dancer testified that based on her review of the March 13, 2020 progress report, A.B. was making progress on his IEP goals. Dr. Dancer also testified there was no indication A.B. was not making progress on his IEP goals. (Tr. Vol. V, 1355:19-24).

591. Ms. Kramer testified she worked with A.B. until the COVID-19 pandemic shut down the schools in March of 2020 and A.B. was responding to reading intervention and reading supports were working for A.B. (Tr. Vol. V, 1239:13-1240:1).

592. Mrs. B testified the District did not propose any changes to A.B.'s IEP or BIP, including any changes to address the concerns expressed in Ms. Waeckerle's emails that A.B.'s current plan was no longer effective and A.B. was not engaged in the classroom. (Tr. Vol. III, 640:9-13; Petitioner's Exs. 364, 393).

593. Mrs. B testified that beyond the paraprofessional trial intervention proposal, the District did not propose any changes to the IEP or request parental consent to evaluate A.B. in any other areas. (Tr. Vol. III, 640: 18-20).

594. Mrs. B's formal complaint with KSDE culminated in a KSDE investigator's report dated April 10, 2020. (Tr. Vol. III, 633:5-15; Petitioner's Ex. 495). Among other things, KSDE investigator Durkin's report describes the following findings:

- a. "According to the report of a special education evaluation conducted by the district at the request of the parent dated February 25, 2019, the student met criteria for being considered a child with an exceptionality under the category of Autism.... The student was determined to be eligible for and in need of special education services. However, an individualized education plan (IEP) for the student was not developed until the 2019-20 school year."
- b. "According to the district, the Autism coach met on March 9, 2020, with the principal, case manager, classroom teacher, school psychologist, speech and language pathologist, and the paraeducator who would be working with the student under the proposed trial intervention. The purpose of the meeting was to review and clarify the language of the student's BIP."
- c. "The district confirms that the student had, on several occasions, been offered the option of completing independent math work in the resource room but reports that the student only exercised the option to leave the classroom on three occasions. Daily behavior data sheets provided by the district show that, on January 8, 21, and 22, 2020, the student chose to go to the resource room"
- d. "By proposing an option for the student to leave the general education setting and move to a special education setting where the student would receive specialized instruction from a special education teacher, the district effectively changed the student's placement. Further, the district provided approximately one hour and forty minutes of special education services to the student in a special education setting without providing prior written notice to the parent of the removal.... A violation of special education statutes and regulations is substantiated because the parent was not provided with prior written notice

before the district removed the student from the regular education environment to the special education environment."

- e. "[A]t the time of the writing of this report, no changes have yet been made to the student's IEP or his behavior intervention plan that further define either "breaks" or "choices." It is clear to the investigator that the parties did not have a 'meeting of the minds' regarding the definitions of a 'break' and 'choices.'"
- f. "The district proposed a 'trial intervention' to address the parent's request for additional paraeducator support for the student during math. That intervention would have provided 60 additional minutes per day of special education services to the student beyond the 50 minutes of services specified in the student's November 2019 IEP..... Had [the trial intervention] been implemented, the special education services to the student in the general education setting would have more than doubled, well beyond the 25% level considered to be a material change in services. While prior written notice of the proposed action was given to the parent, parental consent for the proposed material change in services was neither sought nor obtained. Therefore, a violation of special education statutes and regulations is identified."

(Tr. Vol. III, 633:16-635:1, 636:17-639:4; Petitioner's Ex. 495).

595. KSDE issued Corrective Action to the District, directing the District take four (4) corrective action steps. (Petitioner's Ex. 495, pp. 12-13).

596. Ms. Dumolien sent a letter to KSDE regarding the four (4) action steps. It was noted that action steps 1 and 4 were resolved. The District requested additional time (30 days rather than 10 days) to complete item 2 due to COVID and potential delay in school calendars and remote learning, as well as some additional variables happening at that time. The District indicated that action step 3 would be complied with. (Tr. Vol. VI, 1485:3-14; Respondent's Ex. SMSD-8, pp. 60-62).

597. On May 22, 2020, Ms. Waeckerle provided Mrs. B a progress report regarding A.B.'s progress on IEP goals 2, 4, 5 and 6. The report noted due to the COVID pandemic, the District had moved to continuous education through a home-based remote or virtual program. According to a note by Ms. Grover, during the third week of home-based instruction, Mrs. B responded that A.B. was working on project-based learning vs. school supplied curriculum. The SLP continued to provide weekly activities. Social skills stories/lesson were provided on a weekly basis and Mrs. B stated she would choose which activities she felt were most appropriate/beneficial. (JE-1, p. 1906-1909).

598. A.B.'s May 28, 2020 report card indicated that A.B. needed improvement (the lowest scoring mark) in the following fourteen areas: reads well orally, reads with understanding, completes written assignments correctly, applies language skills in all written work, spells assigned words correctly, applies spelling skills in all written work, works independently, listens

and follow directions, uses study time effectively, completes assignments on time, class participation, classroom behavior, knows math facts as studied, and understands mathematical concepts. (JE-1, pp. 1920-1921). A.B. scored "expected progress toward outcome" in twelve categories, and "exceptionally good progress" in one category. (*Id.*).

599. Mrs. B testified A.B.'s difficulties at school continued through the spring 2020 semester. His eye-poking perseveration continued. A.B. did not want to go to school or interact with his peers at the playground. He continued cutting up and drawing all over his schoolwork. (Tr. Vol. III, 625:18-627:2). A.B. did not understand normal peer social interactions and began to grow apart from his only friend and regress socially. (Tr. Vol. III, 627:3-13).

600. According to Dr. Dancer, there were no more IEP team meetings conducted after the meeting on January 31, 2020. (Tr. Vol. V, 1355:25-1356:6).

601. Dr. Dancer testified the IEP dated November 20, 2019, as consented to by the Mrs. B on December 2, 2019, is A.B.'s current IEP. (Tr. Vol. VI, 1428:3-6; JE-1, p. 1612-1626).³²

602. Dr. Weigand testified in her opinion the District procedurally and substantively violated the IDEA during the 2017-2018, 2018-2019, and 2019-2020 school years. (Tr. Vol. I, 227:23-229:3). Dr. Weigand further testified in her opinion the District deprived A.B. of a FAPE during the 2017-2018, 2018-2019, and 2019-2020 school years. (Tr. Vol. I, 229:4-230:6).

603. The HO issued a decision on July 23, 2021 and supplemented the decision on August 4, 2021.

604. Appeal and cross-appeal were taken of the HO's decision(s).

605. On August 19, 2021, the District filed a Notice of Appeal with the Kansas State Department of Education (KSDE). The District raised ten (10) enumerated issues on appeal:

- a. The HO erred by allowing and relying upon evidence of "best practices" and educational progress which did not exist and were not presented to A.B.'s IEP team and constitute impermissible retroactive analysis.
- b. The HO erred in concluding the District failed to satisfy its "Child Find Obligation for the 2018-2019 and 2019-202 school years with regard to A.B. "as specifically alleged in Petitioner's Due Process Complaint."

³² Due to the stay put provisions in the law, as of the September 9, 2021, the IEP consented to on December 2, 2021 was still the current IEP for A.B. The law allows the parties to make modifications if the parties agree it is in the best interests of the child. Yet, despite the fact that the IEP was developed based on data from A.B.'s kindergarten year (A.B. is now in 3rd grade) and the fact that there have been two major changes in how education was delivered since March of 2020, no changes have been made to A.B.'s IEP.

- c. The HO erred in concluding the District failed to evaluate A.B. to determine his eligibility to receive special education services "as alleged in the Due Process Complaint."
- d. The HO erred in concluding the District failed to appropriately determine A.B.'s education placement through development of an Individualized Educational Program ("IEP") "as specifically alleged in the Petitioner's Due Process Complaint."
- e. The HO erred in concluding the District failed to implement A.B.'s IEP's such that he was denied a free and appropriate public education as "alleged in the Petitioner's Due Process Complaint."
- f. The HO erred in concluding the District failed to satisfy IDEA's procedural requirements such that (1) A.B.'s right to a free and appropriate public education was impeded; (2) the parent's opportunity to participate in the decision-making process was significantly impaired; and (3) A.B. was deprived of educational benefits "as alleged in Petitioner's Due Process Complaint."
- g. The HO erred by concluding that the District failed to provide an IEE requested by Petitioner.
- h. The HO erred by allowing and relying upon issues which were not included in the Due Process Complaint, thereby perpetuating and rewarding trial by surprise.'
- i. The HO erred by reopening the administrative record to "entertain" arguments "regarding remedies" outside of his lawful authority or discretion.
- J. The HO erred by awarding numerous unlawful and arbitrary "remedies," unsupported by competent and substantial evidence and the subsequent award was *void ab initio*.

606. On August 23, 2021, the Petitioner's Notice of Appeal was received. The Petitioner raised four (4) issues on appeal:

- a. Whether the HO erred in holding that the limitations period barred petitioner's Child Find claims pertaining to A.B.'s 2017-2018 school year, when the Kansas Supreme Court suspended "all statutes of limitations and statutory time standards or deadlines applying to the conduct or processing of judicial proceedings" on March 20, 2020?

- b. Whether the HO erred in holding the statute of limitations exception found in K.S.A. 72-3415(b)(1)(B) did not apply, resulting in Petitioner's Child Find claim pertaining to A.B.'s 2017-2018 school year being time-barred?
- c. Did the HO err by dismissing Petitioner's claims under the American's with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act, and precluding Petitioner's from soliciting testimony regarding alleged Section 504 and ADA violations at the hearing?
- d. Did the HO err by not awarding Petitioner's relief in the initial order issued on July 23, 2021, supplemented by the HO's Supplemental Decision & Award issued on August 4, 2021?

607. During a conference conducted on August 31, 2021, the parties indicated a desire to present additional evidence and/or arguments to the RO. The RO received a copy of the record on appeal on September 1, 2021.³³ On September 9, 2021, the RO issued a limited order on the parties' request to present additional evidence and/or arguments, allowing additional written argument only as to the issue of the remedy ordered by the HO. No additional written or oral arguments were allowed, and the RO did not review the body of the Respondent's Notice of Appeal, other than the actual issues on appeal enumerated above, since the Petitioner was not going to be given the opportunity to supplement the Notice of Appeal that was filed.

608. Having examined the hearing record, the RO find that the hearing procedures in this matter appear to have been conducted in conformance with the requirements of due process.³⁴ The one potential exception is with regards to the issuance of the Supplemental Decision and Award by the HO on August 4, 2021. This issue will be discussed in detail below in the Compensatory Damages section of the Decision.

³³ It was learned later in the review process, that the RO was not provided the actual record from the HO, but rather the parties had worked to create a copy of the record, to include the pleadings and evidence the parties felt was relevant. The actual record was obtained from the HO and provided to RO on October 15, 2021.

³⁴ The RO reiterates the concern raised earlier that the parties provided a "record" to the RO, certifying the same to be the "record" of the due process proceedings. This was not the official "record" as the official record remained with the HO until it was brought to the RO's attention at a later time. Eventually the RO received the "record". However, even upon receipt of the "record" from the HO, the RO observed that one of the Respondent's exhibits, SMSD-12, was missing in its entirety, leaving the RO to rely on an incomplete copy of the exhibit, as has been noted above.

Conclusions of Law and Analysis

Legal Authority

1. A parent may present a due process complaint relating to any matter governed by Kansas' Special Education for Exceptional Children Act, including the identification, evaluation, placement, or the provision of a FAPE to their child.³⁵

2. Any party aggrieved by the findings and decision rendered on the due process complaint may appeal the findings to the State educational agency which is responsible for conducting an impartial review of the findings and decision appealed and making an independent decision based upon the review.³⁶

3. In Kansas, the State educational agency, KSDE, appoints a Review Officer (RO) to conduct an impartial review of the decision issued by the Hearing Officer (HO). The RO shall: examine the record of the hearing; determine if the hearing procedures complied with due process requirements; give the parties an opportunity for oral or written argument, or both, at the RO's discretion; seek additional evidence if necessary; render an independent decision; and send the decision rendered to the parties and KSDE.³⁷

4. Review by a RO is de novo; however, deference should be given by the RO to the HO's decision when "the hearing officer's findings [are] based on credibility judgments unless the non-testimonial, extrinsic evidence in the record would justify a contrary conclusion or unless the record read in its entirety would compel a contrary conclusion."³⁸ It is noted in this case that the RO is not giving deference to each of the HO's credibility determinations as the credibility findings stated in the HO's decision dated July 23, 2021 were not based upon the HO's independently articulated findings, but rather were stated in findings of fact that were merely copied and pasted from the proposed findings of fact offered by the Petitioner. While the RO acknowledges the HO was in the best position, having heard and seen the witnesses, the findings of credibility are not supported by any independent statements. For example, in paragraph 382 of the Notice of Hearing Officer's Decision it states:

³⁵ K.S.A. 72-3415; 20 U.S.C. § 1415(b)(6), (f)(1)(A).

³⁶ 20 U.S.C. § 1415(g).

³⁷ K.S.A. 72-3418(b).

³⁸ *O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233*, 144 F.3d 692,699 (10th Cir. 1998) (Quoting *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 529 (3rd Cir.1995)). See also *Fort Zumwalt Sch. Dist. v. Clynes*, 119 F.3d 607, 610 (8th Cir.1997) ("Where there is a conflict between the findings and conclusions of the hearing panel and the final reviewing officer, a court may choose to credit the hearing panel's findings based on observation of the witnesses and reject the reviewing officer's analysis if it does not appear to give sufficient weight to the views of the professional educators."), *petition for cert. filed* (U.S. Dec. 29, 1997) (No. 97-1568). *Doyle v. Arlington County Sch. Bd.*, 953 F.2d 100, 104 (4th Cir.1991) (disregarding reviewing officer's finding contrary to hearing officer where the disagreement was as to credibility of witness who only testified before the hearing officer).

"Ms. Ostby testified that the District had enough information to determine eligibility as far back as the December 6, 2018, IEP team meeting and that A.B. would probably qualify for services. Ms. Ostby intimated that M[r]. B's concerns regarding the FBA process delayed an eligibility determination and provision of services. (Tr. Vol. IV, 1035:19-1037:1, 1073:5-9). However, each iteration of A.B.'s evaluation preceding the version discussed at the February 6, 2019, meeting contained data summary and conclusions that were the same or similar to those described in paragraph 144, indicating the District evaluation team had concluded A.B. did not qualify-as originally expressed in Dr. Wiseman's November 13, 2018, email. (Tr. Vol. IV, 1074:1-13, 1075:8-1079:12; JE-1, pp. 826, 872, 882-83; Pet. Ex. 72). Accordingly, Ms. Ostby's testimony lacks credibility."

