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| <b>STATE OF COLORADO</b><br><b>OFFICE OF ADMINISTRATIVE COURTS</b><br>1525 Sherman Street, Denver, Colorado 80203  |  |
| <b>[Mother] and [Father],</b><br>Complainants,<br><br>vs.<br><br><b>POUDRE SCHOOL DISTRICT R-1,</b><br>Respondent. | <b>▲ COURT USE ONLY ▲</b>                      |
|  | <b>CASE NUMBER:</b><br><br><b>EA 2018-0028</b> |
| <b>AGENCY DECISION</b>   |  |

On July 10, 2018, the Colorado Department of Education, Exceptional Student Services Unit (“CDE”) received a due process complaint filed by [Mother] and [Father] (“Complainants,” or “[Mother],” or “[Father],” respectively) on behalf of their minor child, [Student] (“[Student]” or “Student”), alleging that the Poudre School District R-1 (“Respondent” or the “District”) had denied [Student] a free and appropriate public education under the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1415(f), its implementing regulations at 34 C.F.R. § 300.511, and Colorado’s Exceptional Children’s Educational Act (“ECEA”), 1 CCR 301-8. The complaint was forwarded to the Office of Administrative Courts (“OAC”) and assigned to Administrative Law Judge (“ALJ”) Keith J. Kirchubel for an impartial due process hearing.

Hearing was held in Denver, Colorado on March 4 to 8, 2019. Complainants appeared through their counsel of record, Mr. Jack Robinson. The District was represented by its counsel, Ms. Mary Gray and Mr. Robert Montgomery. At hearing, the ALJ admitted into evidence the following exhibits by stipulation: A through G, I through N, S through U, Z, No. 1, No. 5, No. 9, No. 12, No. 17, No. 25, No. 34, No. 36, No. 41, No. 45, No. 46, No. 59, No. 60, No. 68, No. 74, No. 76 through No. 78, and No. 99. The following exhibits were also admitted during the course of the hearing: No. 16, No. 20<sup>1</sup> through No. 22, No. 32, No. 44, No. 50, No. 52, No. 55, No. 56, No. 66, No. 72, No. 88, No. 90, No. 92, No. 98 through No. 100, No. 102, H, AA through CC, EE through JJ, LL,

<sup>1</sup> Only pages 1 and 2 were admitted within Hearing Exhibit No. 20.

RR through VV,<sup>2</sup> ZZ,<sup>3</sup> and BBB through DDD.<sup>4</sup> The proceedings were digitally and stenographically recorded. Following conclusion of the hearing, the parties each submitted a written closing brief.

## **ISSUES PRESENTED**

Whether the District properly implemented the services and supports specified in a September 25, 2017 Individualized Education Program (“IEP”) for the Student during the 2017-18 academic year; whether the District impeded Complainants’ ability to participate in the Student’s IEP process during the 2017-18 academic year by withholding evaluation results, withholding data related to the Student’s academic progress, and by failing to correct inaccurate information in written notices provided to Complainants; whether a comprehensive evaluation of the Student undertaken by the District in 2017 was adequate to determine his unique educational needs, including but not limited to assistive technology and extended school year (“ESY”) services; whether the District violated Student’s rights under the Individuals with Disabilities Education Act (“IDEA”) in its handling of Independent Education Evaluation results from 2018; whether the District was bound to review and revise the Student’s operative IEP in early 2018 and failed to do so; whether IEPs developed for the Student in October, 2016 and September, 2017 identified and included all services and supports necessary to provide him with a Free Appropriate Public Education (“FAPE”); and whether the Student’s lack of educational progress in light of his unique circumstances amounts to a deprivation of FAPE.

## **FINDINGS OF FACT**

Based on the evidence in the record, the ALJ finds the following:

1. [Student] is a twelve year-old boy who resides with his family within the jurisdictional boundaries of the District. There is no dispute that he is a child with disabilities including diagnoses of Down Syndrome, Autism Spectrum Disorder (“ASD”), and substantial impairments of his hearing and vision. At six months of age, he was discovered to have cataracts in both eyes, and before he was two underwent surgery on the lenses of both eyes. [Father] established that the Student can functionally see objects that are no more than twelve inches away and recognizes photographs of himself and his parents. The Student experienced fluid in his ears and his eardrums were found to be perforated before age two. He does not tolerate traditional hearing aids because of sensory issues, but was provided with bone-anchored hearing aids which allow him to have muffled hearing that [Father] described as being like under water. Although he enjoys interactions with others, [Student] does exhibit behaviors that affect his ability to be educated in typical school settings, such as grabbing, kicking, pulling hair, undressing

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<sup>2</sup> Only pages 16 through 25 were admitted within Hearing Exhibit UU.

<sup>3</sup> Only pages 5 and 6 of Hearing Exhibit ZZ were admitted.

<sup>4</sup> Only pages 12 through 16 of Hearing Exhibit DDD were admitted.

himself, and attempting to run away. [Student] will engage in perseverative, self-stimulating actions such as rocking, and frequently attempts to lick or place his mouth on objects he encounters. [Father] compared the Student's current cognitive abilities to those of a 20 month-old child.

2. [Father] described the Student's behaviors as challenging and physically demanding to manage. [Father] has a good rapport and "decent" control with [Student] because his ([Father]'s) voice is calming and he tends to do activities the Student prefers like riding bicycles. [Student] is less cooperative with [Mother]. According to [Father], the Student is very routine-oriented and displays more negative behaviors when presented with novel tasks or a distracting environment. He tends to learn skills better from familiar people. [Father] characterized the Student's progress on tasks as non-linear: he can experience no progress, or regression, or a sudden huge leap of progress "out of nowhere." [Student] likes to perform tasks that he has mastered.

3. [Student] attempts some vocalizations, such as "bathroom" or "bike," but is substantially non-verbal. [Father] testified that the Student never took to sign language. For that reason, [Student] has relied on an augmentative device for communication since the fall of 2014. The NovaChat device functions like a touch-screen tablet and allows the Student to access categories of words by pressing on icons. For example, he might select the icon for "I want" leading the device to display options such as "play" and further items in the category of play. Based on his selections, the device then emits corresponding sounds to emulate speech.

4. The Student is able to communicate when he has to use the bathroom. He tends to try to remove all of his clothing when he prepares to use the toilet. [Father] stated that [Student] needs direction and help with hygiene. He is also unable to fasten snaps and zippers and so needs help with getting dressed after toileting. [Father] and others established that [Student] is fascinated with flushing the toilet. He will also grab excessive quantities of paper towels if allowed to do so.

5. Complainants moved into the District from out of state in February, 2014. At that time, [Student] was in the first grade. Complainants had the Student evaluated by the Children's Hospital leading to a report that was shared with the District. Hearing Exhibit No. 1.

6. Initially, Complainants sought to have the Student educated at an ASD program housed at [Elementary School 1] within the District. Because that program did not offer any opportunity for interaction with non-disabled peers, the District recommended placement at [Elementary School 2] where an Integrated Learning Supports ("ILS") program was offered. Complaints were informed by District staff that ILS classrooms implemented aspects of Applied Behavior Analysis ("ABA"), a research-based system of measures commonly used in educating students with ASD.<sup>5</sup> The Student did attend [Elementary School 2] through the fifth grade.

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<sup>5</sup> The ABA methodology also includes certification of trained professionals, including Board Certified Behavior Analysts ("BCBAs") and Registered Behavioral Technicians ("RBTs").

7. The Student's IEP team created an IEP dated October 27, 2014, that was implemented for the second grade at [Elementary School 2]. Hearing Exhibit C. The program featured direct services in the areas of attending skills, social skills, daily living skills, functional communication, and physical/motor, as well as multiple accommodations and modifications to support his educational needs. It was noted that [Student] required adult supervision at all times, including during opportunities for inclusion with his non-disabled peers. The Service Delivery Statement stated as follows: "Specific services include a behavior shaping program that emphasizes replacement and shaping of behaviors based on ABA principals, [sic] such as Discrete Trial, Errorless Learning and Gentle Teaching techniques." Witnesses presented by the District testified that this provision evidenced the implementation of ABA methodology in the Student's IEP. The District did not conduct a functional behavioral analysis (discussed in greater detail below) as part of an ABA approach for the Student prior to May, 2018.

8. [Father] testified that Complainants did not receive a thorough explanation from the District of the language quoted in the previous Finding of Fact. They understood "errorless learning" to mean "hand over hand assistance." At hearing, errorless learning was clarified by [Special Education Teacher] to mean instructional assistance where the Student was helped to provide a correct response. For example, if he was asked to point to an image correlating to the spoken word "dog," the teacher or aide would help guide his hand to the correct image if at first he began to indicate something else. Then the instructor would reinforce the result by telling [Student] that he was, in fact, pointing to a dog.

9. The Student's next IEP was dated October 13, 2015. Hearing Exhibit D. It continued many of the services and supports present in the 2014 IEP and included the same statement quoted in Finding of Fact No. 7 related to delivery of ABA services. *Id* at page 15. The language continued to be included in subsequent IEPs. Hearing Exhibit F at page 15, and Hearing Exhibit K at page 17.

10. [BCBA] testified in her capacity as a BCBA who has worked with the Student since 2016 and provided private behavioral therapy to him since December, 2018. She was qualified as an expert in ABA methodology and the treatment of children with ASD. She described ABA as a tool for understanding how environment and behaviors can influence each other with the purpose of shaping behaviors to be more appropriate. A functional behavioral analysis ("FBA") is often the first step in implementing ABA strategies. [BCBA] established that an FBA has three component steps: an indirect assessment with family and caregivers to identify target behaviors, an indirect assessment of the child in home, school, and community environments to develop a hypothesis of the function of the target behaviors, and an analysis of how changes in the child's environment affect the manifestation(s) of behaviors. The goal of the FBA is to understand why/when/where behaviors are occurring and to learn how to reduce the number, frequency, and intensity of the occurrences.

11. After completion of an FBA, an ABA therapist will have identified target behaviors that are to be decreased or replaced by more appropriate behaviors. A behavior intervention plan (“BIP”) can then be developed to suggest pro-active procedures that may increase a child’s skill in regulating himself or that will switch off the maladaptive behavior that is being worked on. [BCBA] emphasized the need for detailed data on behavioral incidents including the antecedent, a description of the behavior exhibited, and what consequence ensued to be able to know if the protocol is working or not. FBAs and BIPs are typically completed (and modified as needed) by a therapist with BCBA-level training. RBTs typically provide direct therapy to the child under the supervision of BCBA’s and compile data on the efficacy of the therapeutic plan for further analysis. [BCBA] acknowledged parents, teachers, and other caregivers can implement ABA principles even though they do not have formal certification. A goal of ABA is for the BCBA to fade out services as skills become generalized in multiple environments.

