STATE OF NORTH DAKOTA

DEPARTMENT OF PUBLIC INSTRUCTION

IN THE MATTER OF:	)	
	)	
[redacted], by and through [redacted] parent, [redacted]	)	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**
Petitioner,	)	
	)	
vs.	)	OAH File No. [redacted]
	)	
[redacted] Public Schools,	)	
	)	
Respondent.	)	

. . . . . .

DIGEST OF CASE HISTORY AND ISSUES

[1] On September 7, 2022, a Due Process Complaint and Request for Administrative Hearing was filed with the Department of Public Instruction (DPI) by [redacted], on behalf of [redacted]. against [redacted] Public Schools (District). The Student is not represented by legal counsel, but [redacted] is a licensed attorney in the state of North Dakota. The District is represented in this proceeding by Attorneys [redacted].

[2] On September 8, 2022, DPI requested the designation of an administrative law judge from the Office of Administrative Hearings to conduct a hearing and make findings of fact, conclusions of law, and a final order in this matter. Administrative Law Judge [redacted] (ALJ) was designated to preside in this matter.

[3] The District filed a letter response to the Due Process Complaint under 34 CFR § 300.508(E) dated September 19, 2022.

[4] This proceeding commenced on September 7, 2022, the date the Complaint was filed with DPI. The resolution meeting was held on September 19, 2022, but no resolution was reached. The parties did not attend mediation.

[5] The hearing was originally scheduled for October 17 through 20, 2022. By agreement of the parties, the hearing was continued on October 11, 2022, January 6, 2023, and February 27, 2023. A Third Notice of Continued Hearing and Prehearing Order was issued on February 27, 2023 scheduling the hearing for April 3 through 6, 2023. Following the hearing, the parties agreed to deadlines for the filing of closing briefs. In accordance with that schedule, the District filed a Post-Hearing Brief on May 5, 2023, [redacted] filed a Closing Brief on May 5, 2023, and the District filed a Reply Brief on May 15, 2023. The parties agreed to a decision deadline of June 5, 2023.

[6] A prehearing conference were held by telephone conference on September 16, 2022. Thereafter, telephone status conferences were held on October 10, 2022; November 18, 2022; December 15, 2022; and February 6, 2023.

[7] The following prehearing orders were issued: Order on Motion to Compel dated December 21, 2022; Order on Request for Extended Deadline dated January 6, 2023; Prehearing Order dated February 7, 2023; Order on Motion to Enforce Partial Settlement Agreement dated March 17, 2023; and Order on Statute of Limitations dated March 17, 2023.

[8] The hearing commenced, as scheduled, on April 3, 2023 and continued each day until April 4, 2023. The hearing on April 3, 2023 was conducted in-person at the [redacted] in [redacted], North Dakota. The hearing continued April 4 through 6 via Zoom video conference due to inclement weather.

[9] In a Prehearing Order dated February 7, 2023, the ALJ set the issues for hearing as:

1. Whether [redacted] denied [redacted] a free and appropriate public education (FAPE) by committing repeated procedural violations that inhibited parental participation, compromised [redacted] access to FAPE, and deprived [redacted] of education benefits.

2. Whether [redacted] developed IEPs for [redacted] that were reasonably calculated to enable [redacted] to make appropriate progress in light of [redacted] circumstances when it failed to evaluate [redacted] in all areas of suspected disability, administer assessments using trained and knowledgeable personnel, or individualized special education instruction.

3. Whether [redacted] implemented an appropriate IEP.

4. Whether [redacted] denied [redacted] FAPE by failing to review and revise [redacted] IEPs despite increased behavioral concerns and lack of progress on goals.

5. Whether [redacted] prevented [redacted] and [redacted] parents from filing for a due process by making specific misrepresentations as to the resolution of issues raised by [redacted] parents and withholding information from [redacted] parents in violation of the IDEA.

[10] The District filed prehearing briefs dated February 2 and March 27, 2023. [redacted] did not file a prehearing brief.

[11] [redacted] appeared for the hearing, [redacted] spouse and the minor child's [redacted] also appeared for the first day of the hearing. The agency representative for the District was [redacted]. The District was represented by attorneys [redacted] and [redacted]

[12] By request of [redacted], the hearing was open to the public. [redacted] called the following witnesses to testify: [redacted], [redacted], [redacted], [redacted], [redacted], and [redacted]. In addition to those witnesses, the District called [redacted] and [redacted].

[13] An Exhibit list documenting the documents pre-filed, offered, and admitted is attached to the Order.

[14] On March 17, 2023, an Order on Statute of Limitations was issued granting the District's Motion to Limit the Issues and the Application of the Statute of Limitations. Evidence to establish

violations occurring prior to September 6, 2020 was excluded other than limited evidence for background information.

[15] Based on the preponderance of the evidence presented at the hearing, prehearing briefs, and post-hearing briefs, the ALJ makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

[16] The Student is currently [redacted] years old and just finished third grade at [redacted] Elementary School [redacted] within the District. The Student has several diagnoses pertinent to [redacted] learning and education programming. The Student's primary diagnosis is Noonan's syndrome with multiple lentigines. Noonan's Syndrome is a "genetic condition characterized by growth and feeding difficulties, skeletal issues, cardiac disease, and neurological differences." Ex. R45, p. 3. Noonan's Syndrome can also be associated with "heightened risk for neurocognitive and behavioral conditions, including development delay, intellectual and learning disabilities, motor deficits, attention problems, as well as autistic characteristics." R.45, p. 4. The Student has also been diagnosed with apraxia of speech and dyspraxia, intellectual disability, and hypotonia. Apraxia affects the Student's speech and [redacted] ability to use verbal speech to communicate.