Paragraph 146 of the proposed Findings of Fact submitted by the Petitioner states:

"Ms. Ostby testified that the District had enough information to determine eligibility as far back as the December 6, 2018, IEP team meeting and that A.B. would probably qualify for services. Ms. Ostby intimated that M[r]. B's concerns regarding the FBA process delayed an eligibility determination and provision of services. (Tr. Vol. IV, 1035:19-1037:1, 1073:5-9). However, each iteration of A.B.'s evaluation preceding the version discussed at the February 6, 2019, meeting contained data summary and conclusions that were the same or similar to those described in paragraph 144, indicating the District evaluation team had concluded A.B. did not qualify-as originally expressed in Dr. Wiseman's November 13, 2018, email. (Tr. Vol. IV, 1074:1-13, 1075:8-1079:12; JE-1, pp. 826, 872, 882-83; Pet. Ex. 72). Accordingly, Ms. Ostby's testimony lacks credibility."

These are identical in every respect. The same credibility findings are made in paragraphs: 505 (Paragraph 176 of Petitioner's proposed Findings of Fact), 813 (Paragraph 279 of Petitioner's proposed Findings of Fact), and 912 (Paragraph 314 of Petitioner's proposed Findings of Fact). The RO will not defer to the HO's credibility determinations that are simply restatements of conclusions made by one party or the other. Moreover, the HO made two (2) credibility determinations as to Dr. Weigand and Ms. Ruble that were not proposed by the Petitioner. However, the HO does not provide any explanation as to why he found either of those testimonies to be credible, "highly credible" in the case of Dr. Weigand. Therefore, the RO has, to the extent necessary, made independent determinations of credibility, where necessary, based upon the record provided.

5. The burden of proof and the burden of persuasion lie with the party challenging the IEP.³⁹ The party seeking relief bears the burden of proving the appropriateness or inappropriateness of the education.⁴⁰ In this matter, A.B. is the party seeking relief and bears the burden of proof.

6. "The IDEA is a comprehensive statute enacted to ensure that all children with disabilities have access to a free and appropriate public education designed to meet their unique needs."⁴¹ The Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*, establishes a substantive right to a "free appropriate public education."⁴²

7. FAPE "means special education and related services that-- (a) Are provided at public expense, under public supervision and direction, and without charge; (b) Meet the standards of the State educational agency; (C) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) Are provided in conformity with the individualized education program required under Section 614(d)".⁴³

8. The U.S. Supreme Court recognized that for an IEP to satisfy FAPE it must be reasonably calculated to provide some educational benefit. The court described that benefit as a "Basic floor of opportunity," and that school districts are not required to "maximize each child's potential."⁴⁴ The U.S. Supreme Court expanded the definition of FAPE in the *Rowley* holding that a district satisfied this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP.⁴⁵

9. The duty to offer a FAPE, and to issue an IEP, resides with a child's home school district, or "local educational agency."⁴⁶ "The duty to offer a FAPE remains with the agency where the child resides; and a FAPE cannot be offered unless an IEP is issued."⁴⁷ "Generally, a 'local educational agency' is synonymous with the local school district."⁴⁸

³⁹ *Schaffer ex. rel. Schaffer v. Weast*, 546 U.S. 49, 56-58 (2005); *Johnson v. Jndep. Sch. Dist. No. 4 of Bixby, Tulsa County, Okla.*, 921 F.2d 1022, 1026 (10th Cir.1990).

⁴⁰ *L.E. v. Ramsey Bd. of Educ.*, 435 F.3d 384,391 (3rd Cir. 2006).

⁴¹ *L.B. v. Nebo Sch. Dist.*, 379 F.3d 966,968 (10th Cir. 2004) (quoting *Murray v. Montrose County Sch. Dist.*, 51 F.3d 921, 928 (10th Cir. 1995)).

⁴² *Bd. Of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, _ (1982). See also *G.L. v. Ligonier Valley School Dist. Authority*, 802 F.3d 601,608 (3rd Cir. 2015).

⁴³ 20 U.S.C. §1401(9).

⁴⁴ *Rowley*, 458 U.S. 176, (1982).

⁴⁵ *Id.*

⁴⁶ 20 U.S.C. § 1414(b) (imposing obligations to create and administer IEPs on local educational agencies).

⁴⁷ *Doe v. E. Lyme Bd. of Educ.*, 790 F.3d 440,451 (2d Cir. 2015).

⁴⁸ *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 1110 n.7 (9th Cir. 2016) (citing 20 USC. §1401(19)).

10. "Special education" is "specially designed instruction...to meet the unique needs of a child with a disability."⁴⁹

11. "In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade."⁵⁰

12. The U.S. Supreme Court in *Rowley* set forth a two-part test to determine whether the district has complied with federal special education law: "First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?"⁵¹

13. The U.S. Supreme Court reviewed the standard the Tenth Circuit Court of Appeals had applied to the second prong of the *Rowley* test and found the Tenth Circuit's de minimis benefit test lacking. Instead, the Supreme Court held that "a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances."⁵²

14. The Supreme Court went on to explain that: The "reasonably calculated" qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials....The Act contemplates that this fact intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child's parents or guardians Any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.⁵³

15. In *Endrew F.*, the Supreme Court reiterated *Rowley's* deference to school authorities with respect to educational policy, stating: We will not attempt to elaborate on what "appropriate" progress will look like from case to case. It is in the nature of the Act and the standard we adopted to resist such an effort: The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created. This absence of a bright-line rule, however, should not be mistaken for "an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review."⁵⁴

16. As modified by *Endrew F.* the two-prong *Rowley* test is now properly stated as: First, has the school complied with the procedures set forth in the Act? And second, has the school

⁴⁹ 20 U.S.C. § 1401.

⁵⁰ *Rowley*, 458 U.S. 176, 203-04 (1982).

⁵¹ *Rowley*, 458 U.S. 176, 206-07 (1982).

⁵² *Endrew F. v. Douglas County Sch. Dist.*, 137 S. Ct. 988, 999 (2017).

⁵³ *Id.* (citing *Rowley*, 458 U.S. at 207-209).

⁵⁴ *Id.* at 1001 (quoting *Rowley*, 458 U.S., at 206).

offered an IEP reasonably calculated to enable the child to make progress appropriate in light of the child's circumstances?⁵⁵

17. "'Medical services' means services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services."⁵⁶

18. The IDEA offers states federal funds to assist in educating children with disabilities.⁵⁷ In exchange for the funds, a state pledges to comply with a number of statutory conditions.⁵⁸

19. A child with a disability, who by reason thereof, needs special education and related services, qualifies for benefits under IDEA.⁵⁹ A child with a disability is also known as an "exceptional child" in Kansas.⁶⁰

20. ASD is a qualifying disability under IDEA.⁶¹ Kansas regulations define "Autism" as meaning "a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three but not necessarily so, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. The term shall not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance."⁶²

21. Under the IDEA, a request for due process hearing must be initiated within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint.⁶³

22. If a procedural violation is found, then the court inquires whether the violation resulted in the denial of FAPE, specifically by analyzing whether the procedural violation caused (1) substantive harm to A.B. or his parents, (2) a deprivation of an IEP for A.B., or (3) the loss of an educational opportunity.⁶⁴ "Multiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not."⁶⁵

⁵⁵ *Id.*, at

⁵⁶ K.A.R. 91-40-1(nn).

⁵⁷ *Arlington Central Sch. Dist. Bd. of Ed. v. Murphy*, 548 U.S. 291, 296-97 (2006) (citing *Rowley*, 458 U.S. at 179).

⁵⁸ 20 U.S.C. § 1412(a)(1); 34 C.F.R. 300.17; K.A.R. 91-40-2(b)(l).

⁵⁹ 20 U.S.C. § 1401(3)(A); K.S.A. 72-3404(g), (z); K.A.R. 91-40-1(k).

⁶⁰ K.A.R. 91-40-1(w).

⁶¹ 34 C.F.R. 300.8(a); K.A.R. 91-40-1(f).

⁶² K.A.R. 91-40-1(t).

⁶³ 20 U.S.C. § 14 15(t)(3)(C).

⁶⁴ *Systema ex rel. Systema v. Acad. Sch. Dist. No. 20,538* F.3d 1306, 1313 (10th Cir. 2008) (quoting *Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 765-66 (61h Cir. 2001)).

⁶⁵ *R.E. v. N.Y.C. Dep't of Educ.*, 694 F.3d 167, 190 (2d Cir. 2012).

23. Only procedural inadequacies that (i) impeded the child's right to a FAPE, (ii) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or (iii) caused a deprivation of educational benefits may be found to result in the denial of FAPE.⁶⁶

24. Unlike a procedural violation of the IDEA, a substantive violation is not subject to a harmlessness analysis.⁶⁷

25. Although the "harmlessness" of a substantive violation is not considered in determining whether a denial of FAPE has occurred, the degree of harm is an important factor to be considered in the remedy analysis. A hearing officer may only grant a remedy that is appropriate based upon the evidence at the hearing.⁶⁸

26. "To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature of the severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."⁶⁹

Analysis

27. A.B. is a child with an exceptionality, diagnosed with ASD, who by reason thereof, needs special education and related services. Accordingly, A.B. qualifies for benefits under the IDEA. A.B. resided within the District at all times relevant to this proceeding. Accordingly, the District was obligated to provide a FAPE to A.B.

28. Dr. Weigand's conclusions rely solely on the educational records that were available to the District at the time the District made educational decisions pertaining to A.B. B (Tr. Vol. I, 220:8-18).

29. The HO concluded that Dr. Weigand's testimony in this matter was highly credible. Unlike other credibility determinations discussed hereinbelow, the RO has no reason to question the HO's credibility determination of Dr. Weigand.

⁶⁶ *L.Mv. Capistrano Unified Sch. Dist.*, 556 F.3d 900,909 (9th Cir. 2008) (citing *W.G. v. Bd. of Trs. of Target Range Sch. Dist. No. 23*, 960 F.2d 1484,1483 (9th Cir. 1992), superseded by statute on other grounds by the Act); see also *O'Toole*, 144 F.3d 692, 707 (10th Cir. 1998) (citing *Roland Mv. Concord Sch. Comm.*, 910 F.2d 983,994 (1st Cir. 1990)).

⁶⁷ *A.Kex rel. J.K. v. Alexandria City Sch. Bd.*, 484 F3d 672, 679 n. 7 (4th Cir. 2007) (Procedural violations are subject to "harmlessness analysis," while substantive violations of the IDEA are not.)

⁶⁸ 20 U.S.C. § 1415(i)(2)(C)(iii) (Court to grant such relief as it determines is appropriate); *School Committee of Town of Burlington, Mass. v. Department of Educ. Of Mass.*, 471 U.S. 359,369 (1985) (IDEA does not specify the type of relief, except that it must be "appropriate.").

⁶⁹ 20 U.S.C. 1412(a)(5).

30. Dr. Gentry reviewed A.B.'s educational records from 2015 through the 2019-2020, school year, and a report completed by Dr. Ostmeyer of Beyond the Individual concerning A.B.'s present levels. Dr. Ostmeyer's report is not the foundation for Dr. Gentry's compensatory education recommendation. (Tr. Vol. III, 736:5-738:13, 764:14-765:15).

31. The HO made no conclusions regarding the credibility of Dr. Gentry.

32. The HO made no conclusions regarding the credibility of Dr. Yell, other than the restatement of the conclusory statement of proposed fact(s) submitted by the Petitioner, as discussed herein below.

- ***Child Find Violation, Inadequate Evaluations and Exclusion:***

33. Petitioner first asserts that the District failed to meet its responsibilities under Child Find, relied upon inadequate evaluations in developing an IEP and BIP for A.B., and excluded A.B. from participating in his classroom by secluding, segregating and disciplining A.B.

34. The Child Find duty is an affirmative obligation of the school district to identify, locate, and evaluate all children within a reasonable time, that it suspects, knows, or should know is a child with a disability, regardless of the severity, that may need special education.⁷⁰

35. "All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services."⁷¹

36. Child Find requirements for Kansas schools applies to children ages birth through 21. Kansas schools must adopt policies and procedures that meet the following requirements: "(1) For children younger than five years of age, observations, instruments, measures, and techniques that disclose any potential disabilities or developmental delays that indicate a need for evaluation, including hearing and vision screening; (2) for children from ages five through 21, observations, instruments, measures, and techniques that disclose any potential exceptionality and indicate a need for evaluation, including hearing and vision screening as required by state law; and (3) implementation of procedures ensuring the early identification and assessment of disabilities in children."⁷²

⁷⁰ E.g. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.11 l(c); *Timothy O.*, 822 F.3d at 1119; *Boutelle v. Bd of Educ.*, No. 17-1232, 2019, WL 2061086, at *9 (D.N.M. May 9, 2019); K.A.R. 91-40-7.

⁷¹ 20 U.S.C. 1412(a)(3)(A).

⁷² K.A.R. 91-40-7(b).

37. Determining that a child has an exceptionality requiring special education, also referred to as Child Find, "is a profound responsibility, with the power to change the trajectory of a child's life."⁷³

38. Knowledge or suspicion of a disability triggers a school district's Child Find duty, and may be inferred from written parental concerns, verbal communications, the behavior or performance of the child, teacher concerns, or parental request for an evaluation.⁷⁴

39. "A school district's child find duty is triggered when the district 'had reason to suspect [the child] had a qualifying disability.'" ⁷⁵ The [child find] duty is triggered when the [school] has reason to suspect a disability, and reason to suspect that special education services may be needed to address that disability."⁷⁶

40. "Although there is no bright-line rule, a school district generally has sufficient notice if it is aware of facts suggesting the child has a disability and that the child is struggling academically."⁷⁷ "

41. The "child-find" provisions of the IDEA requires schools to adopt and implement policies and procedures to ensure that all children with disabilities residing within its boundaries are "identified, located, and evaluated."⁷⁸ Either a parent of a student or a school district employee may initiate a request for an initial evaluation to determine if a student is a student with a disability under the IDEA.⁷⁹

42. "A finding of a child find violation turns on three inquiries: (1) the date the child find requirement triggered due to notice of a likely disability; (2) the date the child find duty was ultimately satisfied; and (3) the reasonableness of the delay between these two dates."⁸⁰

43. A.B.'s Pre-K teacher, Ms. Rubles, raised a concern regarding A.B.'s difficulty "building peer relationships and friendships," as well as other behavior A.B. would exhibit during class. Ms. Ruble testified that A.B.'s behaviors were impacting his ability to form healthy friendships in the classroom, but she did not feel those behaviors were impacting his ability to learn. Because of her observations, Ms. Rubles asked for an evaluation of A.B. On August 23, 2017, Ms. Ruble emailed Ms. Seitnater requesting some ideas for social stories that may help A.B. On August 30, 2017, following Ms. Ruble's request to evaluate A.B. to determine if he was eligible

⁷³ *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d at 625.