12. [Special Education Teacher] testified in her capacity as a credentialed special education teacher employed by the District. Her Colorado credential, issued in 2014, reflects an emphasis in ASD. She also attained a Master’s degree in 2018. [Special Education Teacher] taught students with ASD in a private setting before taking a position with the District in the Spring of 2016. She served as the Student’s special education teacher in the ILS classroom for his fourth and fifth grade years. [Director], the District’s Director of Integrative Services, characterized the ILS setting as serving those with low incidence disabilities, those who have significant cognitive impairment(s) or low functioning, and those with ASD and/or physical impairments. In addition to [Special Education Teacher], the ILS classroom featured six paraprofessional aides whom she supervised.

13. [Special Education Teacher]’s emphasis in educating students with ASD has been to foster acquisition of new skills while reducing problem behaviors. In her private experience in Weld County, she implemented discrete trial training in a 1:1 setting, providing high levels of reinforcement to students upon achievement of subcomponents of skills and then attempting to build on that skill. She also implemented a natural environment teaching approach where students were permitted to explore their environment(s) and learn through functional play.

14. In the ILS classroom, [Special Education Teacher] also implemented extended evidence outcomes which she described as a scaffold system of skill building, and extended readiness competencies which are general access skills correlated to grade standards. [Special Education Teacher] regularly consulted with members of the Student’s IEP team and collaborated with other District professionals, as well as with [BCBA] to ensure consistency between the Student’s school day and home.

15. [Special Education Teacher] described [Student] as being friendly, socially motivated, and active. He loved movement, music, and technology. During the Summer of 2016, [Special Education Teacher] met with the Student’s third grade teacher, [3<sup>rd</sup> Grade Teacher], to prepare for fourth grade. [3<sup>rd</sup> Grade Teacher] emphasized that [Student] worked better with people that he had bonded with and developed a trust

relationship. [Special Education Teacher] established that she had bonded with [Student] within the first two weeks of fourth grade.

16. The Student continued to wear his bone-anchored hearing aids that were connected to a microphone that [Special Education Teacher] used consistently. He also had access to his NovaChat device during fourth and fifth grades. The District's speech language pathologist, [Speech Language Pathologist], trained [Special Education Teacher] and the aides in the use of the device. The NovaChat was configured with two separate libraries of icons for use at home and at school. Hearing Exhibit CCC represented examples of "page" sets of icons on the NovaChat. [Special Education Teacher] established that during the time she worked with [Student], the device was set up with 3x5 grids consistent with pages 1, 2, and 6 through 9 of Hearing Exhibit CCC. The more crowded grid on page 3 was not used. The buttons on the pages were capable of being hidden to reduce clutter. For example, if weather was being discussed in class, only the images for sun, rain, cloudy, wind, etc., on page 6 could be selected and the unrelated images suppressed to simplify the Student's use of the device. [Middle School Special Education Teacher] established that the same controls were implemented during the short time [Student] attended sixth grade with her.<sup>6</sup>

17. On August 23, 2016, [BCBA] completed an updated treatment plan for the Student. Hearing Exhibit H. She noted that [Student] was receiving ABA therapy at school and occupational therapy ("OT") at home. [BCBA] observed the Student at home on August 15, 2016, during which time she observed him engage in object mouthing twelve times. He licked the wall and put items in his mouth including his jacket, markers, a hat, and crayons. She identified five inappropriate behaviors (object mouthing, disrobing, disruption in the form of hitting, swiping, or grabbing objects, inappropriately seeking attention, and blowing raspberries) and three goals (toleration of waiting or denial of a preferred item, seeking attention appropriately, and accepting "no") for [Student]. The plan specified proactive strategies for preventing negative behaviors and reactive strategies for addressing manifested behaviors.

18. The Student's IEP team convened on October 3, 2016, to update his program for the fourth grade. The IEP team reviewed information relative to his progress since implementation of the October, 2015 IEP. Hearing Exhibit F at pages 5 through 7. Each of the goals was identified, and for each objective, it was noted whether the Student had met the measurable standard or, if not, what progress was observed. With regard to Goal 1, the Student met Objective 1, and made progress on Objective 2; on Goal 2, he made progress on Objectives 1-3; on Goal 3, he also made progress on Objectives 1-3; on Goal 4, he made progress on Objectives 1 and 2; and on Goal 5, he met both objectives. The progress was described in terms of percentages, but the data upon which those percentages was based is not in evidence. [Special Education Teacher] established that she also used results of the Assessment of Basic Language and Learning Skills-Revised

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<sup>6</sup> There was no evidence that the District ever called upon the Statewide Assistive Technology, Augmentative, and Alternative Communication ("SWAAC") team for testing or consultation regarding the Student's communication needs. However, no witness established that involvement of the SWAAC team was necessary for him to receive FAPE.

("ABLLS-R") and Verbal Behavior Milestones and Placement Program ("VB-MAPP") Barriers instruments to inform the development of new goals for [Student].

19. [Special Education Teacher] remembered the participation of Complainants during the IEP team meeting and testified that she repeatedly checked to see if they had questions or input. She perceived that the process was collaborative and that parents seemed comfortable providing information. Complainants requested that independent living and writing skills be emphasized. As to the latter, [Special Education Teacher] responded that more baseline data was needed to be able to predict the Student's achievement in writing. She recalled Complainants accepting the idea that implementation of a writing goal should be postponed until more information about [Student]'s skill level could be developed. Complainants also specifically advised the District that it was their choice not to have [Student] participate in ESY as part of the IEP. Hearing Exhibit UU at page 17. [Father] clarified that this choice was based on the fact that the Student did not experience regression in skills over school breaks because of the private therapies he received at home.

20 [BCBA] attended the Student's IEP meeting in the Fall of 2016. She could not recall if any District personnel shared data about the Student's behaviors or whether [Student] had a BIP in place for school at the time.

21. The IEP team decided that [Student]'s program would continue to be implemented in the ILS classroom at [Elementary School 2], but with him receiving services and supports in a general education classroom with non-disabled peers between forty and eighty percent of each school day. The team proceeded to draft six goals with corresponding objectives for [Student] in the areas of improving attention to tasks, following direction to completion, receptive and expressive language, and fine motor. Hearing Exhibit F at pages 8 through 12. [Special Education Teacher] testified that she tracked the Student's performance on his goals and objectives using index cards. The data she recorded was then transferred to his progress reports. [Student] was exposed to grade level concepts (i.e. weather) but with modified standards for him (identifying weather images on the NovaChat). When the class was studying Colorado history, [Special Education Teacher] showed [Student] videos, initiated coloring, and discussed animals relevant to the instruction given the rest of the class. [Special Education Teacher] understood that Complainants wanted the Student more engaged in class through exposure to the same curricular concepts as the other students.

22. [Speech Language Pathologist] established that she served as the Student's speech language therapist from 2016 through 2018. In this role, she assisted with implementing curriculum for [Student] in the general education and special education (pull-out) settings, as well as facilitating his social/emotional development. During the 2016-17 year, [Speech Language Pathologist] was part of the Student's IEP team. As she had minimal experience with him at the time of the IEP meeting in October, [Speech Language Pathologist] did not recommend changes in the mix of direct and indirect services. She testified that [Student] improved his ability to communicate effectively with others and made progress on goals 3, 5, and 6. [Speech Language Pathologist] tracked

progress by intermittent probes of the Student's skills and incorporated her data into progress reports. With regard to Goal 5, [Speech Language Pathologist] noted his ability to communicate greetings and closures, as well as "I want" concepts using the NovaChat. She acknowledged that [Student] can use the NovaChat with support as he was not consistently independent with the skill. As for Goal 6, he improved on his acceptance of verbal directions and ability to follow through.<sup>7</sup> She found his behaviors to be predictable based on a need for attention or aversion to tasks. However, she felt that he could be easily redirected by rephrasing or restating instructions to the point where was able to make progress.

23. The IEP team also drafted an extensive set of accommodations and modifications to address the Student's unique needs at school. *Id* at pages 12 and 13. In the category of "strategies for success" [Special Education Teacher] included brightly colored and high contrast materials to encourage attention, the hearing aid and microphone system, availability of a quiet, consistent 1:1 work area, access to and support for the NovaChat, and clear verbal models for speech. The following addressed the sensory needs of [Student]: movement breaks, swinging, an oral sensory "chewy" tube, and exposure to multi-sensory materials.

24. [Special Education Teacher] explained her understanding of the language regarding techniques quoted from the service delivery statement in Finding of Fact No. No. 7 and repeated in multiple IEPs. Behavior shaping and replacement described interventions that allow learning and decrease behaviors. Discreet trial referred to breaking down tasks into manageable components. Gentle teaching meant actively ignoring inappropriate behaviors. [Special Education Teacher] clarified "actively ignoring" to mean giving a physical prompt to end the behavior, but not using language that the Student could perceive as attention. If he accepted the redirection, then he could receive a reward in the form of praise, a "high-five," or access to a preferred item or activity. Leisure instruction referred to exploring toys and learning how to play. Natural environment teaching described opportunities to teach "in the moment" and not just as part of a structured schedule. [Special Education Teacher] addressed these techniques with the classroom aides and with District personnel who consulted her.

25. [Father] expressed Complainants' concern that data regarding the occurrences, frequency, and intensity of the Student's behaviors needed to be tracked in order to understand whether [Student] was progressing in eliminating such behaviors. Complainants felt that the District only provided anecdotal information about behavioral incidents and generalized statements about progress being satisfactory. [Father] testified that Complainants saw no improvement in the Student's behaviors between 2014 and 2017. He was still mouthing objects, grabbing at people in hallways at school, and kicking at people. [Father] was not aware of any plan put forth by the District to address behaviors until the Complainants requested that the District perform a functional behavioral analysis (discussed in more detail below) in early 2018. Nor were Complainants aware of any qualified BCBA ever attending the Student's IEP meetings on behalf of the District.

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<sup>7</sup> She provided both direct 1:1 services with [Student], and indirect services consulting with the teaching staff to embed receptive language instruction throughout his program.



[Father] acknowledged that a teacher of [Student] told him ([Father]) that she was consulting with a District BCBA regarding how to address behaviors.

26. [Director] established that District personnel are expected to collect data on goals and objectives as well as other areas of concern. She did not ask that data collection be performed in a particular way regarding [Student]. Once the data is analyzed and interpreted, and reflected in present levels of performance by the IEP team, then it is appropriate to purge the data. If raw data is maintained for any reason, it can be shared with a family, although such instances were not typical in the experience of [Director].

27. [Special Education Teacher] characterized the Student's behaviors as manageable although she acknowledged that they did not change much over the time she worked with him. She echoed the testimony of other witnesses that [Student] did not have much ability to recognize and stop his own behaviors; adults (caregivers and teachers) were required to provide the necessary control(s). [Special Education Teacher] emphasized that the Student's behaviors were not so severe that they interfered with his progress or deprived her of instructional control at school. Additionally, she worked to manage antecedent factors that increased the likelihood of negative behaviors, such as distractions, unexpected changes in routine, and negative feedback directed at [Student].

28. [Special Education Teacher] collaborated with [District BCBA], a BCBA employed by the District. Although the District had not completed an FBA prior to the Student's fourth grade year, [Special Education Teacher] felt that she understood the functions of his behaviors as attention-seeking, sensory, and avoidance of non-preferred tasks.