⁷⁴ See *Weisenberg v. Bd. of Educ.*, 181 F. Supp.2d 1307, 1311 (D. Utah 2002).

⁷⁵ *D.C. v. Klein Indep. Sch. Dist.*, No. 20-20339, at *10 (5th Cir. June 17, 2021) (quoting *Dall. Indep. Sch. Dist. Woody*, 865 F.3d 303,320 (5th Cir 2017)).

⁷⁶ *Weisenberg*, 181 F. Supp. 2d at 1311 (citing *Dep't of Educ., State of Hawaii v. Cari Rae S.*, 158 F. Supp.2d 1190, 1194 (D. Haw. 2001)).D. Utah 2002)

⁷⁷ *D.C. v. Klein Jndep. Sch. Dist.*, No. 20-20339, at *10 (5th Cir. June 17, 2021) (citing *Compare Krawietz ex rel. Parker v. Galveston Indep. Sch. Dist.*, 900 F.3d 673,677 (5th Cir. 2018)).

⁷⁸ 34 CFR 300.111(a).

⁷⁹ 34 CFR 300.301(b).

⁸⁰ *Spring Branch Jndep. Sch. Dist. v. O. W.*, 961 F.3d 781, 793 (5th Cir. 2020).

for special education, the District proposed to conduct an evaluation to determine whether A.B. was a child with an exceptionality in need of special education and related services.

44. The District initiated an evaluation to determine whether A.B. was eligible for special education and related services on August 30, 2017, just a couple weeks following the beginning of that school year. Ms. Seitnater, an early childhood special education teacher, oversaw the Pre-K evaluation of A.B. beginning on August 31, 2017. Ms. Seitnater evaluates three, four- and five-year old children before kindergarten.

45. Ms. Seitnater recalled meeting with Mrs. B and discussing the scope of the evaluation during the fall of 2017. Ms. Seitnater got consent and told Mrs. B what to expect during the evaluation process. Ms. Seitnater testified that she knew A.B. was previously evaluated for eligibility for special education but did not qualify. (Tr. Vol. IV, 946:2-17).

46. Ms. Seitnater testified that an evaluation to determine eligibility for specialized instruction does not include an analysis of every possible qualifying factor; the evaluation only considers the area triggering the Child Find obligation. The area that the District evaluated for A.B. was the social-emotional category because of some behaviors he exhibited. The evaluation was limited to just that one component because the evaluation team did not have concerns in other areas. A.B. did not show any motor, communication, or cognitive concerns. Moreover, Mrs. B did not ask the District to evaluate A.B. in any other area.

47. The evaluation for A.B. included a teacher interview, a parent interview, observations, as well as the AEPS II for ages three to six. The AEPS II is a play-based assessment that involves observations of behaviors in both structured and unstructured activities and was completed by MS. Seitnater.

48. On September 11, 2017, Ms. Seitnater observed A.B. right as school staff were starting interventions for him and she filled out the evaluator protocol for the AEPS in the social area. Ms. Seitnater conducted another observation again about six weeks later, on October 25, 2017, before the evaluation meeting. Ms. Seitnater stated she wanted to give enough time for the interventions to work and make sure the team was still within the required 60 school days to complete the evaluation. Ms. Seitnater observed A.B. in a variety of structured and unstructured settings in the classroom. Ms. Seitnater looked at different pieces of that social area development in the classroom. Ms. Seitnater also observed A.B. outside of the formal observations she recorded on the AEPS to make sure she was not missing anything and to confirm what she had found.

49. At the end of Ms. Seitnater's AEPS report, there are calculations recorded on the bottom of the last page. Ms. Seitnater has a score of 38% on September 11, 2017. On October 25, 2017, she indicated a score of 68%. Ms. Seitnater's analysis showed improvement with the interventions put into place. A.B. had 38% of the skills in September 2017, and he almost doubled his skills in about six weeks. It showed that the interventions were working for A.B. and he was able to better participate socially in the classroom. At the beginning of the 2017-2018, school year, A.B. scored zeros in whole group instruction and small group instruction. He was escaping and

leaving the area or not coming to the area to begin with. By October 2017, A.B. was getting 2's, which means he was performing the monitored tasks consistently in some of the areas and able to more fully participate in that whole group and small group instruction.

50. Ms. Seitnater fully included Mrs. B on the evaluation team and relied on what Mrs. B told her. She reported it in the evaluation report under the parent interview piece. The family also completes an AEPS report so that they can have a look at the whole child, not just what A.B. is doing at school. The evaluation team wants to see what he's doing at home to identify whether the concerns only arise at school. Evaluators rely on what the parents tell them in the evaluation process.

51. Mrs. B never indicated that she had any additional concerns about A.B. Other than the information Ms. Ruble provided, and the email received at the very beginning - which was another reason they moved forward quickly with doing an evaluation - once the evaluation was started, no one provided any information that caused Ms. Seitnater to conclude that A.B. had issues or discrepancies in other area that the team should consider.

52. On October 30, 2017, Ms. Seitnater emailed Mrs. B with questions about A.B. for the evaluation. Mrs. B responded that day and said, "Any relevant medical/health information? Vision/hearing screenings? Other than speech therapy we had, no. Dr. Slaymaker has evaluated [A.B.] and says he is 100 percent on target." Ms. Seitnater did not rely on the fact that A.B.'s pediatrician did not identify any concerns with A.B.'s development, but it helped confirm the evaluation team's findings. Mrs. B did not provide any information that was inconsistent with the outcome of the evaluation.

53. Ms. Seitnater performed a teacher interview with Ms. Ruble to gather more information because Ms. Ruble was always with A.B. Ms. Seitnater also conducted a record review, where she learned A.B. had received infant/toddler services and was previously evaluated for special education and did not qualify.

54. When Ms. Seitnater completed A.B.'s evaluation, she felt she had all the data that was needed and did not need additional data after the evaluation was completed.

55. By October 2017, A.B. was making gains in participating so his behaviors were not interfering with his ability to participate in the classroom. With the interventions in place to help him stay and participate, A.B. was participating the same as other students in the classroom. For instance, by October 2017, A.B. was sitting for a much longer period of time for circle time and then he was able to ask for a break but was sitting behind the table continuing to participate; he was receiving the instruction.

56. After the evaluation, data was collected and the report was prepared. Ms. Seitnater, Ms. Ruble, Mr. Lash (Briarwood Principal), and Mrs. B met on November 6, 2017. During the meeting, Ms. Seitnater provided Mrs. B with all the information she had collected during the evaluation. The evaluation team talked about whether there was a significant discrepancy between

A.B. and his same age peers and whether what A.B.'s needs were beyond what is available in the general education classroom. The evaluation team determined that A.B. did not show a significant discrepancy from same age peers and that A.B. did not require resources beyond what was available in Ms. Ruble's general education classroom. The District evaluated A.B. in the area of social/emotional status as this was the only area in which any concerns were identified. Moreover, the scope of the evaluation was discussed with and consented to by Mrs. B. The District administered the AEPS, obtained information through teacher and family reports, conducted observations, and collected relevant data from other sources, including the prior evaluation conducted of A.B. and the assessment by his physician that there were no medical concerns. On November 6, 2017, the evaluation team determined that A.B. did not qualify for special education services.

57. A PWN was hand delivered to Mrs. B on November 6, 2017, documenting that A.B. was not eligible for special education services. The PWN states the evaluation team's conclusion that A.B. was "evaluated and determined not eligible for special education services in the area of social/emotional skills and he will benefit from continuing in his Pre-K general education setting and exposure to age appropriate curriculum... [A.B.] is not discrepant from same age peers and does not demonstrate a need for special education services at this time... It is believed that [A.B.] will continue to progress through general education resources. However, if concerns arise in the future, parent may contact the school district to discuss further options."

58. Mrs. B agreed with the evaluation determination on November 6, 2017.

59. Dr. Weigand questioned the effectiveness of the evaluation conducted of A.B. during his Pre-K year. It is noted that Dr. Weigand made at least two (2) assumptions that were not supported by the record. First, Dr. Weigand refers to reports that A.B.'s behaviors were interfering with his ability to learn. Ms. Ruble discounted this during her testimony. Dr. Weigand also suggested that Ms. Ruble had expressed a concern that A.B. "was a child with a disability, namely autism" but fails to mention that this suspicion was not expressed during A.B.'s Pre-K year. It was not until after the school year had ended that Mrs. B had raised concerns that A.B. might be autistic, and Ms. Ruble did not react with any surprise to the suggestion.

60. Despite Dr. Weigand's suggestion otherwise, there had been no concerns raised that A.B.'s behaviors were interfering with his ability to learn, or that A.B. might have autism. Dr. Weigand did testify that there were red flags that should have been caught by the District that would have hinted at the fact that A.B. was possibly a child with autism. Dr. Weigand's recognition of those red flags after the fact, and after A.B. has been affirmatively diagnosed with autism, does not impose a responsibility on the District at the time that the evaluation was made, and the conclusion reached that A.B. was not a child with an exceptionality.

61. While Dr. Weigand suggested the evaluation conducted by the District during the 2017-2018 school year was ineffective, the evaluation addressed all the areas of concern raised by Ms. Ruble and found that A.B. was not a child with an exceptionality.

62. As relates specifically to the concerns raised leading to the evaluation, the Pre-K evaluation completed by the District is comprehensive and accurate and contains all the information obtained by the evaluation team, including summaries of observations and the results of the assessments and other data obtained during the evaluation.

63. The District's Child Find obligation was triggered when Ms. Ruble requested an evaluation. The evaluation was requested on or about August 23, 2017. There was no evidence that suggests the District should have suspected A.B. was a child with an exceptionality prior to the request for evaluation by Ms. Ruble.⁸¹ The District agreed to conduct an evaluation on August 30, 2017. Mrs. B consented to the District's evaluation on August 31, 2017. The District reasonably responded to the notice of suspected disability and within approximately two (2) weeks initiated the evaluation.

64. The District satisfied the requirement under IDEA to conduct a full and individual initial evaluation of A.B. The District appropriately discharged its child find obligation during the 2017-2018 school year regarding A.B. and did not commit a procedural violation by failing to identify him as a student for whom there was reason to suspect a need for specialized education in a timely manner. Having found that the District satisfied its child find obligations for the 2017-2018 school year, the issue of timeliness is a moot issue.⁸²

65. Child Find obligations do not terminate once a student is first identified as likely having a disability. School districts have a continuing duty to identify and evaluate students thereafter.⁸³ The school's Child Find duty continues during summer vacation.⁸⁴ When a school's Child Find duty is triggered in the spring semester, it "cannot get away with doing nothing" over summer break.⁸⁵

66. While the District had a continuing obligation to identify whether A.B. had a disability, there was no suggestion of such until A.B. had returned to school during the 2018-2019 school year for Kindergarten.

67. On August 27, 2018, A.B. underwent genetic testing which identified that A.B. had a microdeletion, suggesting A.B. might have autism.

⁸¹ See *D.K. v. Abington Sch. Dist.*, 696 F.3d 233,251 (3rd Cir. 2012); see also *Bd. Of Educ. Of Fayette Cnty. v. L.M.*, 478 F.3d 307,314 (6th Cir. 2007).

⁸² Due to the continuing nature of the child find complaint raised by the Petitioner, had there been a violation of the District's child find obligation during the 2017-2018 school year, the statute of limitations would not have necessarily time-barred the Petitioner from seeking remedy. The Third Circuit Court found that if the claim is made within two (2) years of when the Petitioner knew or should have known (discovered) about the injury, remedy extending more than two (2) years before the date of the complaint are not time-barred. *G.L. v. Ligonier Valley Sch. Dist. Auth.*, 802 F.3d at 625.

⁸³ *Smith v. Cheyenne Mt. Sch. Dist. 12*, 2017 WL 2791415, *18 (D. Colo. May 11, 2017).

⁸⁴ *Klein Indep. Sch. Dist.*, No. 20-20339, at *12

⁸⁵ *Id.* at *12, *12 n.6 (rejecting argument that child find is suspended over the summer based on the "school day" timeline in place after parental consent is requested and received).

68. On August 29, 2018, soon after returning to school at Westwood View Elementary in August of 2018, Mrs. B requested a full evaluation of A.B. It was at this point that the District's Child Find obligations were triggered. This was the point at which the District should have suspected A.B. might be a child with an exceptionality in need of special education services.

69. Based upon the request by Mrs. B, one (1) week after being made aware, the District prepared a Prior Written Notice, signed by Mrs. B on September 5, 2018, proposing to evaluate A.B. in the areas of health/motor, social/emotional status/behavioral status, academic performance, communicative status, and transition skills to determine if A.B. meets the eligibility criteria as a child with an exceptionality and demonstrates a need for special education services.

70. Upon receipt of Mrs. B's consent to evaluate on September 5, 2018, the District engaged in conducting an evaluation of A.B.

71. Again, the District responded to the parent's request, obtained consent from the parent, and initiated the evaluation.

72. According to the testimony and documents making up the record of this matter, the District, through the prompting of Mrs. B, identified A.B. as a child who was suspected of having an exceptionality requiring special education. The district conducted an evaluation of A.B. upon receipt of the request from Mrs. B (within a week a meeting was conducted, and consent granted) and the evaluation of A.B. was ongoing. While the Petitioner has raised additional concerns regarding the sufficiency of the District's evaluative processes, which will be addressed within the RO's decision, that does not detract from the fact that the District took steps required to identify, locate, and evaluate A.B. within a reasonable time once made aware of the possibility of a disability that may need special education. In reviewing the record, the District remained responsive to each request from the parent of A.B. when it came to conducting evaluations. So much so that the ultimate determination that A.B. was a child with an exceptionality and the development and implementation of the IEP were delayed due to multiple requests that the District take additional evaluation measures. The Petitioner has not proven that the District failed to meet its child find obligations as alleged in Problem 1.

• ***Failure to complete the initial evaluation within the prescribed time period***

73. The Petitioner alleges that the District violated the IDEA by failing to complete the initial evaluation within 60 school days of receiving parental consent; failing to conduct an IEP team meeting to develop an IEP in the required timeframe after the evaluation was requested and/or the District's conclusion A.B. had an exceptionality; failing to develop an IEP in the required timeframe after the evaluation was requested and/or the District's conclusion A.B. had an exceptionality; and, failing to implement an IEP in the required timeframe after the evaluation was requested and/or the District's conclusion A.B. had an exceptionality.

74. The initial issue of concern is the delay in completing the initial evaluation of A.B. Mrs. B consented to the initial evaluation on September 5, 2018. The District conducted an

evaluation and a final determination was made by the District evaluation team on February 25, 2019 finding that A.B. was a child with the exceptionality of autism and that A.B. needed specialized instruction. As this was for establishing eligibility, there was no need for parental consent to the District evaluation team's final findings.

75. Once a child has been identified under the Child Find requirements, the public agency, the District in this matter, must conduct an initial evaluation to determine if a child qualifies as a child with a disability. To conduct the initial evaluation, the public agency must obtain informed consent from the parent of the child prior to conducting the evaluation⁸⁶.

76. Within 60 school days from the date parental consent to evaluate is received, Kansas schools must conduct a meeting to determine whether a child is an exceptional child (the "Evaluation Team Meeting") and, if so, conduct a meeting to develop an IEP for the child (the "IEP Team Meeting").⁸⁷ The District may extend its deadline to complete an evaluation only if it "has obtained written parental consent to an extension of time."⁸⁸

77. "Consent" means that all of the following conditions are met:

- 1) A parent has been fully informed of all information relevant to the activity for which consent is sought, in the parent's native language or other mode of communication.
- 2) A parent understands and agrees in writing to the carrying out of the activity for which consent is sought, and the consent describes that activity and lists the records, if any, that will be released and to whom.
- 3) A parent understands the following:
 - (A) The granting of consent is voluntary on the part of the parent and may be revoked at any time.
 - (B) If the parent revokes consent, the revocation is not retroactive and does not negate an action that has occurred after the consent was given and before the consent was revoked.
 - (C) The parent may revoke consent in writing for the continued provision of a particular service or placement only if the child's IEP team certifies in writing that the child does not need the particular service or placement for which consent is being revoked in order to receive a free appropriate public education."

⁸⁶ 34 C.F.R. 300.300(a).

⁸⁷ K.A.R. 91-40-S(t). *See also* 34 C.F.R. 300.301(c).

⁸⁸ K.A.R. 91-40-S(t).

K.A.R. 91-40-1(1) (emphasis added).

78. Child Find, as discussed above, does not contain a specific timeframe within which the District must comply but rather requires that the District evaluate students with suspected disabilities within a reasonable period of time.⁸⁹

79. The initial evaluation, on the other hand, is governed by specific timeframe requirements that must be complied with, unless the parent informed, written consent to an extension of the timeframe.

80. Parental consent was obtained on September 5, 2018 to conduct the initial evaluation of A.B. Utilizing the school calendar for 2018-2019, the 60-school day period for completing A.B.'s initial evaluation concluded on December 6, 2018.

81. The District had scheduled an evaluation team meeting for November 26, 2018; however, the meeting had to be postponed due to inclement weather. The District attempted to reschedule the meeting for November 28, 2018; however, Mrs. B was unavailable. The meeting was eventually rescheduled for December 6, 2018.

82. The HO included a finding of fact that the 60th school day after the consent was given on September 5, 2018 was November 28, 2018. However, in counting the number of school days, not including days that were not in session due to "No School" or holiday(s), the 60th school day fell on December 6, 2018, making that the final day the school could complete the evaluation and remain compliant with the applicable statute(s) and regulation(s).

83. There was conflicting evidence as to whether the District had identified A.B. as a child with an exceptionality as of December 6, 2018. The evaluation had no stated conclusion; however, one staff member indicated the evaluation team was prepared, as of December 6, 2018, to identify A.B. as a child with an exceptionality. Regardless of whether the District had or had not made such a determination, no conclusion was reached during the meeting on December 6, 2018.

84. At the end of the December 6, 2018 meeting a copy of a PWN dated September 5, 2018 was signed by Mrs. B. Mrs. B acknowledged she had signed the document a second time, backdating her signature to November 28, 2018. In handwriting above Mrs. B's signature, it reads, "Shawnee Mission School District + Parent agreed to extend evaluation." Mrs. B testified that at the end of the meeting on December 6, 2018 she was asked to sign the handwritten note on the back of the September 5, 2018 PWN. Mrs. B testified she thought she was agreeing to extend the evaluation because the team was supposed to meet on "November 28, 2018" but was unable to because of inclement weather.⁹⁰

⁸⁹ *Spring Branch*, 961 F.3d at 793.

⁹⁰ The original meeting was scheduled for November 26, 2018, not November 28, 2018, raising a question as to why the signature was backdated to November 28, 2018. The only explanation is the mistaken belief that November 28, 2018 was the last day for the District to complete the initial evaluation.

85. It is very clear from the record that Mrs. B was dissatisfied with the evaluation that had been conducted by the District. Testimony from Mrs. B and District officials supports that Mrs. B was not comfortable with the evaluation, particularly the FBA, that had been completed on A.B. District staff testified that the focus of the December 6, 2018 meeting was on the evaluation documents and very little discussion was had regarding whether A.B. was a child with an exceptionality.

86. Mrs. B did not feel that the FBA completed as part of the evaluative process accurately portrayed A.B. or gave a complete picture of A.B. Mrs. B obtained an expert, Dr. Weigand, who reviewed the various iterations of the evaluation and concluded the underlying observations and documentation rendered the evaluation insufficient.

87. Because of the issues raised by Mrs. B, the evaluation team agreed to conduct further analysis to address Mrs. B's concerns. This lends credibility to the assertion by the District that the 60-school day deadline was appropriately extended with the knowledge and consent of Mrs. B. However, there simply is not enough evidence in the record to support the conclusion that Mrs. B provided informed consent. Moreover, "the IDEA imposes the Child Find obligation upon school districts, not the parents of disabled students."⁹¹

88. Ms. Ostby testified, and the record supports, that she felt like A.B. qualified as a child with an exceptionality, and that the team was prepared to make a determination that A.B. was eligible for special education services. There was no indication from the record that Mrs. B was made aware that the District had arrived at a conclusion with regards to A.B.'s eligibility. The documentation provided by the District does not include an eligibility determination. While Mrs. B certainly raised concerns with the adequacy of the District's evaluation, there is nothing in the record indicating that Mrs. B was made aware of the implications of extending the deadline or that the District was under an obligation to complete the evaluation as of the date of the meeting.

89. There was obvious confusion as to the extension agreement signed by Mrs. B. Mrs. B indicated she had backdated the extension to November 28, 2018 because that was the date of the meeting that had been canceled due to the inclement weather and she was led to believe the extension was necessary because the meeting was held after the November 28, 2018 deadline. The handwritten agreement is vague and fails to demonstrate that Mrs. B was fully informed of what she was agreeing to.

90. The District did not tender a PWN. Quite simply, the District failed to ensure that Mrs. B was fully informed regarding the District's responsibilities and what the extension requested was for. It is not enough that the District and Mrs. B agreed that additional evaluation was needed. Mrs. B was not aware of what the District's determination was and was not fully informed of the implications of agreeing to extend the time beyond the 60-school day deadline.

⁹¹ *Krawietz by Parker v. Galveston Indep. Sch. Dist.*, 900 F.3d 673, 677 (5th Cir. 2018).

91. The District violated the federal and state regulations requiring that an eligibility determination be made within 60-school days of satisfying the child find obligation. As a result of failing to comply with K.A.R. 91-40-8(f) and 34 C.F.R. 300.301(c), the District also necessarily failed to develop and implement an IEP for A.B. within the required timeframe. The District's breach results in a substantive IDEA violation and denial of a PAPE to A.B. The District's breach denied A.B. and his parents important and necessary information regarding his eligibility and need for special education or related services and Petitioners' ability to meaningfully participate, deprived A.B. of an IEP, and resulted in loss of educational opportunity and benefit to A.B.

- ***Untimely provision of Special Education and Related Services***
- ***A.B.'s IEP not in effect at beginning of 2019-2002 school year***

92. The Petitioner alleges that the District failed to provide special education and related services designed to meet A.B.'s individual educational needs. Specifically, the Petitioner alleges that the District's failure to complete the evaluation process within the prescribed 60-school days resulted in more than a one (1) year delay in providing special education and related services to A.B.

93. Once a school determines a child has a disability and needs special education and related services, the school must develop an IEP for the child.⁹²

94. Kansas schools must ensure that an IEP is developed for each exceptional child within 30 days from the date on which the child is determined to need special education and related services.⁹³

95. "Each agency shall ensure that... (3) An IEP is in effect for each exceptional child at the beginning of each school year."⁹⁴

96. It is the school district's responsibility to initiate and conduct IEP Team Meetings to develop, review, and revise the IEP of an exceptional child.⁹⁵

97. Evaluation team meetings held for purposes of discussing a student's evaluation do not satisfy the school's obligation to conduct IEP team meetings to develop an IEP.⁹⁶ Nor do Evaluation Team Meetings that lack discussion and consideration of the student's special education needs, placement, or the IEP document for the affected child.⁹⁷

⁹² 34 CFR 300.306(c)(2).

⁹³ K.A.R. 91-40-8(h).

⁹⁴ K.A.R. 91-40-16(b).

⁹⁵ K.A.R. 91-40-16(a).

⁹⁶ *Knable*, 238 F.3d at 764-65.

⁹⁷ *Id.*; 34 C.F.R. 300.324; K.S.A. 72-3429; K.A.R. 91-40-8(t)(2), (3), 91-40-16, 91-40-17.

98. Even after the District concluded A.B. was a child with an exceptionality, autism, on February 25, 2019, the District failed to convene an IEP team meeting until October 1, 2019. The District did not make any effort to convene an IEP team meeting to develop an IEP for A.B. in the spring of 2019, nor did the District make any reasonable and prompt efforts to obtain informed consent from the Bs to implement any services to A.B.

99. It appears Mrs. B was a contributing factor in the failure to meet. Mrs. B, by email dated February 21, 2019, requested an independent educational evaluation (IEE) of A.B. Mrs. B again voiced her concern that the FBA and other evaluative documents did not represent A.B. and that further evaluation was necessary in order to address A.B.'s needs. The District responded by conducting more evaluation of A.B. and made no further attempt to conduct an IEP meeting.

100. As a result, A.B. started 1st grade at Westwood View without the benefit of an IEP or any special education or related services. Even during the October 1, 2019 IEP team meeting, the team did not implement an IEP for A.B. The team did agree, and Mrs. B consented to, implementing special education services for A.B. in the form of push-in support for 50 minutes each school day. This was the first time that that A.B. was able to begin receiving special education services.

101. The actual IEP developed by the IEP team for A.B. was not approved and implemented until December 2, 2019.

102. If a school determines a student has a qualifying disability and is in need of special education or related services, but fails to develop and implement an IEP, the student is denied access to specialized instruction, which necessarily results in lost educational opportunity to the student, a substantive violation of the IDEA.⁹⁸

103. In light of the RO's finding that the District failed to timely evaluate A.B. and develop and implement an IEP for A.B., the District also failed to provide special education and related services to A.B. designed to meet A.B.'s unique educational needs. Moreover, despite identifying A.B. as a child with an exceptionality in February of 2019, during A.B.'s kindergarten year, the District did not ensure that an IEP was in effect for A.B. when the 2019-2020 school year began. The District's failure to provide special education and related services due to the failure to timely evaluate and develop and implement an IEP for A.B. resulted in a substantive IDEA violation and denial of a FAPE to A.B. from and after December 6, 2018 until December 2, 2019. The district deprived A.B. of a FAPE; the District caused substantive harm to A.B.'s parents by denying their ability to participate in the IEP process, and deprived A.B. of an IEP until the following school year, which resulted in lost educational opportunity for A.B.

⁹⁸ *Knable*, 238 F.3d at 766-67.

- ***October 2019 IEP Not Reasonably Calculated***
- ***November 2019 IEP Not Reasonably Calculated, Refusal to Include a 1:1 Paraprofessional, Lack of Parental Participation, and Failure to Review the IEP***
- ***Vague and Ambiguous IEP Terms***
- ***Failure to Track Goal Progression***

104. In Problem 5, the Petitioner alleges that the IEP that was proposed by the District at the October 1, 2019 IEP team meeting was not reasonably calculated to enable A.B. to make progress in light of his individual circumstances. The Petitioner raises the following issues: (1) a May 2019 speech IEE was not considered, (2) the FBA completed in May of 2019 was not considered, (3) the proposed IEP included an outdated BIP, (4) the IEP was almost identical to the initial draft created while A.B. was in kindergarten, and (5) the goals and accommodations were vague, ambiguous, immeasurable and not tailored to A.B.'s individual needs.

105. In Problem 6, the Petitioner raises the same concerns regarding the IEP proposed in November of 2019 and ultimately approved in December of 2019 not being reasonably calculated to enable to A.B. to progress in light of his individual circumstances. In addition, the Petitioner raises a complaint regarding the District's refusal to grant a 1:1 paraprofessional for A.B. in the afternoon for mathematics and the District's failure to include A.B.'s parent(s) in the discussion regarding such paraprofessional support. Finally, the Petitioner raises a concern regarding the District's not revising A.B.'s IEP.

106. Problem 7 raises the issue that the terms within the IEP were vague and ambiguous requiring revision(s) to the Current IEP and necessitating parental involvement in the process.

107. The IEP is the tool used by Kansas schools to deliver a FAPE.⁹⁹ It is the "centerpiece" of IDEA's education delivery system for disabled children and is the "means by which special education and related services are 'tailored to the unique needs' of a particular child."¹⁰⁰

108. An IEP means "a written statement for each exceptional child that meets the requirements of K.S.A. 72-987, and amendments thereto, and the following criteria (1) Describes the unique educational needs and the manner in which those needs are to be met; and, (2) is developed, reviewed, and revised in accordance with [IDEA]."¹⁰¹

109. "[T]he essential function of an IEP is to set out a plan for pursuing academic and functional advancement."¹⁰² This reflects the ambitious purpose of the IDEA, in response to Congress' concern that the majority of handicapped children in the United States "were either

⁹⁹ E.g., K.A.R. 91-40-1(z); *Garcia v. Bd of Educ. of Albuquerque Pub. Schs.*, 520 F.3d 1116, 1120 ("In order to provide [student] a FAPE, the school district was obligated to develop and implement an individualized education program ("IEP")).

¹⁰⁰ *Endrew F.*, 137 S. Ct. at 994 (quoting *Honig v. Doe*, 484 U.S. 305, 311 (1988) and *Rowley*, 484 U.S. at 181).

¹⁰¹ K.A.R. 91-40-1(gg).