29. [Special Education Teacher] testified that [Student] made slow, steady progress over time. However, she characterized the progress as inconsistent in terms of temporary plateaus and sudden jumps similar to the account of [Father], above. Additionally, the Student would often master a task in one environment but then be completely thrown off in another setting.

30. In March, 2017, [BCBA] observed the Student in the school environment at [Elementary School 2]. She noted that [Special Education Teacher] had a comparatively high level of instructional control with [Student], especially in a one-on-one setting. [BCBA] and [Special Education Teacher] discussed tips that both agreed were successful in reducing the Student's behaviors. Hearing Exhibit UU at pages 23 to 24. In reporting to [Mother], [BCBA] expressed that the observation was helpful; [BCBA] did not identify any serious problems.

31. In August, 2017, Complainants gave consent for [Student] to be re-evaluated by the District. Hearing Exhibit No. 17. The re-evaluation was documented in a report dated September 17, 2017. Hearing Exhibit I. [Special Education Teacher] prepared the summary of the Student's academic achievement; she also readministered the VB-MAPP, and the ABLLS-R.<sup>8</sup> [Speech Language Pathologist] conducted an informal

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<sup>8</sup> Hearing Exhibits M and N, respectively.

assessment of the Student's speech and language skills as he was unable to complete standardized instruments. Her evaluation was based on parent feedback and teacher records. *Id* at pages 6 and 7. No specific testing was conducted related to his diagnosis of ASD because [Special Education Teacher] stated there was no doubt about his disability in that area. Nor was there any evaluation related to his alternative communication needs as [Director] concluded that there was no uncertainty that [Student] was functional with and would continue using the NovaChat. Following the re-evaluation, the IEP team confirmed the Student's continuing eligibility for special education services and supports. Hearing Exhibit J.

32. [School Psychologist] testified regarding her contribution to the re-evaluation as the District's school psychologist. She first met [Student] during his fifth grade year. She attempted to administer a formal cognitive assessment without success, but conducted an adaptive behavioral assessment using the Adaptive Behavior Assessment System ("ABAS-3") instrument from ratings provided by Complainants and teachers. [School Psychologist] characterized [Student]'s social emotional functioning as very low as a result of her assessment. [School Psychologist] also drafted the cognitive portion of the re-evaluation report based on the results of past evaluations, review of educational records, and interviews with District personnel. Hearing Exhibit I at page 5. Although she is trained to conduct FBAs, [School Psychologist] did not conclude that one was necessary as part of the triennial re-evaluation because she felt that the functions of the Student's behaviors were well understood.

33. [Speech Language Pathologist] addressed the extent to which [Student]'s behaviors impacted his acquisition of communication skills. Occasionally, he would use the NovaChat as a form of stimulation, pressing buttons with no purpose or context. At times his behaviors could seem aggressive, although no witness testified that he ever hurt or acted maliciously toward another person. [Speech Language Pathologist] saw grabbing and kicking as a way for [Student] to seek attention, but not in an unmanageable way.

34. On page 8 of Hearing Exhibit I, [Speech Language Pathologist] characterized the Student's expressive language skills as having plateaued. She explained this to mean that he remained at a developmental level because he did not have the cognitive ability to master the curriculum. Nonetheless, she believed he could continue to learn skills at his level. On cross examination, she acknowledged that [Student] required support with the NovaChat in the form of prompts and assistance holding it. [Speech Language Pathologist] established that he would accept prompts to initiate a greeting or request a fist bump from others. He was also proficient in asking for bathroom breaks, which the staff would honor even if it was only so that he could flush the toilet.

35. [Occupational Therapist] testified in her capacity as occupational therapist for the District. She met [Student] in 2017 during his fifth grade year and began providing direct and indirect services to him in August. She contributed to the re-evaluation report regarding the Student's motor abilities. *Id* at page 9. Her findings were based on skilled observations of him in the lunch room (opening containers and ziploc bags), performing

fine motor tasks (writing), and engaging in sensory processing. She noted that he had only made minimal progress on Goal 5 related to twisting caps on and off. He succeeded in the task in only one of four trials. However, she noted that during the subsequent IEP period, he increased his ability in this skill to 100 percent.

36. On September 17, 2017, the District transmitted an initial draft of an updated IEP based on the results of the re-evaluation. Hearing Exhibit No. 16.

37. At an IEP team meeting on September 25, 2017, District personnel informed Complainants of a proposal to modify the manner in which [Student] would be receiving services for speech and language as well as occupational therapy. The modification resulted in fewer minutes of direct services per week, but more consultative services between the particular specialist and the Student's instructors. [Father] did not understand what data was being relied upon to support this change. In the area of occupational therapy, he noted that [Occupational Therapist] described the Student's functional motor skills as "similar to that in which he started" at the District in 2014. Hearing Exhibit I at page 9. At hearing, [Occupational Therapist] clarified that she fully supported the modification to the mix of direct and indirect services. As discussed below, she felt that the Student's progress could be improved with more opportunities to work on OT tasks throughout the day. Complainants were also told to refer to the Student's progress report(s) for data in support of the proposed changes. [Father] stated that the proposal to change the manner of delivery as described above was presented before any discussion of [Student]'s goals and objectives at the IEP team meeting.

38. The Student's progress on his goals from the 2016 IEP was summarized as follows: with regard to Goal 1, he made satisfactory progress on Objective 1, and minimal progress on Objective 2, for Goal 2, he made satisfactory progress on Objectives 1-3; on Goal 3, he made satisfactory progress on Objectives 1-2, and met Objectives 3-4; on Goal 4, he made satisfactory progress on Objectives 1-3, and met Objective 4; on Goal 5, he made satisfactory progress on Objectives 1-3; and on Goal 6, he made satisfactory progress on Objectives 1 and 2. As with Hearing Exhibit F, the 2017 IEP expressed progress in terms of percentages in relation to the measurable standard of the respective objectives, but the body of data that formed the bases for the percentages was not in evidence.

39. [BCBA] did not participate in the 2017 IEP meeting. [Father] informed [Special Education Teacher] that Complainants had discontinued her BCBA services because the Student's behaviors had been getting worse at home. Complainants composed additional input that was transmitted to the IEP team members (Hearing Exhibit No. 20) and subsequently added to the document. Hearing Exhibit K at page 10.

40. The IEP team meeting discussed above had to be terminated and continued based on time constraints of the participants. Prior to the second part of the meeting that took place on October 24, 2017, Complainants communicated with [Special Education Teacher] to determine what skill acquisition or evidence of generalization on the part of [Student] supported the proposal to change the delivery model for speech and language

services. [Special Education Teacher] responded that the change represented a more “collaborative” model in which services would be provided by more instructors across the educational settings in the Student’s school day. Testifying for the District at hearing, [Special Education Teacher] stated that she observed [Student] make more significant progress working on skills in the classroom milieu—especially in the areas of retention and generalization—than when such services were provided during “pull-out” individualized therapy time. Thus, while direct services for speech language therapy were reduced from 240 minutes per month in the October 3, 2016 IEP,<sup>9</sup> to 160 direct minutes in the September 25, 2017 IEP, an additional 30 minutes per month of indirect services were included in the latter to facilitate more integration of speech and language instruction into the classroom time. [Special Education Teacher] sent email correspondence to the IEP team emphasizing that the service delivery statement should reflect a team decision and that the service minutes remained up for discussion. Hearing Exhibit No. 21.

41. [School Psychologist] also joined the Student’s IEP team based on her involvement in the re-evaluation. She testified that the team had a discussion regarding the necessity of developing a behavior intervention plan for [Student]. The team unanimously concluded that a separate plan was not needed because behavioral strategies (such as offering the chewy tube as a replacement for mouthing, or high fives as a replacement for grabbing) embedded in multiple sections of the IEP were permitting the Student to make progress.

42. The final IEP document included a summary of the Student’s triennial re-evaluation at page 7 and substantially similar accommodations and modifications at pages 8 to 9.<sup>10</sup> Hearing Exhibit K. [Special Education Teacher] noted that the Student had made concrete progress in a number of areas: he was more proficient at using the NovaChat to greet peers leading to a corresponding decrease in grabbing behaviors, he was no longer wearing pull-ups as a protection against accidents, he had improved bilateral coordination, and was more successful with sorting tasks. [Speech Language Pathologist], who participated in both meetings, took part in the discussion with Complainants that resulted in an increase of direct service minutes compared to the draft IEP document of September 17, 2017.

43. The IEP team created a goal in the area of expressive language that integrated the Student’s sorting ability and added the challenge of using the NovaChat to label items. Additionally, based on input from Complainants, [Student] was tasked with tracing words. Progress in these areas would be measured by anecdotal records and data collection. *Id* at page 11. The second goal was centered on communication and further emphasized skill acquisition with the NovaChat. [Special Education Teacher] felt that as the Student’s communication improved, his behaviors would decrease. A third goal in the area of independent living skills encouraged more motor development and bilateral coordination. [Special Education Teacher] established that this goal could also further improved behaviors by satisfying the Student’s need for sensory input and by keeping his hands

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<sup>9</sup> Comprised of 120 minutes for expressive language therapy, and 120 minutes for receptive language.

<sup>10</sup> Clean-up after meals was added as a component of independent living skills.

occupied. [Occupational Therapist] endorsed the more consultative model whereby she provided indirect services by instructing the Student's teachers how to incorporate two-handed skills into multiple tasks throughout the day. This actually increased the amount of time he could work on the skill and fostered generalization among staff. The fourth goal specifically addressed behavioral needs by fostering an improved ability to follow directions with reduced prompting. [School Psychologist] assisted in the drafting of the fourth goal.

44. [Special Education Teacher] established that a number of IEP provisions addressed the Student's sensory needs. His inappropriate mouthing behavior was to be redirected and opportunities for safe oral stimulation with the chewy tube provided. Multi-sensory materials were again emphasized, as were movement breaks and opportunities to take breaks from the hearing aid system and the possibility of over-stimulation. Behavior supports included encouraging eye contact during directions, quiet 1:1 setting, short breaks as needed, first/then visual schedules, and use of social stories. As for the latter, [Special Education Teacher] testified that this method of modeling behaviors prior to using the bathroom or walking in the hallways was effective to prepare [Student] for the challenges of different environments.

45. The IEP team discussed the change in minutes and the more consultative model in significant detail. At the request of Complainants, direct service minutes in speech and language as well as OT were increased over the draft quantities and the team agreed to re-evaluate the efficacy of the changes in the Spring of 2018.

46. During the fifth grade year, [Special Education Teacher] met with the general education teacher during each week. They attempted to include [Student] in class activities related to the weather and rocket projects. [Special Education Teacher] also attempted to expose the Student to grade-level vocabulary in accordance with the request of Complainants. Related to the class unit on government, images for democracy, independence, and war were added to the NovaChat even though these abstract concepts were beyond his ability to understand.