¹⁰² *Endrew F.*, 137 S. Ct. at 999.

totally excluded from schools or were sitting idly in regular classrooms awaiting the time when they were old enough to drop out."¹⁰³ The IDEA contemplates IEP development will be a fact-intensive exercise informed by expertise of school officials, but also the expertise and input of the child's parents.¹⁰⁴ "An IEP is not a form document. It is constructed only after careful consideration of the child's present levels of achievement, disability, and potential for growth."¹⁰⁵

110. Federal law at 20 U.S.C. 1414(d)(1)(A)(i) defines an IEP and sets out, in detail, what must be included in a child's IEP:

- I. a statement of the child's present levels of academic achievement and functional performance, including-
 - (aa) how the child's disability affects the child's involvement and progress in the general education curriculum;
 - (bb) for preschool children, as appropriate, how the disability affects the child's participation in appropriate activities; and
 - (cc) for children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;
- II. a statement of measurable annual goals, including academic and functional goals, designed to-
 - (aa) meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and
 - (bb) meet each of the child's other educational needs that result from the child's disability;
- III. a description of how the child's progress toward meeting the annual goals described in subclause (II) will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;
- IV. a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

modifications or supports for school personnel that will be provided for the child-

(aa) to advance appropriately toward attaining the annual goals;

(bb) to be involved in and make progress in the general education curriculum in accordance with subclause (l) and to participate in extracurricular and other nonacademic activities; and

(cc) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph

V. an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in subclause (IV)(cc);

VI.

(aa) a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 1412(a)(16)(A) of this title; and

(bb) if the IEP Team determines that the child shall take an alternate assessment on a particular State or districtwide assessment of student achievement, a statement of why-

(AA) the child cannot participate in the regular assessment; and

(BB) the particular alternate assessment selected is appropriate for the child;

VII. the projected date for the beginning of the services and modifications described in subclause (IV), and the anticipated frequency, location, and duration of those services and modifications; and

VIII. beginning not later than the first IEP to be in effect when the child is 16, and updated annually thereafter-

(aa) appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills;

(bb) the transition services (including courses of study) needed to assist the child in reaching those goals; and

(cc) beginning not later than 1 year before the child reaches the age of majority under State law, a statement that the child has been informed of the child's rights under this chapter, if any, that will transfer to the child on reaching the age of majority under section 1415(m) of this title.

111. In determining the adequacy of an IEP, first it must be determined if the District complied with the IDEA procedures and whether the IEP conformed to the IDEA requirements. Then it has to be determined if the IEP is "reasonably calculated to enable [A.B.] to receive educational benefits."¹⁰⁶ The "Supreme Court has specifically rejected the proposition that a child is receiving a FAPE simply because he is 'advancing from grade to grade.'"¹⁰⁷

112. Every IEP must describe the child's present level of achievement, including an explanation of how the child's disability affects his involvement and progress in the general curriculum. The IEP must also set out "a statement of measurable annual goals," along with a description of specialized instruction and services that the child will receive.¹⁰⁸

113. The IEP "must be appropriately ambitious in light of his circumstances," which is "markedly more demanding than" the *de minimis* test previously applied by the Tenth Circuit.¹⁰⁹ For a child fully integrated in the regular classroom, an IEP should "be 'reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.'"¹¹⁰

114. "The purpose of present levels is to establish a baseline relative to which the teaching staff and IEP team may determine goals and objectives and against which they measure student progress. Present levels must be stated in specific terms in order to inform a revision of the IEP. Present levels provide a roadmap to further integration, so that approaches for ensuring the child's involvement and progress in the general curriculum ... can be identified."¹¹¹

115. The IEP in this case considered progress prospectively. However, the Third Circuit Court has said that "'the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date Neither the statute nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement.'"¹¹²

¹⁰⁶ *O'Toole*, 144 F.3d at 701 (citation omitted).

¹⁰⁷ *Klein Indep. Sch. Dist.*, No. 20-20339, at *17 (quoting *Endrew F.*, 137 S. Ct. at 1000, n.2); accord 34 C.F.R. 300.101(c).

¹⁰⁸ *Endrew F.*, 137 S. Ct. at 1000 (citing 20 U.S.C. § 1414(d)(1)(A)(i)).

¹⁰⁹ *Id.* at 1000.

¹¹⁰ *Endrew F.*, 137 S. Ct. at 999 (quoting *Rowley*, 458 U.S. at 203-204).

¹¹¹ *W.-Linn Wilsonville Sch. Dist. v. Student*, No. 3:12-CV-02364-ST, 2014 U.S. Dist. LEXIS 103844, at *39 (D. Or. July 30, 2014).

¹¹² *Carlisle*, 62 F.3d at 534 (quoting *Fuhrmann v. East Hanover Bd. of Educ.*, 993 F.2d 1031, 1040 (3rd Cir.1993)); see also *Roland M v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir.1990) ("An IEP is a snapshot, not a retrospective."); see also *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir. 2008) (explaining that the adequacy of an IEP is not determined through hindsight "because the question before us is not whether the IEP will guarantee some educational benefit, but whether it is reasonably calculated to do so"); *Endrew F.*, 798 F.3d 1329, 1341 (10th Cir. 2015) (citing *O'Toole*, 144 F.3d at 701--02, and *Thompson*, 540 F.3d at 1149, for the proposition that "the measure is whether the IEP is reasonably calculated to guarantee some educational benefit, not whether it will do

In other words, the reviewer is to consider what the IEP team knew at the time the IEP was drafted. This is not to be mistaken with reviewing the process to see if the IEP team should or could have known more at the time the IEP was drafted.

116. The IDEA requires schools to "[u]se a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining (i) whether the child is a child with a disability ... (ii) the content of the child's IEP."¹¹³ Schools are required to "use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors."¹¹⁴ An evaluation must assess all areas of suspected exceptionality, and assessment tools and strategies are provided that furnish relevant information to directly assist persons in determining the educational needs of the child.¹¹⁵ At (c). Schools may not use any single measure or assessment as the sole criterion for determining eligibility or an educational program, and assessments must be conducted by trained and knowledgeable personnel in accordance with any instructions provided by the producer of the assessments.¹¹⁶

117. The IDEA contemplates IEP development will be a fact-intensive exercise informed by expertise of school officials, but also the expertise and input of the child's parents.¹¹⁷ An IEP is not a form document: it must be constructed with "careful consideration of the child's present levels of achievement, disability, and potential for growth."¹¹⁸

118. When a school suspects a child has a specific qualifying disability, such as ASD, it must specifically assess that suspicion using thorough and reliable procedures and technically sound instruments.¹¹⁹

119. A school must ensure that the IEP team uses the results of the evaluations to develop the child's IEP and considers existing data.¹²⁰ And if a school concludes that it needs additional data, it "shall administer those tests and evaluations that are appropriate to produce the needed data."¹²¹

so"); *LG. v. Fair Lawn Bd. of Educ.*, 486 F. App'x 967, 973 (3rd Cir. 2012) ("Courts deciding whether this requirement has been met must avoid 'Monday Morning Quarterbacking' and must evaluate the reasonableness of a school district's decision at the time that it was made."); *J.R. ex rel. S.R. v. Bd. of Educ.*, 345 F. Supp. 2d 386, 395 (S.D.N.Y. 2004) ("[W]e ... must not engage in Monday morning quaiterbacking guided by our knowledge of [the student J's subsequent progress at [a particular school], but rather [must] consider the propriety of the IEP with respect to the likelihood that it would benefit [the student] at the time it was devised.").

¹¹³ 34 C.F.R. 300.304(b).

¹¹⁴ K.S.A 72-3428.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Andrew F.*, 137 S. Ct. at 999.

¹¹⁸ *Id.*

¹¹⁹ *Timothy O.*, 822 F.3d at 1118-1119 (when school suspects autism or observes autistic-like behavior, it must conduct an evaluation that assesses the possibility of autism).

¹²⁰ K.A.R. 91-40-8(b)(2); 34 CFR 300.324.

¹²¹ KAR 91-40-8(e); 34 C.F.R. 300.305.

120. An evaluation team must also review current classroom-based observations and observations by teachers and related service providers.¹²²

121. "[A]n IEP must be drafted in compliance with a detailed set of procedures [that] .. emphasize collaboration among parents and educators and require careful consideration of the child's individual circumstances."¹²³

122. A student's behavior intervention plan is an important component of their IEP.¹²⁴ A material failure to implement an IEP or BIP substantively violates the IDEA.¹²⁵ "A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP" or BIP.¹²⁶ This "materiality standard" does not require that the child suffer demonstrable educational harm in order to prevail, but lack of progress may be probative.¹²⁷ "Rather, courts applying the materiality standard have focused on the proportion of services mandated to those actually provided, and the goal and import (as articulated in the IEP) of the specific service that was withheld."¹²⁸

123. An IEP with immeasurable goals causes substantive harm because the education agency cannot tell whether its methods are working or if a particular goal has been achieved, thus impeding progress.¹²⁹

124. "In complying with subsection (f), each agency shall ensure that an IEP is developed for each exceptional child within 30 days from the date on which the child is determined to need special education and related services."¹³⁰

125. The initial requirement for an IEP is that it must include a statement of the child's **present** levels of academic achievement and functional performance.

126. A draft IEP was presented to Mrs. B on or about February 13, 2019 (February IEP). The February IEP included a statement of A.B.'s current level of performance. It was noted that A.B.'s current level of performance was determined by the evaluation that had been conducted during his kindergarten year, utilizing the information that had been obtained during the evaluation conducted to determine if A.B. was a child with an exceptionality. Three (3) goals were listed within the February IEP, and each had a included a brief statement of A.B.'s present levels of academic achievement and functional performance (PLAAFP) as related to each of the goal areas. The PLAAFP was also based upon the evaluation that had been completed between September

¹²² K.A.R. 91-40-8(c)(1); 91-40-7(b); 91-40-10(a)(1)(C).

¹²³ *Andrew F.*, 137 S. Ct. at 994.

¹²⁴ *E.C. v. U.S.D. 385 Andover*, No. 18-1106-EFM, 2020 U.S. Dist. LEXIS 92792, at*18-19 (D. Kan. May 27, 2020).

¹²⁵ *Id.*; *Van Duyn v. Baker Sch. Dist.*, 502 F.3d 811,822 (9th Cir. 2007); *Wilson v. District of Columbia*, 770 F. Supp. 2d 270,275 (D.D.C. 2011).

¹²⁶ *E.C.*, 2020 U.S. Dist. LEXIS 92792, at*18-19; *Van Duyn*, 502 F.3d at 822.

¹²⁷ *Van Duyn*, 502 F.3d at 822.

¹²⁸ *Wilson*, 770 F. Supp. 2d, at 275.

¹²⁹ *Samberg v. Utica Cmty. Schs.*, 2016 U.S. Dist. LEXIS 41771, at*13 (E.D. Mich. Mar. 30, 2016).

¹³⁰ K.A.R. 91-40-8(h).

and December of 2018. Mrs. B questioned the results of the evaluation; however, there was no evidence offered to suggest that the statements were not reflective of A.B.'s present level as of February of 2019. Rather, there was merely testimony offered by Dr. Weigand that the stated goals were immeasurable, and the February IEP was not reasonably calculated to enable A.B. to make appropriate progress. No evidence was offered to suggest that A.B.'s levels had declined or improved substantially since the FBA and evaluation had been completed. Again, this does not address the assertions by Mrs. B that the FBA was not reflective of A.B. to begin with. As the February IEP was not the one that was ultimately approved, and only served as a draft for the initial meeting, very little discussion will be given to this issue. The February IEP, as a draft, did not include any Special Education and Related Services to be Provided to A.B. The February IEP was merely a draft upon which the IEP team could begin to build an appropriate IEP for A.B.

127. Even if the February IEP could be perceived as having been a proposed IEP for A.B., without development or request for consent to implement, the IEP in the form it was proposed did not offer to confer a FAPE to A.B.

128. A second proposed IEP (October IEP) was presented to the Bs in August of 2019, nearly six (6) months after the District concluded A.B. was a child with an exceptionality who needed special education services. It is noted that the statement regarding A.B.'s current level of performance was essentially identical to the statement contained in the February IEP. The statement was nearly identical despite the fact that a second evaluation, FBA and BIP, had been completed in May of 2019. Very little, if any, of the information from the second evaluation, FBA or BIP, was included in the October IEP. The PLAAFP statements provided as baseline data for each of the three (3) goals, were identical to the PLAAFP statements in the February IEP. Therefore, it cannot be said that the October IEP was reflective of A.B.'s PLAAFP as the District had additional information that could have been included. The District set forth the same three (3) goals: behavior, social and communication, but the goals had been reworded to provide additional detail. The District also reworked objectives and benchmarks. The October IEP included four (4) proposed Special Education and Related Services to be Provided. The October IEP did not take into consideration the speech IEE that had been completed.

129. While the October IEP had been reworked, it still was not the IEP that was ultimately implemented for A.B. From the October IEP and the meeting that accompanied, A.B.'s first services were agreed to. The IEP team agreed, Mrs. B consented, to provide A.B. with "push-in support" for fifty (50) minutes per day each school day. However, the remainder of the October IEP was not approved, and the team agreed to continue working towards a consensus.

130. Therefore, it is irrelevant whether the October IEP was or was not reasonably calculated to enable A.B. to make appropriate progress considering his circumstances.

131. Of concern to the Review Officer is the fact that the statute requires that the IEP be completed within thirty (30) days of the date upon which the child was determined to need special education services. The February IEP proposed by the District was not in compliance with the federal requirements for what must be included within an IEP for it to be considered compliant.

After February 25, 2019, the date the District concluded A.B. was a child with an exceptionality, an IEP was required to be developed by March 27, 2019, noting that the IEP requirement does not specify "school days" like the evaluation time period does. The February IEP did not constitute a proposed IEP in that it did not include any special education and related services to be provided to A.B. For the remainder of A.B.'s kindergarten year, the District did not convene an IEP team meeting after the determination was made that A.B. was a child with an exceptionality in need of special education services. No effort was made after February 25, 2019 to meet as a team and develop an IEP for A.B. until A.B. started first grade in August. While the District points to the fact that Mrs. B had requested a second evaluation, FBA and BIP, the law does not grant an extension for developing an IEP based upon such a request. Furthermore, the October IEP that was developed and presented to Mrs. B at the beginning of A.B.'s first grade year did not include information from the evaluation, FBA or BIP. In other words, the delay cannot be attributed to those steps because the District did not even bother to include the results in the development of the IEP that had been proposed.

132. A school's failure to convene an IEP Team Meeting denies an exceptional child's parents of a meaningful opportunity to participate in the IEP process.¹³¹

133. By failing to substantially rework the proposed IEP, the District unnecessarily prolonged the IEP process, a process that had already long exceeded the statutory time limits.

134. The District substantively violated IDEA by failing to develop an IEP within the statutorily prescribed period and denied A.B. a FAPE.

135. Another draft IEP was provided to Mrs. B on November 10, 2019 (November IEP). The statement regarding A.B.'s current level of performance was slightly more developed than the previous version. The first three (3) paragraphs were nearly identical. The primary difference was that the District included a list of behaviors and percentages that purportedly represented the number of instances A.B. was observed engaging in the various behaviors. There is no supporting explanation as to how the percentages were developed or where the information was derived from. The statements of PLAAFP accompanying the social and communication goals were identical to the statements on previous IEPs. The PLAAFP statement for the behavior goal had additional information included with it, although there was no indication where the additional information was derived from. The goals, objectives and benchmarks for the social and communication goals were identical to the October IEP. The behavior goal was reworded, and additional information was included in the listed objectives and benchmarks. In essence, the November 10, 2019 draft IEP was the same as the one that had been proposed in October of 2019. The IEP appeared to be based upon the same data that had been previously used, noting that it was not evident that the second evaluation, FBA and BIP were incorporated into the IEP. Again, as this was not the IEP that was ultimately adopted, it is not being considered in determining if the District further violated the IDEA.

¹³¹ *Knable*, 238 F.3d at 766; *Amanda J. ex rel. Annette J. v. Clark Cnty. Sch. Dist.*, 267 F.3d 877, 892 (9th Cir. 2001); 34 C.F.R. 300.322, 300.501.

136. The November 20, 2019 IEP (Current IEP) that is now in effect was reviewed by the IEP team during a meeting that occurred on November 20, 2019 and was eventually consented to by Mrs. B on December 2, 2019. The communication goal was identical in all respects to the communication goal set forth in the November IEP. The behavior goal, identified as "Behavior 2," was essentially the same as the behavior goal from the November IEP. The "Measurable Annual Goal" section was slightly modified, as were the objectives and benchmarks. Two (2) social goals were included in the Current IEP. While the PLAAFP was identical in "Social 2" to previous iterations, "Social 3" was completely new, as were the goal, objectives and benchmarks for "Social 2." The PLAAFP statements that were the same as previous statements were obviously based on outdated evaluation documents completed in the Fall of 2018 during A.B.'s kindergarten year and did not take into consideration any changes that may have been noted in the second evaluation that was completed in the Spring of 2019. District staff had even noted deficiencies stating, "Again, the evaluation was done a year prior and your data will change based on student needs and present levels a lot, especially over the course of a year."¹³² Despite being nearly three (3) months into the current school year, the IEP was totally and completely based on information obtained during the initial evaluation. There was no indication from the Current IEP if the PLAAFP statements reflected any upward or downward trends from A.B.'s initial evaluations. The special education and related services to be provided remained the same as had been recommended in the October IEP and the November IEP.

137. Once again, there was testimony offered from experts for each side that the goals were immeasurable. The fact that the goals may not measure exactly what one expert or the other opined was important, does not make the goals necessarily immeasurable. That is something that must be determined over time, based upon a review of the progress reports.

138. Nonetheless, the Current IEP failed to fully take into consideration the results of the second evaluation, if at all, as there is no indication from reviewing the Current IEP that the second evaluation, FBA or BIP were incorporated into the PLAAFP, goals, objectives, or services.

139. As part of the Current IEP, Mrs. B, noting A.B.'s reading deficiencies, requested a reading goal. The District refused to incorporate a reading goal, even though A.B. demonstrated no progress from his September 28, 2018 reading scores (qualifying for Tier 3, with a percentile rank of 17 percent) and December 2019 (again qualifying for Tier 3, with a percentile rank of 17 percent). Further, the District internally recognized that it lacked sufficient baseline information to evaluate the need for a reading goal, but nonetheless rejected Mrs. B's request for the same.

140. Part of the IEP discussion, and a separate issue raised by the Petitioner, was the refusal by the District to include an afternoon one-on-one paraprofessional to assist A.B. with mathematics. Mrs. B had repeatedly requested that the District include an afternoon one-on-one paraprofessional for A.B. because he was having difficulty with mathematics after returning from lunch. The District refused Mrs. B's request calling it a "want, not a need" and noting that A.B. was good at math, even by Mrs. B's admission, and that there was no real proof it had to

¹³² (Tr. Vol. IV, 877:17-20).

do with the subject as much as it appeared to be that A.B. needed assistance refocusing in the afternoon. The District was more receptive to the idea of having an afternoon paraprofessional that would assist A.B. two (2) times during the afternoon but would not be subject specific.

141. Parents are members of the IEP team and "must be afforded an opportunity to participate in meetings with respect to identification, evaluation, and educational placement" of their child and the provision of FAPE to their child. 34 CFR 300.321, .501(b). Parents play "a significant role" in the IEP process, and their concerns must be considered by the team.¹³³ The IDEA "sought to maximize parental involvement in educational decisions affecting their disabled child."¹³⁴

142. The IEP team meeting "is the primary opportunity for parental involvement in the process of developing an IEP."¹³⁵

143. While federal regulations require that parents be given the opportunity to meaningfully participate in the IEP process, see 34 C.F.R. § 300.345, those regulations do not require a school district to relinquish to parents all control over the substance of the IEP or what constitutes a FAPE.¹³⁶ As one court noted, requiring an IEP team "to adopt an IEP as drafted by the students' parents ... essentially nullify the whole IDEA framework."¹³⁷ "School officials must come to the IEP table with an open mind, but they need not come with a blank mind."¹³⁸

144. Whether Parents were meaningful participants in the IEP process is a procedural inquiry.¹³⁹ However, "not all procedural violations by a school district in implementing the IDEA will necessarily result in the denial of a FAPE. Procedural error constitutes the denial of a FAPE only when it results in lost educational opportunity for the child, or when it significantly restricts parental participation in the IEP formation."¹⁴⁰

145. Courts routinely find that parents are afforded the opportunity to participate in the IEP process, even though the parents' desires are rejected.¹⁴¹

¹³³ *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516,524 (2007); 20 U.S.C. § 1400(c).

¹³⁴ *Ellenbergv. New Mexico Military Institute*, 478 F.3d 1262, 1269 (10th Cir. 2007); *MM ex rel. C.M v. Sch. Ed. of Miami-Dade Cnty., Fla.*, 437 F.3d 1085, 1095-96 (11th Cir. 2006) ("parental involvement is critical; indeed, full parental involvement is the purpose of many of the IDEA's procedural requirements.").

¹³⁵ *Knable v. Bexley City Sch. Dist.*, 238 Fed 755, 766 (6th Cir. 2001).

¹³⁶ See *White v. Ascension Parish School Ed.*, 343 F.3d 373, 377 (5th Cir. 2003) ("we reject the assertion that parents are denied input into a decision if their position is not adopted").

¹³⁷ *T. ex rel. C. T. v. Lewiston Sch. Comm.*, No. 99-202-P-H, 2000 U.S. Dist. LEXIS 10674, at *53 (D. Me. July 27, 2000).

¹³⁸ *Ed. of Educ. v. Michael R.*, No. 02 C 6098, 2005 U.S. Dist. LEXIS 17450, at *45 (N.D. Ill. Aug. 15, 2005).

¹³⁹ *J.L. v. Mercer*, 592 F.3d 938, 953 (9th Cir. 2009).

¹⁴⁰ *ML v. Federal Way Sch. Dist.*, 39443 F.3d 634, 653 (9th Cir. 2004) (collecting cases).

¹⁴¹ See, e.g., *Ms. S. ex rel. G v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1133 (9th Cir. 2003) (finding, despite the fact "the parent and the school district are in disagreement about aspects of the proposed plan," a school district complied with 34 C.F.R. § 300.345 where it provided "a meaningful opportunity for [a parent] to participate in the IEP process, developed an IEP plan to the best of its ability after [the district and parent could not come to a consensus about an IEP, and afforded [the parent] two due process hearings to establish the validity of its proposed plan"); *L.P.*

146. While Mrs. B may have desired to have a one-on-one paraprofessional for A.B. in the afternoon to assist with mathematics, the District is not required to adapt every suggestion that the parent makes. The fact that the District did not adopt Mrs. B's request, instead considering the possibility of a paraprofessional at different times in the afternoon, is not, in and of itself, a violation of IDEA. The District acknowledged that additional support may be necessary and was working on possible variations that would allow for A.B. to receive the supports while also determining exactly what supports were needed.

147. The Current IEP had numerous, substantial defects, most glaringly the failure to incorporate up-to-date evaluation results. The Current IEP substantively violates the IDEA and does not confer a FAPE to A.B. in that it was not and is not reasonably calculated to enable A.B. to make progress appropriate considering his circumstances.

148. Finally, the Petitioner raises a concern regarding the District's failure to revise what had been recognized as an ineffective IEP.

149. The District must revise a child's IEP as appropriate to address the child's anticipated needs and other matters.¹⁴² "When a school district knows or should reasonably know that a student's behaviors, ineffectively addressed by the IEP in place, impedes that student's opportunity to receive a meaningful educational benefit, it ought to rectify the IEP's inadequacies in a timely fashion."¹⁴³

150. Schools must revise an IEP when a student demonstrates a lack of expected progress, to address the child's anticipated needs or "other matters."¹⁴⁴ It is the responsibility of the school to initiate and conduct meetings to revise an IEP.¹⁴⁵

151. A school cannot ignore the fact that an IEP is clearly failing; however, occasional deviations from the IEP are not necessarily a violation of the IDEA.¹⁴⁶

152. A.B. did not demonstrate expected progress as it related to his refusal behaviors and work completion addressed by his BIP; the motivational system in place did not work and special education staff recognized that he was not "making adequate progress"; staff only partially implemented his BIP; and A.B.'s behaviors continued to impede his access to educational benefit and progress.¹⁴⁷

v. Longmeadow Pub. Schs, No. 10-40190-FDS, 2012 U.S. Dist. LEXIS 115277, at *53 (D. Mass. Feb. 24, 2012) ("Her objection, then and now, to the opinion of others on the IEP team concerns the substance of the resulting proposal, not the procedure. This Court agrees that the record reveals no evidence that any procedural defects 'significantly impeded' plaintiffs' ability to participate in the IEP formation process.")

¹⁴² 34 CFR 300.324(b)(ii).

¹⁴³ *Colonial Sch. Dist. v. N.S.*, No. 194311, 2020 U.S. Dist LEXIS 55150, at *34 (E.D. Penn. Mar. 30, 2020).

¹⁴⁴ 34 C.F.R. 300.324(b).

¹⁴⁵ K.A.R. 91-40-16.

¹⁴⁶ *L.C. and K.C. v. Utah St. Bd. Of Ed.*, 125 F. App'x 252, 105 LRP 12668 (10th Cir. 2005).

¹⁴⁷ *See Andrew F. v. Douglas Cty. Sch. Dist.*, 290 F. Supp. 3d 1175, 1184 (D. Colo. Feb. 12, 2018).

153. The District failed to take necessary steps to revise A.B.'s Current IEP to address his anticipated needs in the areas of fine motor, need for a reading goal, and need for afternoon paraprofessional support despite internally observing (1) A.B. "writes like a 3 year old" (a corresponding request for OT evaluation was unsuccessful); (2) that A.B. "may, in fact, need a reading goal?????" because he "cannot read anything on the page"; and (3) that "A.B. needs more support ... he just needs help." The District unreasonably delayed offering additional paraprofessional support several months after recognizing A.B. needed the support and based its offer on staff availability and not A.B.'s need, a violation of the IDEA.¹⁴⁸ Moreover, it purported to deny Mrs. B's paraprofessional request based on (1) that A.B. was struggling with math because of the time of day rather than academic subject, and (2) paraprofessional support was a more restrictive environment. Both reasons are inconsistent with the IDEA. First, a student's inability to access the educational curriculum because his disability causes him to struggle during the afternoon is no basis to reject a request for special education or related services needed by the student to receive educational benefit. Second, the "least restrictive environment applies to the type of classroom setting, not the level of additional support a student receives within a placement."¹⁴⁹

154. Violations of Kansas law and the IDEA occur where vague language in an IEP "compromise[s] the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process or caused a deprivation of educational benefits."¹⁵⁰

155. The District also failed to take necessary steps to revise A.B.'s Current IEP in that it recognized that vague terms in A.B.'s IEP and/or BIP resulted in staff confusion and A.B.'s removal from the general education environment; after recognizing the deficiency, the District failed to define those terms and failed to propose definitions to A.B.'s parents despite committing to do so. Additionally, the District failed to include A.B.'s parents in subsequent team meetings convened for purposes of defining the vague terms, depriving Petitioners of the ability to meaningfully participate in the IEP process.

156. Although a failure to meet IEP goals is not dispositive of a failure to provide a FAPE, "it can aid in determining whether the IEP was reasonably calculated to make progress."¹⁵¹

157. These violations deprived A.B. of an IEP reasonably calculated to enable him to make appropriate progress in light of his circumstances, and substantively violated the IDEA.

¹⁴⁸ *Tehachapi Unified Sch. Dist. v. K.M.*, No. 1:16-cv-01942-DAD-JLT, 2018 U.S. Dist. LEXIS 169526, at *14-15 (E.D. Cal. Sept. 28, 2018).

¹⁴⁹ *R.B. v. N.Y. City Dep't of Educ.*, 603 Fed. Appx. 36, 40 (2d Cir. 2015); K.A.R. 91-40-21; Kansas State Department of Education Special Education Process Handbook, chapter 6, pp. 119, 123 (discussing LRE in terms of classroom setting, not level of suppmts).

¹⁵⁰ See *O'Toole v. Olathe Dist. Sch. Unif. Sch. Dist. No. 233*, 144 F.3d 692, 707 (10th Cir. 1998) (quoting *Roland M v. Concord Sch. Comm.*, 910 F.2d 983, 994 (1st Cir. 1990)).

¹⁵¹ *A.D. v. Creative Minds In'! Pub. Charter Sch.*, No. 18-2430 CRC/DAR, 2020 U.S. Dist. LEXIS 184957, at *56 (D.D.C. Aug 14, 2020).

158. These failures deprived A.B. of an IEP reasonably calculated to enable him to make appropriate progress in light of his circumstances and resulted in lost educational benefit. Further, the District failed to communicate its concerns to A.B.'s parents, depriving them of the ability to meaningfully participate in the IEP process. Accordingly, the District substantively violated the IDEA.

159. Finally, as relates to the implementation of A.B.'s IEP, the Petitioner alleges the District materially failed to implement A.B.'s IEP and BIP, in that the District (1) changed A.B.'s placement by removing him from the general education classroom and sending him to a special education classroom on three occasions contrary to his placement in his IEP and then failed to send a required PWN notifying the Bs of the change in placement, (2) did not fully implement six separate provisions of A.B.'s BIP, (3) inadequately or failed to measure A.B.'s goal progression (the goal progression data that it did collect was inconsistent with the District's progress report that A.B. was meeting four objectives 53 percent of the time), and (4) failed to alter its goal progression data collection after the District observed it was insufficient to track A.B.'s goals.