47. On cross examination, [Special Education Teacher] acknowledged that she did not formally track the occurrences of the Student's behaviors. She did not consider such data compilation to be a requirement of implementing ABA strategies although tracking is necessary to understand behaviors and the appropriate responses. [Special Education Teacher] felt that she was managing the Student's behaviors without a data collection system.

48. In February of 2018, the District consented to Complainants' request for an independent educational evaluation ("IEE") of the Student in the areas of speech and language, and occupational therapy. In accordance with District policy, Complainants identified [SLP Expert] to perform the speech and language evaluation. [SLP Expert] was admitted as an expert in speech language pathology and provided opinion testimony on that topic. Hearing Exhibit BB. [SLP Expert] reviewed records of [Student]'s abilities with

expressive and receptive language; she also spoke with [Special Education Teacher] regarding her experience with the Student and the provisions in his IEP.

49. On March 1, 2018, [SLP Expert] performed her evaluation of the Student at [Elementary School 2] in a quiet room. She did not observe [Student] in his classroom setting. In the area of receptive language, she administered the Peabody picture vocabulary test in which the Student was asked to point to visual images that corresponded to the vocabulary words she spoke. He correctly identified only two out of twelve attempts, leading [SLP Expert] to conclude that he was probably guessing. She also prompted him to attempt to express one word answers to the question “what is this picture?” [Student] was not able to complete the task and instead requested—using his NovaChat device—to be able to watch a video or take a break on the swing.

50. [SLP Expert] established that the Student understood the concept of using the NovaChat and was functionally able to request a few preferred tasks using the device. He understood the process of selecting “I want” and then an icon for an item he desired. [SLP Expert] opined that [Student] would require direct instruction in order to be able to progress in his use of the NovaChat. She found that he did not have the ability to attend consistently throughout the 60 to 90 minute evaluation. At times he attempted to throw the test materials, although she observed that he displayed fewer problem behaviors while he was sitting with her. As they were walking back to the classroom with [Special Education Teacher] after the evaluation, [Student] grabbed papers from an adult and tried to kick a trash can in the hallway. [SLP Expert] also opined that the Student’s behaviors could be expected to improve as he mastered more expressive language skills since maladaptive behaviors often correlate to unmet wants or needs.

51. [SLP Expert] concluded that the Student lacked the basic communication skills that would allow him to be successfully integrated into a general education class setting. She stated that improvement in his expressive and receptive language skills, and greater functionality with the alternative communication device would be necessary prerequisites to more time in the general education setting. She also advocated reinforcing the connection between better behaviors and the Student getting to do what he wanted.

52. [SLP Expert] prepared a report of her evaluation that was shared with Complainants and the District. Hearing Exhibit AA. She was invited to attend an IEP meeting for [Student] but did not do so. She had no other communication with the District about the results of the evaluation. [Speech Language Pathologist] testified that she was able to interpret the results of the IEE for the IEP team.

53. Since April, 2018, [SLP Expert] has provided private speech language therapy to the Student after school. These services occur once per week for approximately 45 minutes either through [SLP Expert] directly or a speech language pathologist under her supervision. She established that the Student has made progress on being able to identify people and objects on the tablet device, labelling a limited number of high frequency items such as people or body parts, and improving the clarity of his vocalizations. Additionally, [SLP Expert] and her staff cue [Student] on appropriate

behaviors even though they are not certified as BCBA's or RBT's. [SLP Expert] testified that they will remove things from the Student's reach that he attempted to sweep away or throw. In her report, she acknowledged that behavior modification strategies had been implemented in school (ignoring negative behaviors and redirecting to task) and should be continued to facilitate learning.

54. The occupational therapy portion of the IEE was performed by [Occupational Therapist]. [Occupational Therapist] testified in the capacity of an expert in occupational therapy. Hearing Exhibit EE. She established that OT is individually developed for each child to assist with his daily occupations: play, activities of daily living, fine motor skills such as writing, gross motor skills such as bilateral coordination, and sensory integration. The latter [Occupational Therapist] described as the ability to regulate sensory systems if they are dysfunctional by using tools such as vestibular input or auditory protocols to assist with cognitive development.

55. [Occupational Therapist] met [Student] at [Elementary School 2] for approximately two hours on February 22, 2018, after having been retained by the District. Prior to her evaluation of the Student, she was not provided with a copy of his IEP or any other diagnostic impression of him. [Occupational Therapist] met [Special Education Teacher] and the latter explained the Student's dual diagnoses of Down Syndrome and ASD. [Occupational Therapist] observed that the Student was fitted with bone-anchored hearing aids. [Special Education Teacher] initiated a card matching activity with [Student] but [Occupational Therapist] observed him to be disengaged from the task and more interested in grabbing and mouthing the cards. The Student also fell to the floor and grabbed a chair. Later, during a snack time, [Student] was more engaged and remained seated. He was tolerant of a test that [Occupational Therapist] initiated with a spin board and was intrigued by a brush that she showed him.

56. After a time, [Student] requested to be able to take a break on a swing. [Special Education Teacher] and [Occupational Therapist] proceeded to escort the Student to a different room where the swing was located. There were no other people in the hallway where this transition occurred. [Occupational Therapist] observed the Student attempt to bolt into a bathroom, a custodian's closet, and another room. She was surprised by these behaviors but noted that [Special Education Teacher] seemed familiar with the issue. [Special Education Teacher] testified that she observed the Student become emotionally escalated during the prior interaction with [Occupational Therapist] due to her trying a number of new activities with him. [Special Education Teacher] had received instruction to sit back and allow the IEE to be administered by [Occupational Therapist]. Accordingly, [Special Education Teacher] did not provide the typical preparation to [Student] prior to transitioning through the hallway. Ordinarily, [Special Education Teacher] would review with him how the transition would occur and what her expectations were for his behavior(s).

57. [Occupational Therapist] observed [Student] to be fully engaged and enjoying the swing activity, which she testified was very appropriate sensory accommodation for him. With regard to activities of daily living, [Special Education Teacher] showed a visual

schedule used to help the Student wash his hands. [Occupational Therapist] testified that the visual schedule was effective with hand-over-hand assistance and cues as further accommodations. [Occupational Therapist] noted that the Student can dress or undress with minimal to moderate assistance.

58. [Student] demonstrated his fine motor skills by attempting to copy his name and shapes. [Occupational Therapist] noted that he had an immature but functional grasp of his pencil and that his writing motion originated in his shoulder rather in the smaller muscles of his wrist and hand. [Student] required hand-over-hand assistance to be able to perform the task and [Occupational Therapist] was unsure whether he was able to trace a straight line in February, 2018. With regard to gross motor skills, the Student was able to access all areas of his school environment. As for his behaviors, [Occupational Therapist] stated that [Student] attempted to grab her and [Special Education Teacher], attempted to throw objects within his reach, and mouthed objects on the table.

59. [Occupational Therapist] transmitted her recommendations to the District for the Student's OT program. Specifically she advocated multi-sensory learning opportunities, sensory breaks, a listening program<sup>11</sup> to help with auditory processing skills, vestibular and proprioceptive inputs. Hearing Exhibit CC at page 4. She was not sure whether [Student] was receiving multi-sensory learning at the time of her evaluation. [Occupational Therapist] was invited to two IEP team meetings for [Student] but did not attend either of them.

60. On April 3, 2018, the District produced records to Complainants representing data compiled by District personnel regarding the Student's work and progress on IEP goals and objectives. Hearing Exhibits No. 44 and No. 45. Complainants had requested the documents earlier, but they were only produced by the District after the CDE compliance officer ordered that to occur. Some of this data was the subject of testimony by persons who prepared the documents, and that evidence is discussed elsewhere in context. As far as Complainant's reaction to Hearing Exhibit No. 45, [Father] testified that they could not decipher what instruction or support was being provided at any time, whether it was effective in allowing skill acquisition, or whether the Student's problem behaviors were improving.

61. On April 6, 2018, [Mother] requested that the Student's general education teacher, [Gen. Ed. Teacher], include Complainants in "any emails that go out to the 5<sup>th</sup> grade class regarding curriculum and also send home with [[Student]] any assignments for the class." Hearing Exhibit No. 50. [Gen. Ed. Teacher] responded that she had included Complainants in parent emails and sought clarification of the request regarding assignments. Hearing Exhibit No. 52. She asked whether Complainants wanted "all homework assignments in the various subject areas ... that are typically going home with his homeroom classmates?" [Mother] responded, "you can send same assignments the rest of the class receive." *Id.* After a few days, [Mother] wrote again requesting instructions for assignments based on modified curriculum for [Student]. Hearing Exhibit

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<sup>11</sup> Described as a set of specialized headphones that transmit micro vibrations in rhythmic patterns.



ZZ at page 5. [Special Education Teacher] responded that homework assignments appropriate for the Student would be provided. *Id.*

62. [Occupational Therapist] testified regarding the data she compiled that was transmitted as part of Hearing Exhibit No. 45 (pages 76 through 86). Page 76 represented the form on which she logged therapy time, while pages 77 through 83 reflected work on a specific goals. [Occupational Therapist] described an example of the Student's progress using food containers and straws in November and December, 2017. *Id.* at page 81. There, he was 75 percent independent using a screw top, and one time independent opening a ziploc bag. Page 80 reflected subsequent dates where he only required verbal cueing for his thermos, was 40 percent independent with the ziploc bag and 80 percent independent with tupperware. [Occupational Therapist] also began working with him on cutting tasks-- holding paper in one hand and scissors in the other. She summarized this data in a progress report dated May 31, 2018 (Hearing Exhibit No. 76) and used it to assist drafting an independent living goal for [Student]. By that time [Occupational Therapist] established that [Student] was independent with tasks related to snack time which she felt was great progress on his goal. She also established that he was receptive to re-direction and better able to stay on task during therapy time. Because he was comfortable with [Occupational Therapist] and because she took time to set up the environment to reduce distractions, his behaviors did not impair his learning.

63. [Special Education Teacher] also prepared part of the same report of the Student's progress. *Id.* She concluded that he made slow progress on Goal No. 1 with tracing and being able to label items with the NovaChat approximately 30 to 35 percent of the time. On the communication goal, [Student] was more successful with greeting peers in the hallway. He was more proficient opening different types of containers representing progress on the independent living goal. Finally, in the area of behaviors, [Special Education Teacher] testified that the Student was able to work on his own for longer periods of time, demonstrated fewer problem behaviors in the hallway setting, refrained from inappropriate mouthing, and kept his shoes on more consistently. On cross examination she stated that she considered it possible for [Student] to be progressing even if an adult was required to provide a prompt to prevent behavior from interfering with the task.

64. [School Psychologist] and [District BCBA] developed an FBA for the Student in May, 2018. Hearing Exhibit U. [District BCBA] confirmed that the purpose of an FBA is to determine the functions of behaviors, whether for attention, avoidance, access to preferred items or activities, or sensory needs. The behaviors analyzed were running from staff, grabbing/touching peers and items, mouthing/licking objects, and blowing raspberries. These were all observed throughout the day in all school environments over a period of ten days and tracked in terms of their frequency, duration, latency (relation between the antecedent and the behavior), and setting. [School Psychologist] and [District BCBA] reviewed [Student]'s education file, interviewed his parents and teachers, conducted observations of him to compile data in Antecedent/Behavior/Consequence ("ABC") format.

65. Behaviors were noted to be more frequent when [Student] was expected to sit quietly and attend in the general education classroom. When he was in the ILS room and engaged on a task, the behaviors were less frequent. [District BCBA] attributed this to the increased activity and sensory stimulation in the general education classroom. The behaviors were found to impede the Student's ability to participate in the general education classroom and, at times, impede his access to specialized instruction outlined in his IEP. *Id* at page 8 of 11. However, [District BCBA] noted that most behaviors lasted only a couple of seconds. Additionally, [District BCBA] concluded that antecedent measures could be effective to reduce behaviors and increase the Student's success. Such measures included re-arranging the environment (as had been successful with [Occupational Therapist]), providing positive reinforcements, encouraging functional use of the NovaChat, and facilitating greetings or fist-bumps with peers to reduce grabbing. [Special Education Teacher], who helped track behavior data for the FBA,<sup>12</sup> testified that [Student] performed at a lower level than was typical for the time of the assessment due to an illness and interactions with unfamiliar people.

66. [School Psychologist] and [District BCBA] concluded that the Student's behaviors were multi-functional, meaning that there was no single, clear-cut reason why he might engage in a certain behavior in every instance. Although each behavior might not have one identifiable function, [District BCBA] testified that the measures she described to reduce the known antecedents of behaviors could still be effective. On cross examination, she acknowledged that the behaviors will continue to be challenging and that implementation of a systematic approach based on ABA principles is appropriate. Such an approach should identify protocols for managing behaviors and promoting replacement behaviors in a consistent way. A BIP can be used to codify those protocols, but [District BCBA] did not prepare a BIP based on the results of her analysis or include written recommendations in the FBA. She testified that she informed staff at [Elementary School 2] and [Middle School] about appropriate strategies in the course of meetings, including with the IEP team. To prepare for the transition to middle school, she conducted eight sessions of one hour with [Middle School] staff to train them in the particulars of the Student's disability-related behaviors, and how to effectively manage them.

67. Complainants presented the testimony of [ASD Expert], who was qualified as an expert in the areas of behavioral analysis and treatment of children with ASD. [ASD Expert] holds a Master of Arts degree in ABA and is certified as a BCBA. Hearing Exhibit GG. She described ABA as a research-based study of human behaviors, with the goal of increasing positive behaviors and reducing negative behaviors through data-based decisions. Consistent with the testimony of [BCBA], [ASD Expert] described a process of hypothesizing causes of behaviors and testing the hypotheses through manipulation of variables. [ASD Expert] emphasized the importance of data collection and opined that ABA principles cannot be implemented without data.

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<sup>12</sup> Hearing Exhibit T.

68. At an IEP team meeting on May 8, 2018, Complainants requested an independent FBA. That request was approved by [Director] on May 11, 2018. Hearing Exhibit No. 66. As detailed below, [ASD Expert] conducted her FBA in August.

69. In July, 2018, [Occupational Therapist] began giving private OT to [Student] in her clinic and in his home. She worked on goals related to sensory regulation, fine motor development, and bilateral coordination in sessions lasting 45 minutes, one time per week. She testified that [Student] has made progress in tolerating all sensory protocols, following directions, and reducing problem behaviors. He required less hand-over-hand assistance at the time of hearing compared to the February, 2018 observation.

70. On August 20, 2018, [Father] transmitted an outline of the Student's strengths and weaknesses to District personnel to help ease transition to sixth grade. Hearing Exhibit No. 90. It was noted that [Student] could use his NovaChat for some communication and could verbalize his need to use the bathroom. [Father] again noted that [Student] performs better as he becomes comfortable with people. Complainants wanted the Student to benefit from the maximum amount of interaction with disabled peers that could be managed at middle school.

71. In the Fall of 2018, the Student was supposed to transition to [Middle School] within the District for sixth grade. He was assigned to an ILS classroom at [Middle School] under the supervision of [Middle School Special Education Teacher], a licensed special education teacher. [Father] observed the first two days of the school year. On the first day, [Father] observed the Student sitting in the middle of a larger group of children rocking his body in a self-stimulating manner. When [Father] intervened to try to remove [Student] from the classroom, the Student tried to knock a projector to the floor. On the second day of sixth grade, [Father] observed the Student sitting and crying in class. [Father] initiated an activity where other children played ball with [Student]. During the lunch period, [Father] attempted to demonstrate to District staff how to assist the Student with eating using specialized cups, and specially prepared food to prevent him from gulping and potentially choking. [Father] felt that the staff did not take the time to learn the particulars of assisting [Student] as they were involved with other children.

72. [Middle School Special Education Teacher] prepared for the arrival of [Student] by talking to staff at [Elementary School 2] and attending the IEP meeting in May, 2018. She understood his need to work on pre-academic social skills and the challenge that additional transitions characteristic of middle school would present for him. She created a visual schedule in consultation with [District BCBA] to help [Student] anticipate activities that he would engage in throughout the day. Hearing Exhibit No. 100. In the first couple of days, she attempted to "pair" with [Student] in the sense of building a relationship he could trust. She felt that the process was going well and saw a decrease in his behaviors in the brief time she worked with him. She began to configure the NovaChat in collaboration with the speech and language therapist, and made sure the device was always available.

73. The Student attended [Middle School] sporadically from August 20, through September 27, 2018. Hearing Exhibits No. 92 and No. 99. [Middle School Special Education Teacher] established that persistent absences adversely affected her ability to bond with [Student] and progress on his goals. After that time, Complainants removed him from the District and kept him at home. Hearing Exhibit No. 88.

74. On cross examination, [Middle School Special Education Teacher] discussed data that she tracked regarding the Student's behaviors. Hearing Exhibit DDD. She testified that grabbing items from a front table was a problem initially, but that the behavior went away prior to his removal from [Middle School]. Additionally, [Student] ceased taking his shoes off, which he was doing three times per day at the beginning of sixth grade. His licking behavior did not go away, but [Middle School Special Education Teacher] was able to redirect this behavior to the chewy tube without difficulty. He also persisted in some problem behaviors during hallway transitions and required a significant amount of prompting at those times. [Middle School Special Education Teacher] emphasized that the [Middle School] environment and population was still new to [Student] and that his inconsistent attendance made it harder to work on this aspect of his social development.

75. [ASD Expert] performed an FBA of the Student for the District in August, 2018. Hearing Exhibit FF. She saw her assignment as being to determine if his needs were being met at school. [ASD Expert] reviewed medical documents, vision and hearing testing, the Children's Hospital evaluation from 2014, and the Student's 2017 IEP. She also interviewed Complainants and observed [Student] at school. These initial steps led her to conclude that the Student had experienced fluctuation in services and made minimal progress on goals while attending the District.

76. [ASD Expert] also reviewed results of multiple administrations of the VB-MAPP instrument given to [Student] between 2012 and 2018.<sup>13</sup> The VB-MAPP is commonly used by BCBA's to develop a baseline understanding of a child's current levels related to basic skills that typically develop between birth and 18 months (Level 1). The testing instrument is broken down into two subparts: Milestones (abilities) and Barriers. [ASD Expert] questioned the validity of past VB-MAPP Milestones administrations and determined that the VB-MAPP Milestones assessment was not appropriate for [Student] as a low functioning learner. *Id* at page 9. The Barriers assessment, based on teacher observation, was an appropriate means of identifying the Student's most problematic behaviors in the opinion of [ASD Expert]. Comparing the results of past tests, [ASD Expert] noted that the Student's barriers have continually become more problematic in both clinical and school settings based on increased (worsening) scores from 2014, to 2017, and to 2018. *Id* at page 10. Her own VB-MAPP Barriers assessment of [Student] revealed "severe" problems in twelve of 24 barriers including negative behaviors, defective tact (naming), social skills, prompt dependency, self-stimulation, articulation, and hyperactivity. He scored as having "persistent" problems in ten of 24 barriers including instructional control, defective mand (request), imitation, listening, generalization, and obsessive compulsive behavior.

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<sup>13</sup> The District administered the VB-MAPP to the Student in 2014 and 2017.

77. [ASD Expert] also reviewed results of administrations of the ABLLS-R given in 2016, 2017, and 2018. She described this instrument as useful in breaking down skills even further and providing more detail about what to teach the child based on his baseline abilities. For example, if the child has no understanding of colors, then it is not appropriate to ask him to match colors. [Special Education Teacher] completed the ABLLS-R in 2016 and 2017 based on data collected at school; [ASD Expert] did so in 2018 based on data provided by Complainants. [ASD Expert] noted “vast differences” in the reporting on certain skills between the school and the parents. *Id* at page 12. She noted as one example, element C5 which assesses the ability to follow instructions to touch a common item in various positions. For [Student] to have demonstrated this skill, he would have had to be able to touch an item in any position (i.e. up/down/left/right) within three seconds. The District concluded that he could, and Complainants indicated that he could not without repeated and multiple prompts. Although there was agreement between the District and parent results related to 28 assessed tasks, [ASD Expert] concluded that the District report included 51 skills that the parents did not have, while the parent report included 25 skills that the District did not have.<sup>14</sup>

78. [ASD Expert] compared the ABLLS-R results to the goals included in the Student’s IEPs from 2015 through 2017. She concluded that despite the disparity in the school and parent reports, the ABLLS-R revealed certain deficits in the areas of visual performance that made a goal related to matching pictures and objects inappropriate for him. She opined that if the goal is too difficult for the Student to master, it can result in maladaptive behaviors as a manifestation of frustration. *Id* at page 15.

79. As part of her FBA, [ASD Expert] also conducted an interview with Complainants and observations of the Student in the clinical setting over five or six hours, as well as a one-hour observation of him at [Middle School] on August 24, 2018.<sup>15</sup> She identified eleven problem behaviors and provided a narrative of her observation. Figure 8 on page 17 of Hearing Exhibit FF. Based on the clinical and observational data, she concluded that [Student] engages in many forms of maladaptive behaviors to escape from demands of aversive stimuli, to gain access to preferred items such as his tablet, or to self-stimulate. Only on a few occasions during the school day did [ASD Expert] note that the behaviors seemed to derive from attention-seeking. Those behaviors were more prevalent at home with his parents. *Id* at page 22.

80. [ASD Expert] recommended a number of changes to improve the Student’s behavioral functioning. She believed that some of his IEP goals were set too high for his developmental level and should be modified as appropriate by a BCBA.<sup>16</sup> She also

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<sup>14</sup> [ASD Expert] referenced Appendix C on page 33 of Hearing Exhibit FF. Yellow blocks depicted skills determined by the District only; blue blocks depicted skills determined by the parents only; green blocks depicted skills where both sources agreed.

<sup>15</sup> August 24 was the third day of middle school and the first without [Father] present.