160. In order for a change of placement to occur, requiring notice ad action by the IEP team, the removal has to be for a period of more than ten (10) consecutive days.¹⁵² While this is typically discussed in the area of disciplinary removals, there is no evidence in this case to indicate what the purpose was behind the times A.B. was sent to the special education room to complete his assignment. Therefore, it is not possible to ascertain from the record if this constitutes discipline or not. On the other hand, there is no real guidance as relates to sending a child to a special education room on select occasions to complete assignments. Based upon the record, it cannot be concluded that the District was attempting or proposing to change A.B.'s placement from the general education classroom to the special education classroom. To do so, the District would be required to make contact with the parent(s) and provide notice. Even under these circumstances the District should have provided notification to the parent(s); however, it does not appear to be a procedural violation of IDEA.

161. Progress reporting lacking in detail or consisting of conclusory statements may inhibit meaningful parental participation, inhibit the IEP team's ability to craft and implement the student's IEP, and negatively affect the student's education.¹⁵³

162. Parents are entitled to complete access to their child's records with respect to identification, evaluation, and educational placement, and the provision of a FAPE.¹⁵⁴ "Procedural violations that interfere with parental participation in the IEP formulation process undermine the very essence of the IDEA."¹⁵⁵

¹⁵² 34 C.F.R. 300.536.

¹⁵³ *Endrew F.*, 798 F.3d at 1335 *rev'd on other grounds*, 137 S. Ct. 988; *Escambia Cty. Bd. of Educ. v. Benton*, 406 F. Supp. 2d 1248 (S.D. Ala. 2005).

¹⁵⁴ 20 U.S.C. § 1415(b)(1)(A).

¹⁵⁵ *Amanda J. ex rel. Annette J. v. Clark Cnty. Sch. Dist.*, 267 F.3d 877, 892 (9th Cir. 2001) (finding that summary documents that paraphrased more complete data was a procedural and substantive IDEA violation).

163. The District committed both a procedural and substantive IDEA violation by providing conclusory progress reporting to Petitioners that was inconsistent with goal progression data collected by the District, and by refusing to provide the same goal progression data sheets to the Bs--even though the data sheets were intended to be provided to the Bs and were requested by the Bs. These actions prevented AB.'s parent(s) from meaningful participation in A.B.'s IEP, substantively harmed AB. by depriving him of an IEP that adequately tracked his goal progression, and deprived AB. of educational benefit.

164. These are material failures because the District failed to implement a significant proportion of services, A.B. did not demonstrate expected progress as it related to his refusal behaviors and work completion addressed by his BIP, and AB. did not demonstrate progress towards his social goal as reflected in the goal progression sheets. Accordingly, the District substantively violated the IDEA and deprived AB. of a FAPE and educational benefit.

- ***Denied IEE***

165. The Petitioner alleges that the District violated the IDEA by failing to honor a request made by A.B.'s parent(s) on February 21, 2019 for a behavioral IEE. The Petitioner alleges the District refused to pay for a behavioral IEE, instead insisting that AB. be re-evaluated by another District employee.

166. "A parent has the right to an independent educational evaluation ["IEE"] at public expense if the parent disagrees with an evaluation obtained by the public agency."¹⁵⁶ Upon such a request, the District must provide parents "information about where an [IEE] may be obtained."¹⁵⁷ "At that point, the burden shifts to the school district to do one of two things: **(1)** to honor the parent's request to pay for an IEE, or **(2)** to initiate a due process hearing."¹⁵⁸ The District "may not unreasonably delay" either providing the IEE or filing a due process complaint.¹⁵⁹ Failing to timely respond to a parent's IEE request is a substantive IDEA violation, because it results in the affected student languishing with an IEP that may not be sufficiently tailored to meet the student's needs.¹⁶⁰

167. The school district must conduct a reevaluation of a child with a disability if it "determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation."¹⁶¹

¹⁵⁶ 34 CFR § 300.502(b)(1).

¹⁵⁷ *Id.* at (a)(2).

¹⁵⁸ *D.S. by and Through MS. v. Trumbull Bd. of Ed.*, 357 F. Supp. 3d 166, 172 (D. Conn. 2019) (citing 34 CFR § 300.502(b)(2)).

¹⁵⁹ 34 CFR § 300.502.

¹⁶⁰ *Harris v. District of Columbia*, 561 F. Supp. 2d 63, 64 (D.D.C. 2008) ("failure to act on a request for an independent evaluation is certainly not a mere procedural inadequacy; indeed, such inaction jeopardizes the whole of Congress' objectives in enacting the IDEA.").

¹⁶¹ 34 C.F.R. 300.303.

168. An FBA is an "educational evaluation" subject to a request for an independent educational evaluation pursuant to 34 C.F.R. 300.502.¹⁶²

169. A District employee met with Mrs. B, and her advocate, and the parties agreed to complete an IEE in the area of speech/language and to complete a second FBA, to be completed by a Board-Certified Behavior Analyst (BCBA) employed by the District. Mrs. B requested additional time to investigate who might complete the speech/language IEE. Mrs. B met with District staff in March of 2019 and agreed to allow Ms. Koertner to perform the second FBA. While all aspects of what Mrs. B envisioned in her IEE request may not have been addressed, Mrs. B met with District staff and arrived at an agreement as to how the district should move forward. It appears from the record that the District took the steps necessary to comply with the request made by Mrs. B. There was no procedural violation of IDEA.

170. The District failed to obtain informed parental consent to conduct a second FBA evaluation. The record indicates that the District sent a PWN to Mrs. B dated March 18, 2019. That PWN set forth the agreed upon decision by the District and Mrs. B to conduct an IEE in the area of speech/language and to conduct a second FBA. The PWN set forth a complete description of the discussion had and the decision reached. While the PWN provided the necessary information to the Petitioner, it indicates that "parental consent is not required." In other words, the district failed to seek parental consent to conduct the IEE or the FBA. The District gave the Bs the information necessary to thoughtfully consider the District's proposal, both during the meeting and in written form, noting Mrs. B did not refute the information provided in the PWN. What the District failed to do was seek parental consent to conduct the IEE in speech/language and the second FBA. Something that is required by the applicable statutes and regulation. This constitutes a procedural violation of the IDEA.

171. These procedural violations are subject to a "harmlessness" consideration in determining if they constitute a substantive violation of the IDEA. In so doing the RO is not required to combine all of the procedural violations to see if they collectively rise to a level that they caused harm but look at each violation independently of the others substantively violated the IDEA.

172. The question is whether the district's failure to obtain informed consent is a harmless violation or if it rises to the level of a substantive violation that denied A.B. a FAPE. While the extra evaluation steps may have delayed the implementation of the special education services, that was a separate issue discussed above. The record indicates that Mrs. B was fully informed of the District's proposal and had agreed to the proposal, even agreeing to allow Ms. Koertner to conduct the FBA after having met with her. To claim that Mrs. B was uninformed is disingenuous and does not reflect what is contained in the record. While procedurally the District failed to obtain consent to conduct the additional evaluation(s) requested by Mrs. B, the violation is harmless and did not serve to deprive A.B. of a FAPE.

¹⁶² *Harris v. District of Columbia*, 561 F. Supp. 2d at 68 (D.D.C. 2008).

- **No Prior Written Notice**

173. The Petitioner alleges that the District deprived A.B. of a FAPE by failing to provide the parent(s) with adequate PWNs. The Petitioner alleges that many of the PWNs were not consistent with the IDEA or Kansas law and that some PWNs were not provided at all.

174. Prior written notices are a procedural safeguard afforded to parents. Kansas schools must provide Prior Written Notice (PWN) in at least the following circumstances: (a) prior to any IEP team meeting; (b) when the agency proposes to conduct any evaluation or reevaluation procedures; (c) if the school refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; (d) if the school proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; and (e) if the school determines that additional data is required to determine the possible existence of a qualifying disability, the child's present levels of academic achievement, and the possible need for special education and related services.¹⁶³

175. The PWN serves as a basis for informing parent(s) of the various steps that may or may not be taken with regards to the child. In as much it is important that notices provided to the parent(s) be complete and contain correct information. It is imperative that the school, in this case the District, provide full and complete information to the parent(s). The PWN is the surest way of providing valuable information to the parent(s) and, since it is written, provides a record of exactly what has or has not been communicated. Moreover, the PWN serves as the basis for obtaining parental consent.

176. In reviewing the record, there were multiple PWNs that were submitted at different stages of the evaluative process, the development of the IEP, and after implementation of the IEP. The record is replete with evidence of the ongoing communication that took place between the District and the parent(s). The District remained in constant contact with Mrs. B through various staff during the entirety of the process. At the same time, the District did fail, as was noted above, to provide PWNs as relates to each and every action that was taken or refused to be taken.

177. In reviewing the notices, the District provided a description of the action taken, proposed or refused. The District also provided a description of the factors that were relevant to the proposal or refusal. Not each PWN; however, was prepared or provided in accordance with the IDEA or Kansas law.

178. "A meeting does not include informal or unscheduled conversations involving public agency personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision. A meeting also does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting."¹⁶⁴

¹⁶³ 34 C.F.R. 300.322(a)(1), .301(a), .501(b)(2), .503; K.A.R. 91-40-S(e)(1). See also K.A.R. 91-40-26.

¹⁶⁴ 34 C.F.R. 300.501(b)(3).

179. The District's failure to provide adequate PWNs constitutes a procedural violation of IDEA; however, the violation is harmless in that it did not rise to the level of a substantive violation that deprived A.B. of a FAPE. Again, the record contains record after record of communication that was maintained between the District and the parent(s). The results may not have always been to the parent's satisfaction, but the parent was provided notice and was informed along the way. Mrs. B was a very active participant in the process. And while there may have been some discussions had between staff outside of the evaluation or IEP team meetings, the courts have recognized that schools may get together to develop suggestions, as long as they remain openminded throughout the process. In the limited instances where District staff met to discuss A.B.'s case, there was no evidence that the District made decisions regarding A.B. without communicating with and receiving the parent's input. The record does not support the Petitioner's allegation that the District's failure to provide adequate PWNs rose to the level of a substantive violation of IDEA and a denial of a FAPE to A.B.

Decision

For the reasons detailed in the Findings of Facts and Conclusions of Law above and, pursuant to K.S.A. 72-3430 and § 34 C.F.R. 300.507, the RO rules as follows as to the issues herein:

- A. The District satisfied its' "Child Find Obligation" as relates to A.B. K.S.A. 72-3428 and § 34 C.F.R. 300.111(a).
- B. The District failed to timely evaluate A.B. to determine his eligibility to receive special education services such that he was denied a free and appropriate public education (FAPE) resulting in lost educational benefit to A.B. K.S.A. 72-3428 and § 34 C.F.R. 300.301.
- C. The District failed to appropriately determine A.B.'s educational placement through development of an Individualized Educational Program (IEP) such that he was denied a FAPE resulting in lost educational benefit to A.B. K.S.A. 72-3428 and § 34 C.F.R. 300.324.
- D. The District failed to implement A.B.'s IEP's such that he was denied a FAPE resulting in lost educational benefit to A.B. § 34 C.F.R. 300.17.
- E. The District failed to provide A.B.'s parents with adequate notice.
- F. There is insufficient evidence to establish the District failed to appropriately and timely evaluate A.B. for eligibility to receive special education services in pre-K.
- G. There is insufficient evidence to establish the District violated IDEA or denied A.B. a FAPE by providing him instruction in math in the special education room on three occasions during the first grade.

- H. There is insufficient evidence to establish the District violated FAPE or denied A.B. a FAPE by proposing to provide adult support for A.B. in the afternoon in response to the parents' demand that A.B. be assigned a paraprofessional during math.

Compensatory Damages

A Review Officer's finding of FAPE deprivation is the trigger that both authorizes and requires a remedy, including compulsory education and other forms of relief. "Although the Part B regulations do not comprehensively list all the specific remedies available to a hearing officer if he or she finds that a child has been denied FAPE, we have stated that an impartial hearing officer has the authority to grant any relief he or she deems necessary, inclusive of compensatory education, to ensure that a child receives the FAPE to which he or she is entitled."¹⁶⁵ "Having found violations of the IDEA, we turn to the parties' dispute regarding the appropriate relief. The IDEA confers "broad discretion" upon hearing officers and courts to order remedies that are "'appropriate' in light of the purpose of the Act."¹⁶⁶

The District raises a legitimate concern regarding the HO's actions after the decision was issued on July 23, 2021. On July 23, 2021, the HO issued a decision, intended to be the final decision of the HO. The HO did not order any compensatory damages as part of the decision issued on July 23, 2021. Counsel for the Petitioner sent an email inquiring about the lack of compensatory damages. On July 26, 2021 the HO issued an email acknowledging the July 23, 2021 decision did not include compensatory damages. A second email advised the parties the HO would "entertain a Motion for Reconsideration regarding remedies."¹⁶⁷ The HO then received briefs from each party and rendered the supplemental decision granting compensatory damages. It would appear from a review of the statutes that there is no provision within the Kansas Special Education for Exceptional Children Act (KSEECA) for a party to petition for or request reconsideration of a HO's final decision. Rather, K.S.A. 72-3416(h) sets forth that the HO's action "shall be final, subject to appeal and review in accordance with this act." The HO's actions soliciting a motion for reconsideration and then acting upon that motion was outside of the process established for these types of hearings.

Nonetheless, federal regulation instructs that a RO is to "[m]ake an independent decision on completion of the review."¹⁶⁸ Therefore, while the HO may not have included an award of compensatory damages, the RO has the independent authority to render a decision based upon the review conducted.¹⁶⁹

¹⁶⁵ *Letter to Riffel*, 34 IDELR 2929 (OSEP 2000).

¹⁶⁶ *ndep. Sch. Dist. No. 283 v. E.M.D.H.*, 960 F.3d 1073, 1084 (8th Cir. 2020) (quoting *Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359,369, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985)).

¹⁶⁷ See Notice of hearing Officers Supplemental Decision & award, August 4, 2021.

¹⁶⁸ 34 C.F.R. 300.514(b)(2)(v).

¹⁶⁹ See Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers Under the Individuals with Disabilities Education Act: An Update*, 31 J. Nat'l Ass'n Admin. L. Judiciary 1, 21 (2011).