<sup>16</sup> This recommendation did not identify any particular goal or objective as being inappropriate. In her testimony, [ASD Expert] referenced Figure 5 on page 13 of Hearing Exhibit FF in opining that measures B17-B19, C37-C39, and H43-H47, depicted unspecified IEP goals that were far above the Student’s abilities.

recommended full-time ABA therapy under the supervision of a BCBA to decrease maladaptive behaviors and help him make educational gains. She advocated for development of a BIP to be consistently implemented in all environments (home and school) through enhanced collaboration. Finally, she recommended further vision evaluation to determine if the Student's grabbing behaviors represented a form of him "seeing" the objects or persons involved.

81. At hearing [ASD Expert] opined that [Student] received no educational benefit from his time in the classroom that she observed. He was disengaged, focused on his tablet, and engaging in persistent rocking and clapping to self-stimulate. She concluded that he did not have the prerequisite learning skills to function in the classroom environment. [ASD Expert] acknowledged that she did not interview any teachers or staff from [Elementary School 2] as part of her assessment. She did ask questions of staff at [Middle School], but they had little information as it was only the Student's third day there. She did not interview any speech and language or OT provider.

82. On cross-examination, [ASD Expert] clarified that her statement about the Student's minimal progress from 2014 to 2017 was based on review of the VB-MAPP and ABLLS-R results, but not from review of District progress reports. She also testified that the ABLLS-R protocol was not designed to assess the propriety of IEP goals and objectives, although the data could properly be used in the development of an IEP. [ASD Expert] acknowledged that the day of her observation at [Middle School] represented a new environment and new routine for [Student].

83. After leaving [Middle School], [Student] continued to receive behavioral, occupational, and speech and language therapies at home. [Father] described progress [Student] has made since that time in communication and behavior management. Complainants have been able to introduce more items back into the Student's room and challenge him to practice skills with an increased number of distractions.

84. [BCBA] completed an FBA for the Student in December, 2018, based on observations of [Student] in a therapeutic setting and at home with his mother. Hearing Exhibit RR. She observed that [Student] engaged in throwing behavior much more when he received any type of attention for the behavior or where it led to the cessation of some non-preferred activity. So long as the Student was provided with everything he wanted (as a control measure) the behaviors were less evident. [BCBA] developed a BIP for [Student] based on the results of the FBA. Hearing Exhibit SS. She emphasized the importance of following the measures in the plan consistently and of taking data on how the measures were or were not effective.

85. [BCBA] testified that [Student] has made progress in reducing maladaptive behaviors through implementation of the BIP. Throwing objects has decreased in interactions with three different therapists (suggesting generalization of the skill) and the Student has been asking for time when appropriate. The home therapy program is fairly intensive, comprising 22 hours per week at the time of hearing, an increase from six to nine hours per week in December, 2018.

86. Complainants presented the testimony of [Pediatric Neuropsychologist], who was qualified as an expert in the areas of pediatric neuropsychology, ABA, and treatment of children with ASD. Her qualifications are set forth in Hearing Exhibit JJ. She completed a doctoral dissertation and post-doctoral fellowship both in the area of ASD. In 2005, she began Emerge, a clinic of professionals serving clients with needs related to ASD, behaviors, and personal growth. After the District declined to fund an IEE in neuropsychology, Complainants retained [Pediatric Neuropsychologist] to complete such an evaluation of the Student, which she did on August 6, and 7, 2018.

87. [Pediatric Neuropsychologist] reviewed the documents detailed in Appendix B of her report in evidence at Hearing Exhibit HH, including the FBA completed by [ASD Expert] (whom [Pediatric Neuropsychologist] supervised at Emerge). The neuropsychological evaluation assessed the Student's functioning in areas of cognition, academic achievement, attention and memory, language, and social/emotional needs. It sought to identify what measures and/or accommodations will help the child to be successful at school. With respect to the Student, Complainants listed their primary concerns as a lack of adequate progress and worsening behaviors.

88. On August 6, 2018, [Pediatric Neuropsychologist] conducted a clinical interview with Complainants and [Student] with [ASD Expert] present. In addition to the concerns noted above, Complainants described having to stop the Student's home speech and language therapy due to behaviors. They also felt that some of his IEP goals were set too high to allow him to succeed.

89. [Pediatric Neuropsychologist] found the Student to be uncomfortable in the presence of her and [ASD Expert]. He tried to grab her clipboard and aggressively tear some paper; he threw items and bolted around the interview room. [Pediatric Neuropsychologist] estimated having completed roughly 2,500 to 3,000 such interviews and testified that she did not expect the Student's behaviors in the presence of his parents in a non-threatening environment. She considered [Student]'s behaviors to be markedly severe. The next day during two hours of clinical testing she attempted to administer a simple developmental measure appropriate to his age. [Pediatric Neuropsychologist] was unable to administer the test due to the Student's behaviors. The same was true with a lower measure of receptive language appropriate to infants: [Student] smashed wildly at the test materials and refused to even look at the book. [Pediatric Neuropsychologist] concluded that the behaviors interfered with her ability to assess him cognitively and presented a significant barrier to learning. From the historical records, [Pediatric Neuropsychologist] concluded that the Student's behaviors and academic abilities were in decline. With [Student] growing and getting stronger, [Pediatric Neuropsychologist] felt that he was at a crisis point and close to representing a safety risk.

90. Emerge subsequently generated a supplemental report that synthesized the findings of [ASD Expert] and [Pediatric Neuropsychologist]. Hearing Exhibit II. [Pediatric Neuropsychologist] expressed no criticism of the District's use of the VB-MAPP and ABLLS-R, although she opined that the data was not used to create appropriate goals.

She found no indication in the educational records of direct involvement of a District BCBA in the Student's instruction prior to April, 2018. In the opinion of [Pediatric Neuropsychologist], the results of the VB-MAPP Barriers revealed the Student's need for intensive ABA therapy based on consistent and rigorous data collections.

91. [Pediatric Neuropsychologist] opined that the Student's lack of demonstrable academic progress and decreasing behaviors evidenced a failure to receive FAPE in the District since 2014. She recommended a compensatory education program to address maladaptive behaviors in a simplified, 1:1 setting, and supervised by a BCBA. After the Student's behaviors improve, then it is likely that a teacher and paraprofessionals could provide services as directed by a BCBA. This program would consist of full-day ABA therapy five times per week, featuring direct services from a BCBA for 1.5 hours per week, and an RBT at other times. [Pediatric Neuropsychologist] felt that ideally the Student should be in school, but needs to make significant progress before that is possible.

92. On cross-examination, [Pediatric Neuropsychologist] clarified that she did not interview any District personnel in reaching her opinions. In her testimony, [Pediatric Neuropsychologist] opined that the Student's educational goals needed to be adjusted on a weekly basis to ensure that they remain appropriate. She did not testify that such adjustment would require input of the IEP team; rather [Pediatric Neuropsychologist] envisioned a "skilled educator" making "microscopic" adaptations to expectations within the scope of the written IEP goals. She believed that the data available to review from the District failed to establish that an ABA program was effectively delivered to the Student.

93. The District presented the testimony of [Significant Support Needs Expert], who serves as a professor in the special education training program at the University of Northern Colorado. He established that he specializes in facilitating inclusive education for children with significant support needs in the general classroom setting, positive behavior supports, and communication. [Significant Support Needs Expert] was qualified as an expert and permitted to give opinion testimony in the areas of education methods for students with severe disabilities, language and communication, behavior modification, and inclusive education. Hearing Exhibit No. 98 at pages 16 through 75. [Significant Support Needs Expert] reviewed the materials listed on pages 76 through 79 of Hearing Exhibit 98 and interviewed multiple District employees who participated in the Student's program. He did not perform any observation of the Student. [Significant Support Needs Expert] prepared a report of his analysis and conclusions. *Id* at pages 1 through 15.

94. The testimony of [Significant Support Needs Expert] focused largely on his study, supported by numerous research articles, of whether the Student would benefit more from education in a natural (typical) or a clinical classroom environment. He characterized the natural classroom environment as more complex with more distractions and more need for multiple instructions over a longer time, while the clinical environment is usually 1:1, with the instructor more able to get attention, focus on tasks, and provide reinforcement for appropriate responses. His understanding of [Student] from the document review and interviews with District personnel was as follows: the Student learned slowly, was gaining



social (pre-academic) skills, and was under the instructional control of his teachers and aides. He structured his analysis in terms of examining what he defined as the five variables of FAPE: the characteristics (strengths and weaknesses) of the Student, the characteristics of the educational curriculum, the context (where the IEP is implemented), the instructional method, and progress.

95. With regard to the characteristics of the Student, [Significant Support Needs Expert] noted that [Student] had difficulty generalizing skills among environments and sometimes needed to back up and relearn a skill that had already been mastered. He defined “resurgence” as being able to demonstrate a skill until control is withdrawn and behaviors take over. Based on his research, [Significant Support Needs Expert] concluded that while the Student may experience slower progress in the natural class setting, he would likely experience less resurgence as compared to the clinical setting. *Id* at page 10. Similarly, [Significant Support Needs Expert] opined that the Student would, over time, benefit from the “incidental instruction” of being with and observing typical peers in a natural classroom, a feature not present in the clinical setting. *Id* at page 11. In response to a question from the ALJ, [Significant Support Needs Expert] clarified that [Student] would likely need more breaks to avoid over stimulation in the more complex natural setting.

96. In further analyzing the context in which the IEP should be implemented, [Significant Support Needs Expert] emphasized that peers, teachers, stimuli, and rules present in a natural classroom environment reinforce the expectations that will help the Student adapt his behaviors. By contrast, [Significant Support Needs Expert] deemed the “errorless” environment of the clinical classroom where [Student] would be separated from peers as less effective in helping him acquire skills. *Id* at page 12. With respect to the use of antecedents as an instructional method, [Significant Support Needs Expert] concluded that the natural classroom would logically feature more variability and thus more potential antecedents for the Student’s behaviors. Nonetheless, [Significant Support Needs Expert] believed that this complexity would foster increased generalization of skills across environments than would the relatively quiet and controlled clinical setting. *Id* at page 13.

97. Finally, [Significant Support Needs Expert] testified that measurement of progress in a natural classroom would occur across settings, whereas progress in the clinical setting would be specific to discreet trials. He predicted that even if [Student] mastered a skill in the clinical setting, he would have difficulty maintaining that skill in a natural environment. For all of the foregoing reasons, [Significant Support Needs Expert] concluded that the natural classroom setting would be more beneficial for the Student overall, even though it might result in slower rates of progress. Despite the disparity between that conclusion and the District’s repeated preference for errorless, discreet trial training in a quiet 1:1 setting, [Significant Support Needs Expert] opined that the Student had received FAPE. In support of that statement, he cited the research-based behavioral supports implemented over time and evidence of progress [Student] had made on behaviors, communication, and social skills. On cross examination, [Significant Support Needs Expert] identified improvement in the Student’s social interactions with peers as

behavioral progress in the general sense. This opinion was based on anecdotal reports by teachers and statements of the Student's present levels of performance and not any specific measure of negative behaviors being reduced. [Significant Support Needs Expert] testified that it was typical to not see raw data cited in an IEP summary of progress and that he felt comfortable relying on the accounts of teachers regarding progress.

98. [Significant Support Needs Expert] reviewed the 2017 re-evaluation report (Hearing Exhibit I) but did not rely on the results in forming his conclusions. He dismissed the use of the ABLLS-R for children with disabilities like those of [Student] even though the ILS protocol he helped prepare for the District included the use of ABLLS-R. Although he would not rely on the instrument to determine progress, he clarified that it was useful to get ideas about what a child can do. [Significant Support Needs Expert] opined that it is not uncommon for a child like the Student to have disruptive behaviors in a novel setting like that presented by some of the independent evaluations. He believed that it was possible for [Student] to progress on his goals even while problem behaviors are still an issue. He advocated the use of antecedent controls to reduce behaviors and promote more focus and progress on skill-related tasks. He also opined that there is more benefit reinforcing positive behaviors than focusing on what might be considered maladaptive. He noted that nearly all children have a difficult time with transitioning to middle school and that more behaviors should be expected.

99. Complainants explained the relief they are seeking in this matter. They want an education program for the Student to be implemented in accord with the recommendations of [ASD Expert] (i.e. intensive 1:1 ABA therapy), compensation to pay for ABA therapy at a rate of \$75,000 per year for each year from July, 2016, through the time of hearing to cover his needs after age 21, and compensation for their out-of-pocket costs for the neuropsychological evaluation and home education program. With regard to the amount of \$75,000, [Mother] testified that she had been provided this amount by a program called Firefly. She did not describe in any detail the characteristics of the Firefly program, the amount of therapy and/or education that would be provided for that amount, nor why it should be deemed appropriate for the Student's complex dual diagnoses. [Mother] established that Complainants paid \$5,500 for the evaluation by [Pediatric Neuropsychologist]. All of the occupational therapy, speech and language therapy, and ABA therapy have been paid for by the Health First Colorado (Medicaid) program and the family's secondary insurance such that there were no out-of-pocket costs for those services in evidence. [Mother] acknowledged that OT services for [Student] are coordinated through [Mother]'s business, [Mother's Business], which pays the contractor therapists \$75 per visit. Those services were reimbursed at a rate of either \$113 or \$122 per visit, depending upon which insurance provider was paying. As a result, the Complainants' business profited between \$38 and \$47 per OT visit.

## **CONCLUSIONS OF LAW**

The purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education that provides special education and related services designed to meet their unique needs. 20 U.S.C. § 1400(d)(1)(A). Central

to the IDEA is the requirement that local school districts develop, implement, and revise an IEP calculated to meet the eligible student's specific educational needs. 20 U.S.C. § 1414(d). A school district satisfies the requirement for a FAPE when, through the IEP, it provides a disabled student with a "basic floor of opportunity" that consists of access to specialized instruction and related services that are individually designed to provide educational benefit to the student. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 201 (1982). To meet its obligations under the IDEA, the school district "must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Andrew F. v. Douglas County School District RE-1*, 580 U.S. \_\_\_; 137 S.Ct. 988 (2017).

In providing FAPE, children should be educated in the "least restrictive environment," meaning that, "[t]o the maximum extent appropriate," disabled children should be educated in public classrooms, alongside children who are not disabled. 20 U.S.C. § 1412(a)(5)(A). A student should be removed to a more restrictive setting only when the nature or severity of the disability is such that "education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."

### Burden of Proof

Although the IDEA does not explicitly assign the burden of proof, *Schaffer v. Weast*, 546 U.S. 49, 58 (2005) places the burden of persuasion "where it usually falls, upon the party seeking relief." See also *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1148 (10<sup>th</sup> Cir. 2008) (stating that "[t]he burden of proof . . . rests with the party claiming a deficiency in the school district's efforts"). Complainants therefore bear the burden of proving by a preponderance of the evidence that the District violated its obligations under the IDEA by failing to provide [Student] with FAPE, and that they have established the elements required to establish a claim for reimbursement of expenses they have incurred as a result of the District's actions or inactions.

### Overview of the Student and his Educational Needs

The record here established that [Student] has substantial educational needs arising from his multiple disability diagnoses. There is no dispute that he is a child with a disability and eligible for special education services and supports under the IDEA. His cognitive abilities and coordination are adversely affected by Down Syndrome. His social and emotional skills, and his ability to regulate his emotions and behaviors are impacted by ASD. His impaired vision and hearing materially limit the ways in which he is able to perceive and experience his environments. These factors in combination present significant challenges for [Student] at school and at home. Specifically, multiple witnesses established that he lacked the ability to control his own behavioral responses to stimuli that he encounters. Additionally, his sensory issues and ASD resulted in his perceptions of such stimuli having a greater impact that would be present in a typically developing child. Thus, he tended to display greater deficits in the areas of behavior when presented with unknown people, novel tasks, or distracting and stimulating environments. Even as it related to people that he knew very well, [Father] established that [Mother] had less behavioral control with [Student] for reasons that the family has

been unable to resolve. Moreover, [Father], [Special Education Teacher], [District BCBA], and [Speech Language Pathologist] established that [Student] does not learn and retain skills in a predictable, linear fashion. Rather, he may demonstrate temporary mastery of a task and then lose the ability if the task is presented in a different time, place, manner, or by a person whom [Student] does not trust. For these reasons, conventional notions of what may or may not represent progress for the Student have limited applicability to the issues here. Nonetheless, his unique profile demonstrated pre-academic developmental needs in the areas of cognition, fine and gross motor, speech and language, and behavior management.

### Development and Implementation of IEP for Fourth Grade

The Student entered the 2016-17 academic year with an IEP for third grade still in effect. His IEP team convened and developed a new IEP for fourth grade dated October 3, 2016. There was no evidence that the IEP team was not properly constituted in terms of the persons attending, that there was any problem with notice or scheduling, or any other procedural problem that rendered the meeting invalid. Complainants attended the meeting and were to participate meaningfully in providing input, raising questions, and expressing their preferences related to their son's educational program. [Special Education Teacher] noted specific input from Complainants on the issue of a writing goal, their decision that ESY should not be considered for [Student], and inclusion of a specific independent living skill (cleaning up after meals) being included as an accommodation. Their private behavioral therapist, [BCBA], also attended and participated. The District documented the Student's present levels of performance, including its assessment of his progress on goals and objectives from the previous IEP. The IEP noted that [Student] had made progress on or met the measurable standards of each objective, although Complainants wanted to see raw data that supported those conclusions. [Special Education Teacher] and [Speech Language Pathologist], both of whom participated in that meeting, established that they did not retain data records of the Student's progress on goals and objectives once that data was summarized and incorporated into a progress report or IEP document. The IEP team determined that [Student] would continue to be educated in the ILS classroom, but would continue to have opportunities to interact with his general education peers for forty to eighty percent of his school day. There was no evidence that any IEP member disagreed with that aspect of the IEP or that such placement was later shown to be inappropriate for [Student]. Despite the general comments of [ASD Expert] and [Pediatric Neuropsychologist] about potential negative effects of unattainable goals, there was no evidence that any specific goal or objective included in the IEP was inappropriate for him. The IEP featured goals related to receptive and expressive language, motor development, and independent living skills (with behavioral components). Nor was any substantial evidence presented that the extensive set of accommodations and modifications that supported the Student's sensory, social, communication, behavioral, and independent living needs set forth in the IEP were inadequate.

Complainants consistently expressed concerns that the Student's behaviors were worsening and having the effect of impairing his ability to progress in his areas of educational need. The crux of Complainants' argument that the fourth grade IEP was

inadequate therefore centered on the extent to which ABA principles were incorporated and actually implemented relative to the Student's diagnosis of ASD and behaviors.

Much was made by Complainants and their counsel about the language quoted in Finding of Fact No. 7 being reiterated in successive IEP documents between 2014 and 2017. Although [Special Education Teacher] explained the meaning of the language in the context of broad ABA principles and the Student's educational needs, Complainants and their experts advocated an understanding of ABA that was distinguishable for its emphasis on data collection and analysis. One BCBA witness presented by Complainants even noted that private therapy for [Student] had to be suspended every twenty minutes or so to permit the technician to document "ABC" data for later analysis. The District's approach was much less technical in that sense leaving the ALJ with the task of deciding whether the data-driven methodology advocated by [ASD Expert] and [Pediatric Neuropsychologist] was the only appropriate way to address the Student's behaviors.

Although anecdotal in nature, the evidence regarding the level of instructional control that District staff had with [Student] was convincing. [Special Education Teacher] and [Speech Language Pathologist], both established that with the appropriate antecedent measures—such as minimizing distractions, developing a relationship with him, making use of visual schedules and social stories—they were able to maintain the focus and attention of the Student on tasks presented to him. [BCBA] in her observation of the Student with [Special Education Teacher], confirmed the fact that she had instructional control with him during the fourth grade year. This did not mean that negative behaviors vanished. But [District BCBA] noted that the Student's behaviors lasted for a matter of seconds and no witness established that the behaviors represented any threat of harm to [Student] or anyone else. [Special Education Teacher] and [Speech Language Pathologist] testified that they understood the various functions of the Student's behaviors and were able to effectively redirect him using positive reinforcements and gentle teaching techniques. Such strategies were also endorsed by [SLP Expert] who assessed [Student] independent of any District affiliation and continued to work with him in his home therapy settings. [SLP Expert] also endorsed the idea put forth by [Speech Language Pathologist] that [Student]'s behaviors may be related to his communication deficits in the sense that he may experience frustration with inability to express his needs. Thus, the speech and language therapy incorporated into the IEP services and supports could also be expected to improve the Student's behaviors separate and apart from strict ABA principles. Accordingly, while the Districts' evidence did not establish how many raspberries the Student blew on a given day or the number of times he attempted to grab at a teacher or peer, it did demonstrate that the Student's behaviors did not actually impede his abilities to access instruction or make progress.

Based on the foregoing considerations, the ALJ finds and concludes that the October 3, 2016 IEP was based on an accurate understanding of the Student's unique needs and included adequate goals, services, supports, accommodations, and modifications to allow him to make appropriate educational progress.

The extent to which [Student] actually made progress in fourth grade was reflected in the testimony of [Special Education Teacher], [Speech Language Pathologist], and [Father], as well as the results of the 2017 re-evaluation and the September, 2017 IEP document. [Father] testified that Complainants did not see improvement in the occurrences of [Student] blowing raspberries or grabbing others in the hallway between 2014 and 2017. He did not speak to whether [Student] acquired skills in the other areas of independent living, communication, or motor development during fourth grade. The 2017 re-evaluation report confirmed that the Student's behaviors continued to be problematic with defective tact (labeling), defective intraverbal, limited social skills and prompt dependency being the most significant barriers for him. Hearing Exhibit I at page 6. Those barriers identified with the VB-MAPP assessment were not the same ones identified by Complainants or the Student's teachers as most concerning and targeted by later FBAs. The re-evaluation did reinforce the notion that [Student] could be redirected in response to problematic behaviors with substantial prompting. [Special Education Teacher] noted that [Student] made progress in areas of motor imitation, visual perception, and receptive identification, and [Speech Language Pathologist] established that he had progressed in receptive language skills. The language regarding [Student] having plateaued on expressive language skills was discussed in detail above and was considered by the ALJ in light of the evidence that [Student] cannot be expected to make linear progress.