"Compensatory educational services are designed to counteract whatever educational setbacks a child encounters because of IDEA violations-to bring [the child] back where [they] would have been but for those violations."¹⁷⁰

Having reviewed and considered the matter, the RO finds that an award of compensatory damages is warranted and proper as follows:

A. A.B.'s Educational Deficit(s)

It should be noted that A.B. is currently operating under an IEP that was developed utilizing an evaluation that was conducted during his kindergarten year. A.B. is currently in third (3rd) grade. There have been no changes or modifications made to the IEP despite the fact that District staff acknowledged in January of 2020 that the "current plan is no longer effective." While the RO understands the "stay put" provisions of the law, that does not make it any easier to comprehend that prior to the filing of the due process complaint the District knew A.B.'s IEP was ineffective, yet no effort has been made by either party to come together and address the inadequacies.¹⁷¹

The evidence presented during the hearing was replete with examples demonstrating that while A.B. was progressing from grade to grade, he was being deprived of educational benefits. Granted, the teachers and staff were identifying that A.B. was a pleasant child and had made some improvements as far as his behavior and social actions; however, the assessments tended to demonstrate otherwise. Assessments conducted during the beginning and end of A.B.'s kindergarten year revealed that A.B. was not progressing, but rather had regressed, scoring worse in sixteen (16) areas. While there were certain subjects, such as math, that A.B. seemingly did well in, there were other areas that A.B. suffered. For example, reading remained a concern for A.B. The testing administered to A.B., again during his kindergarten year, reflected that there had been little or no improvement in A.B.'s reading ability as demonstrated by the various reading assessments that concluded A.B. was well below the benchmarks established for a child in his grade level. This is despite a concentrated effort by the district to provide reading support to A.B. One teacher even noted that A.B. was having trouble with math because he could not read the instructions. Rather than address the reading deficits, the District maintained that A.B. could read and refused to consider incorporating a reading goal into A.B.'s IEP.

The record indicates that A.B. benefited from the substantial amount of support that had to be provided to him by his teacher(s), noting that the teacher(s) also had other students that also required attention. It was noted on multiple occasions that A.B. preferred to do nothing rather than participate in the class activities. A.B.'s participation was generally only accomplished by having a teacher remain with A.B. throughout the entirety of the assignment. When work was completed, the teacher(s) had to whisk away A.B.'s

¹⁷⁰ J.N. next friend of M.N. v. Jefferson County Bd. Of Ed., 12 F.4¹¹¹ 1355, 1362 (1 p1t Cir. 2021).

¹⁷¹ The stay put provisions of the law do allow the parties to make modifications when the "State or local agency and the parents of the child agree otherwise." 34 C.F.R. 300.51S(a).

completed work as soon as he was done or risk having the work destroyed, noting that teachers only salvaged or A.B. only completed one (1) math and one (1) language arts assignment each day. Nonetheless, the District refused to incorporate an afternoon paraprofessional into A.B.'s IEP, instead attempting to conduct a trial intervention, without obtaining the consent of A.B.'s parent(s).

Additionally, testimony and evidence were offered to demonstrate that A.B.'s fine motor skills were deficient, and the District did nothing to address those deficits. There was testimony that A.B. still demonstrated fine motor skill deficiencies in January of 2021. An evaluation was requested, yet the District did not conduct an observation.

The record consistently demonstrates that A.B.'s behaviors impeded his ability to learn. Evidence offered suggested that rather than make progress, A.B. actually may have regressed in a number of areas. The actions by the District denying A.B. a FAPE resulted in a deprivation of educational benefit to A.B. during his kindergarten and first grade years. Based upon the District's failure, the RO finds that an award of compensatory damages is proper.

B. Private Placement:

The Petitioner has suggested that the District's significant IDEA and FAPE violations warrant an award of private placement in a specialized autism center, such as the Sherwood Autism Center, at the District's expense. "Each public agency must ensure that (ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature of the severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."¹⁷² The RO does not find that placement in such a restrictive setting is warranted. The evidence presented in this matter demonstrates that A.B. is receptive to supplementary aids and services and can do well with those services. Furthermore, the Petitioner's own medical expert, Dr. Katie Lindberg, testified to her belief that A.B. should be mainstreamed in a school setting where he has access to typical peers. (Tr. Vol. I, 40:11-41:6). The RO agrees with the HO's finding in the supplemental decision that A.B. will receive a much greater opportunity to receive proper individual socialization and typical peer support by continued placement in the District.

C. Requirements to Accommodate A.B.'s Continued Placement at Shawnee Mission School District 512:

The record, as well as the testimony offered by the expert(s) indicates that the evaluation completed on A.B. was insufficient. This was made even more evident by the testimony and other communications by District staff indicating that A.B.'s current IEP was ineffective just a little over a month after it was implemented. Therefore, based upon

¹⁷² 34 C.F.R. 300.114(a)(2).

A.B.'s needs resulting from the District's substantial FAPE deprivation and the deprivation of educational benefit, that the District shall assume the costs of an Independent Educational Evaluation (IEE), a Special Education IEP Specialist, and a Board-Certified Behavior Analyst (BCBA).

Accordingly, the District shall implement the following:

1. Independent Education Evaluation:

- a) The District shall enter into a contract with an individual to conduct an Independent Education Evaluation of A.B. to assist in meeting A.B.'s current educational needs and to assist in promoting A.B.'s educational progress.
- b) The search for an individual to conduct the IEE shall be commenced by the District within twenty (20) days of this Decision and Award.
- c) The individual contracted to conduct the Individual Education Evaluation shall have the following minimum qualifications:
 1. Possess an active, Kansas conferred Special Education Teaching License in good standing.
 11. Have no less than three (3) years of Special Education evaluation experience.
 - m. Have no less than three (3) years of previous experience working in a school setting with students with Autism Spectrum Disorder.
- d) The District shall act in good faith to permit the parents full participation in the selection process for the independent special educational evaluator. Following consultation with the Parents, it is the responsibility of the District to make the final selection of the individual to conduct the evaluation. The District pay all costs associated with the IEE.
- e) Within twenty-one (21) days after the final IEE is complete and in conjunction with the Independent Board-Certified BCBA, the IEP Team shall convene to develop a new IEP for A.B. The IEP shall consider whether the IEP should include at least 60 minutes of additional para-professional support in the afternoon, a reading goal, social pragmatic goal, a new behavior reduction goal, behavior goals that focus on increasing pro-social replacement and reduce problematic behavior, and a clear and descriptive Behavior Intervention Plan (BIP) as developed by the Independent BCBA and FBA. The IEP shall include additional services, goals, and other provisions as determined necessary by the IEP Team, in consultation with the evaluators and the Parents. The IEP shall also include

any and all OT services to address A.B.'s fine motor skills as recommended through the completion of an independent OT evaluation.

2. Special Education IEP Specialist.

- a) The District shall contract with an independent Special Education IEP specialist to help ensure that the IEP for A.B. is developed to meet A.B.'s current educational needs and to help A.B. make educational progress.
- b) The search for the IEP specialist shall commence within twenty (20) days of this Decision and Award.
- c) The IEP specialist shall have the following qualifications:
 - 1. Possesses an active, state conferred special education teaching license in good standing.
 - 11. Have no less than three (3) years of special education administrative experience,
 - 111. Have no less than three (3) years of experience in conducting IEP meetings, ensuring the District's completion of progress reports and all legally required documentation.
- d) The District shall act in good faith to permit the Parents full participation in the selection process for the independent special education IEP specialist. Following consultation with the Parents, it is the responsibility of the District to make the final selection of the Specialist Education IEP Specialist.
- e) This position shall be contracted for the remainder of 2021-2022 school year and continue through the 2022-2023 school year, including school-based extended school year services during the summer of 2022.
- f) The District is responsible for ensuring that the contractual agreement with the special education IEP specialist satisfactorily reflects the scope of the above responsibilities and obligations.

3. Board-Certified Behavior Analyst (BCBA).

- a) The District shall contract with an independent Board-Certified Behavior Analyst (BCBA) to complete an FBA of A.B.
- b) The search for the BCBA by the District shall commence within twenty (20) days of this Decision and Award.

- c) This position shall be procured for the remainder of the 2021-2022 school year and continue through the 2022-2023, including school-based extended school year services during the summer of 2022.**
- d) The BCBA must have held this credential for a minimum of three consecutive years and have previous experience working in the school setting with students who Autism Spectrum Disorder for a minimum of 3 consecutive years. BCBA must provide a copy of the BCBA certificate and be in good standing with the ethical and professional standards set forth by the Behavior Analyst Certified Board.**
- e) The District shall act in good faith to permit the Parents full participation in the selection process for the BCBA. Following consultation with the Parents, it is the responsibility of the District to make the final selection of the BCBA.**
- f) The contracted BCBA shall:**
- i. Provide behavior analytic services for A.B. throughout all school settings during virtual and face-to-face instruction,**
 - ii. Conduct a complete direct observation that includes a minimum of 3 hours across multiple sessions of direct observation in the course room(s) where A.B. is receiving his remote instruction. The Functional Behavior Assessment conducted by the independent BCBA shall also include A-B-C data collected during the 3 hours of direct observation, a completed Motivation Assessment Scale (Durand & Crimmins, 1992) by Mr. B, Mrs. B, the BCBA and A.B.s' teacher and a VB-MAPP completed by the BCBA. A separate Motivation Assessment Scale shall be completed for each identified target behavior by each person identified above. The District will be responsible for obtaining the Motivation Assessment Scale through a legitimate vendor. A xeroxed copy of the Motivation Assessment Scales must not be provided to the individuals completing this scale. The District will provide the BCBA with a purchased VBMAPP Guide and Protocol. The District will deliver these assessment tools to the BCBA within a sufficient timeframe for the completion of the FBA. The FBA shall also summarize the results for a preference assessment in order to identify A.B.s' motivational preferences.**
 - 111. Conduct direct observations during school sessions.**
 - 1v. It is recommended that The FBA report developed by the independent BCBA be submitted to the District no later than three (3) weeks after the start date of the contractual agreement between these parties.**

- v. The BCBA will present the findings of the FBA, either in person or through remote video conferencing as applicable due to COVID- 19, to the IEP team within two (2) weeks of submitting the FBA to the District's Director of Special Education. All relevant District staff, the parents and the contracted IEP Specialist must be invited and in attendance to this IEP team meeting.
- v1. The IEP Team, including relevant staff from District, the parents, the contracted BCBA and IEP Specialist shall reconvene within three (3) weeks after the FBA review meeting to review the BIP.
- v11. The BCBA will oversee the implementation of the BIP across all school settings, either in-person and/or during remote learning sessions.
- viii. The BCBA will develop materials for the District staff training, parent training on the implementation of the BIP. The District shall assume the cost of all materials.
- 1x. The independent BCBA shall provide twenty-five (25) hours of compensatory in-home ABA services for A.B. during the 2021-2022 school year, at the expense of the District. The scope of these services is to assist the parents with the implementation of evidenced- based behavior analytic strategies to be determined by the independent BCBA.

4. Educational Tutor:

- a) The District shall contract with an educational tutor to provide twenty-five (25) hours of in-home compensatory educational tutoring for each of the 2021-2022 and 2022-2023 school years.
- b) The District shall hire an educational tutor who possesses an active Kansas Special Education teacher license and three (3) years of experience in teaching young children with autism to provide in-home educational tutoring which aligns with A.B.s' IEP.
- c) Tutoring services shall commence within three (3) weeks of the date of this Decision and Award.

5. Additional Requirements:

The District shall provide the following:

- a) Reimburse Petitioners \$2,280 for special education advocate expenses incurred by the Petitioner in enforcing the IDEA
- b) Reimburse the Petitioner \$1,462.12 for A.B.'s private placement in Riley

ABA to make up for the lost educational benefits because of the Districts delay in completing the evaluation and implementing an IEP.

- c) Reimburse the Petitioner \$1,840 for the private evaluation by Dr. Ostmeyer to determine A.B.'s present levels.
- d) Provide quarterly progress reports that identify the observing staff, and that attach copies of all underlying data collection.

6. Attorney's Fees and Cost:

Petitioner sought to have attorney's fees and costs paid by the District. It is noted that the HO granted an award of the Petitioner's attorney's fees and costs. However, there is no provision within the law that permit the HO or RO to award attorney's fees and costs to the prevailing party.

We must first look at whether the federal law provides for the right to recover attorney fees in a due process hearing. The hearing officer is part of a system of procedural safeguards and parental involvement enacted by Congress with the passage of the federal law--Individuals with Disabilities Education Act (IDEA).¹⁷³ "Although there is an occasional due process hearing decision on attorney's fees, the IDEA does not give special education hearing officers authority to award fees."¹⁷⁴ Because the federal law does not provide for the *hearing officer* to award attorney fees, this RO concludes the state law does not authorize a hearing officer to award attorney fees, either.¹⁷⁵

Additionally, Kansas law does not make the hearing officer a court.¹⁷⁶ Thus, because the hearing officer is not a court, this ALJ concludes the hearing officer may not award attorney fees.¹⁷⁷

This RO finds that decision of the HO to award attorney fees is without legal authority. Only attorney fees and costs ordered *by a court* and *as provided by federal law* are authorized and enforceable. The award for attorney fees and associated cost of the legal representation ordered by the HO are stricken from the August 4, 2021 order. The award of such fees and costs is reserved specifically for the district courts.

¹⁷³See e 20 U.S.C. § 1415(i)(3). See also, Professor Lynn M. Daggett, Special Education Attorney's Fees: Of *Buckhannon*, the IDEA Reauthorization Bills, and the IDEA as Civil Rights Statute, 8 U.C. Davis J. Juv. L. & Pol'y I (2004).

¹¹⁴*Id.*

¹⁷⁵ K.S.A. 72-3430(b)(12).

¹⁷⁶ "The judicial power of this state shall be vested exclusively in one court of justice, which shall be divided into one supreme court, district courts, and such other courts as are provided by law; and all courts of record shall have a seal. The supreme court shall have general administrative authority over all courts in this state." Kan. Const. Art. III, § 1. See generally, K.S.A. 75-3403, et seq. and specifically K.S.A. 72-3416(e).

¹⁷⁷ K.S.A. 72-3430(b)(12).

IT IS SO ORDERED.

Loren

Review Officer/Administrative Law Judge
Office of Administrative Hearings.

Notice of Appeal Rights

Any party aggrieved by the findings and decision made herein, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy. The party bringing the action shall have 30 days from the date of the decision of the review officer to bring such an action. K.S.A. 72-3418.

Certificate of Service

On December 1, 2021, I certify that a true and accurate copy of this document was placed in the United States mail, certified mail, return receipt requested, postage prepaid, addressed to:

Matthew J. Rogers
Bethany J. Roberts
Barber Emerson, L.C.
1211 Massachusetts Street
Lawrence, KS 66044
Tel: (785) 843-6600
Attorneys for Petitioners

Joshua E. Douglass
Mickes O'Toole LLC
12444 Powerscourt Dr., Ste400
St. Louis, MO 63131
Tel: (816) 874-8000
Attorney for Respondent

with a courtesy copy by email to:

R. Scott Gordon, General Counsel
Kansas State Department of Education
900 SW Jackson, Ste. 102
Topeka, KS 66612
ogc@ksde.org

Larry Rute
Associates in Dispute Resolution, LLC
212 S.W. 8th Ave., Suite 207
Topeka, Kansas 66603
lany@adrmediate.com



Office of Administrative Hearings
1020 S. Kansas Avenue
Topeka, KS 66612
Telephone: 785-296-2433