As further noted in the Findings of Fact, the District members of the IEP team documented the Student's progress on goals and objectives in the September, 2017 IEP document. There were some areas of minimal progress, some areas of satisfactory progress, and some objectives deemed "met." He improved his abilities to use the NovaChat to choose an activity, to work independently on teacher-directed activities, to sort images of items, to twist the lids off of containers and open Ziploc bags to retrieve items, to use the NovaChat to initiate communication with peers, and to follow directions. These gains were all in areas of demonstrated need for [Student]. Moreover, [Special Education Teacher] and [Speech Language Pathologist] both established that he made slow and steady progress with them, even if sometimes interrupted by plateaus or setbacks. Taking the record as a whole, the ALJ agrees that the Student made adequate progress on his IEP goals to evidence appropriate implementation of his program in fourth grade.

#### Adequacy of the Triennial Re-Evaluation

A student with a disability shall be re-evaluated in all areas of suspected disability at least every three years to ensure that the child's unique needs are known and considered in development of his IEP. 20 U.S.C. § 1414(a) and (b). The re-evaluation undertaken by the District included a vision screening, a hearing screening, an informal communicative assessment by [Speech Language Pathologist], administration of the ABLLS-R and VB-MAPP related to academic performance, administration of the ABAS-3 assess social and emotional functioning, structured observations by [Occupational Therapist] related to motor skills, and reviews of the Student's educational record. None of these assessments was found to be inappropriate. Complainants established that the District failed to assess [Student] specifically in the area of ASD or to put forth an FBA as

part of the re-evaluation. The District agreed to perform an FBA in 2018 and acceded to Complainants' request for an independent FBA conducted by [ASD Expert]. The District declined to approve and fund a neuropsychological assessment leading Complainants to retain [Pediatric Neuropsychologist].

The record demonstrated that ASD was a significant aspect of the Student's profile with material impacts on his educational needs. [Special Education Teacher] testified that the ASD diagnosis was not disputed and therefore no assessment in the area was warranted. However, identification of a disability is not the sole purpose of assessment; it also informs IEP team decisions about appropriate services and supports warranted by the disability.

There was ample evidence to suggest the difficulty, bordering on futility, of attempting some standardized assessments of [Student]. [Pediatric Neuropsychologist] was largely frustrated in her attempt to obtain his compliance with the task and ultimately relied mostly on the results of other assessments, observations, and records she reviewed. Even with that being the case, the ALJ finds and concludes that the District should have undertaken its own neuropsychological assessment of [Student] in 2017. When it did not do so, Complainants gave notice of their request for an IEE consistent with 34 C.F.R. § 300.502(b)(1): "A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency." When presented with that request, the District was obligated to comply with the request or file for due process without undue delay. *Id* at subsection (b)(2). The District did neither. Therefore, the ALJ finds and concludes that Complainants are entitled to reimbursement of \$5,500 representing the amount they spent on the neuropsychological assessment of [Student]. The ALJ finds that the re-evaluation was not deficient in any other respect and awards no further relief related to that issue.<sup>17</sup>

#### Development and Implementation of IEP for Fifth Grade

The IEP created during the September and October, 2017 meetings incorporated information about the Student's unique educational needs and present levels of progress from the re-evaluation report, which need not be discussed in further detail here. Nor do the statements regarding progress, found at pages 5 through 7 of Hearing Exhibit K and discussed regarding implementation of the fourth grade IEP.

The District forwarded a draft of an IEP document to Complainants a week prior to the meeting of the IEP team. That draft set forth a dramatic change in the way in which the District proposed to educate [Student]. Direct service minutes were reduced and indirect minutes were increased to foster a more consultative model where special service providers assisted [Special Education Teacher] and her aides in embedding the skills training throughout the instructional day.

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<sup>17</sup> Because Complainants asserted their opposition to ESY on the basis of home therapies they would provide, the ALJ finds that the failure to consider whether the Student needed ESY was not a violation of the District's duty to assess in all areas of suspected need.

Taking that aspect of the 2017 IEP as a separate matter, the ALJ finds and concludes that the testimony of [Special Education Teacher], [Speech Language Pathologist], and [Occupational Therapist] demonstrated that the shift in services to a collaborative model was effective and appropriate. [Occupational Therapist] established, with thorough data to substantiate her testimony, that [Student] was able to increase the amount of instructional time spent on bilateral coordination and independent living skills over and above what would have been possible under the previous IEP. That extra time produced substantial progress in his abilities to open multiple containers and begin to use both hands for tasks like cutting paper. Similarly, [Special Education Teacher] and [Speech Language Pathologist] established that the Student became more proficient with the NovaChat device to label items and initiate contact with peers. [Special Education Teacher] observed a decrease in behaviors over the course of the fifth grade years and continued to be able to redirect [Student] to mitigate the impact of the behaviors.

The goals and objectives in the September, 2017 IEP document continued to address areas of demonstrated need for the Student. These included functional language, independent living skills, and motor abilities. Similarly, the IEP left in place the substantial set of accommodations and modifications that responded to [Student]'s disability-related needs.

In her FBA, [ASD Expert] documented that the Student's VB-MAPP Barriers assessment showed that behaviors presented an on-going problem for [Student]. Notably, her observation of the Student occurred on the third day of his transition to middle school and the first day that [Father] was not there to support him. Taking into consideration the testimony of [Father], [Special Education Teacher], and [Middle School Special Education Teacher], it is not surprising that [ASD Expert] observed negative behaviors in a new environment with new people. The same is true for the observations of [SLP Expert] and [Occupational Therapist] related to behaviors. [Student] was known to struggle with novel tasks presented by people with whom he was unfamiliar. [Special Education Teacher] established that during the IEEs, she did not take steps to establish instructional control in support of the assessors. As discussed above, those steps were effective in eliminating the antecedents and reducing the impacts of some behaviors. Additionally, [ASD Expert] noted the variability in information related to the Student's skills in the ABLLS-R assessments where District and parent input was more at odds than in agreement—suggesting the difficulty of assessing the Student's progress and mastery.

With regard to the Student's experience at [Middle School], the record demonstrated that he was absent for much of the brief time he attended, and that these absences impaired the ability of [Middle School Special Education Teacher] and others to bond with him and continue progress on his goals. [Father] established that the first two days of sixth grade were very difficult and that the District had much work to do to help [Student] be successful in middle school. [Middle School Special Education Teacher] established that the process had started with some early signs of success before Complainants withdrew the Student from [Middle School].

Taking the evidence as a whole, and acknowledging that there was testimony both of progress and regression, the ALJ finds and concludes that the 2017 IEP did include



the necessary services and supports to permit the Student to make meaningful progress in areas of demonstrated need. For that reason, it was not shown that the IEP needed to be updated in the Spring of 2018. Similarly, the implementation of the IEP occurred in such a way that the Student received a FAPE during fifth grade.

### Procedural Issues Affecting Parent Participation on IEP Team

A hearing officer's determination of whether a student received a FAPE must be based on substantive grounds. 34 *Code of Federal Regulations* (C.F.R.) 300.513 (a)(1). In matters alleging a procedural violation, a hearing officer may find that a student did not receive a FAPE only if the procedural inadequacies – (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provisions of a FAPE to the parent's child; or (iii) caused deprivation of educational benefit. 34 C.F.R. 300.513 (a)(2)(i) – (iii).

Based on the evidence in the record and discussed in detail above, the ALJ finds and concludes that Complainants were permitted to, and actually did participate as fully fledged members of the Student's IEP team throughout 2016, 2017, and 2018. [Parents] provided input, asked questions, received answers, requested modifications, and had some of those modifications adopted by the team. There was no evidence of District team members limiting Complainants' role or dismissing their ideas without due consideration.

Complainants did encounter difficulty obtaining records they requested, particularly in the area of data on the Student's progress on goals and objectives. That matter was resolved by the CDE compliance officer resulting in the production of Hearing Exhibit No. 45. Pursuant to 34 C.F.R. § 300.501(a), Complainants were required to be able to inspect all educational records of [Student] related to his placement and the provision of FAPE. Information regarding progress on goals and objectives falls squarely within that mandate. Accordingly, the District was without justification to impair Complainants' ability to inspect and review the Student's records. Nonetheless, there was no testimony establishing the time gap between the parents' request and the District's compliance, nor any evidence of substantive harm arising from the District's action. For that reason, the ALJ finds and concludes that no further relief is warranted on this issue.

### Relief Requested by Complainants

Based on the discussion above, the ALJ finds and concludes that the District did not fail in its obligation to provide FAPE to the Student from July 10, 2016, through the time of hearing.<sup>18</sup> For that reason, there is no substantive basis to award compensatory services arising from the violations alleged in the fourth and fifth grade years. Even if such violations had been established, the evidence did not support the reimbursement requested by Complainants as the so-called Firefly program was not demonstrated to be

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<sup>18</sup> Which date is two years prior to the filing of the due process complaint.

appropriate in its scope and character in light of the Student's unique needs and the purported cost of the program--\$75,000 per year—was not established by competent testimony of a representative of Firefly. Nor did Complainants establish other out-of-pocket costs that would give rise to a right of reimbursement aside from the IEE by [Pediatric Neuropsychologist]. The evidence in the record demonstrated that the Medicaid program and Complainants' secondary insurer had covered all costs, including deductibles and co-pay obligations. Neither insurer put forth a request for reimbursement and Complainants were not shown to stand in the shoes of those parties such that they were empowered to assert rights on their behalves.

The only relief confirmed on the basis of the evidence presented was reimbursement of the amount of \$5,500 arising from the Complainants' expense in obtaining an appropriate neuropsychological assessment.

### DECISION

The ALJ concludes that the Complainants failed to meet their burden of establishing that the District did not provide FAPE to [Student] in the form of the IEP's created and implemented after July 10, 2016. No relief is warranted on those issues.

Complainants also failed to establish a procedural violation based on the allegation that the District substantively deprived them of their right to meaningful participation in the IEP processes. The District was found to have inappropriately denied the request for an independent educational evaluation in the areas of ASD and neuropsychology. Complainants are entitled to reimbursement of the expense they incurred as a result: \$5,500. Additionally, a procedural violation was established for the failure on the part of the District to produce the Student's educational records when requested. However, no relief is awarded for that violation.

This Decision is the final decision except that any party has the right to bring a civil action in an appropriate court of law, either federal or state, pursuant to 34 C.F.R. 300.516.

**DONE AND SIGNED** this 26th day of April, 2019.



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KEITH J. KIRCHUBEL  
Administrative Law Judge