[17] The Student began receiving services during the 2016-17 school year. At the time, the Student was three years of age and was found eligible for infant development services through the Early Intervention Partners. The Student qualified as a student with a Non-Categorical Delay in the areas of cognitive, motor, communication, socialization, adaptive skills, and speech/language impairments. The Student has continued to received services since then. In October 2017, fine motor delays were added as an additional category. The Student's needs include the areas of cognitive function, academic performance, communication, fine motor skills, social-emotional-behavioral, adaptive functioning including attention and stamina, and speech/language. The

Student had limited verbal communication when [redacted] started kindergarten. In October 2018, the Student received an iPad with the communication software Prologuo2Go (P2G) as an augmentative and alternative communication (AAC) device to use both at school and home. [redacted] edits the P2G software.

[18] Over the years, the Student has taken the following assessments to help identify [redacted] needs:

- Fall 2016 – early intervention evaluation and occupational therapy test;
- 2016 – special education evaluation;
- 2017 – reevaluation and a functional behavior assessment (FBA), and the Independent Plan and Social Behavior and Social Play sections of the Verbal Behavior Milestones Assessment and Placement Program (VB-MAPP);
- [redacted] December 2017 – neuropsychological evaluation, including an IQ assessment, by [redacted]
- Fall 2018 – VB-MAPP on manding (asking or protesting), tacting (naming, expressive labeling), listener skills, visual perceptual skills, matching-to sample, independent play skills, social skills, and social play, motor imitation, echoic (vocal imitation), spontaneous vocal output, listener responding feature, function, and class, intraverbal, group, linguistics, reading, writing and math;
- June 2019 – grasping and visual-motor integration evaluation;
- July 2019 –AAC evaluation by [redacted];
- August 2019 – neuropsychological evaluation by [redacted]. [redacted] concurred with the P2G software and the District's programming for communication. [redacted] was later invited to participate in IEP meetings to discuss AAC programming for the Student;
- November 2019 – second FBA by [redacted], District school psychologist; and
- Fall 2020 – IWAR reevaluation in the areas of "executive function strengths and needs, early academic skills, language skills, social and regulation skills, adaptive strengths and assistive technology." Ex. R54, p. 1. Other areas reviewed were "medical diagnoses, visual fine motor skills, current work samples, teacher observations, and input from teachers, special education staff, and parents . . . ." *Id.*

[19] Due to the statute of limitations, only violations occurring on or after September 6, 2020 are actionable. In an Order dated March 17, 2023, the ALJ found the exceptions to the statute of limitations did not apply in this case.

2020-2021 School Year – First Grade:

[20] The Student attended first grade at [redacted] within the District. The School year started with hybrid learning due to the COVID-19 pandemic. Half the class came to school on Monday and Tuesdays, Wednesday was virtual day, and the other half came to school on Thursday and Fridays. This lasted for approximately half of the school year.

[21] On May 14, 2020, the District issued a Prior Written Notice of Special Education Action (PRN) that the IEP team would meet starting in August 2020 "to discuss [the Student's] profile and assessment plan, as well as a re-entry plan for first grade. Topics to discuss were [the Student's] FBA, Positive Behavior Support Plan, and a Crisis Plan." Ex. R41, p. 1. On July 24, 2020, the District issued a Notice of Meeting to [redacted]. The meeting was scheduled for August 5, 2020 and the purpose of the meeting was the three-year student reevaluation to review continued need for special education services and to review or revise the Positive Behavior Support Plan.

[22] The IEP team developed a Student Profile to identify the areas for assessment. The profile identified the Student's characteristic/influences for cognitive functioning, communicative status – receptive and expressive language, physical characteristics, emotional/social development, adaptive characteristics, and ecological factors. The IEP team had in depth and detailed conversations discussing the Student's needs and plan for evaluation. [redacted] consented to the final proposal.

[23] On August 28, 2020, the District issued a PWN proposing assessments in the areas of executive function, academics, language skills, visual fine motor, social/regulation skills, adaptive skills, and impact of medical diagnoses on learning. The PWN notes that only the attention and memory portion of the Leiter International Performance Scale 3 would be performed. The PWN also noted [redacted] request for an evaluation of the Student's trauma and anxiety-related

needs. The District declined the requested evaluation because the District had sufficient information from the FBAs and previous and planned assessments to program for the Student's education needs. The PWN notes that if the parents disagree with the planned assessments, they could request an independent education evaluation (IEE). On September 1, 2020, [redacted] signed a consent for the proposed evaluations.

[24] The District completed an Integrated Written Assessment Report (IWAR) dated October 7, 2020. The IWAR was not completed on October 7th but some date after that. The reevaluation was comprehensive and addressed adaptive functioning including attention; early academic skills; social-emotional-behavioral skills; speech/language skills and assistive technology; IQ with testing specific for non-verbal learners; communication, writing and reading; review of medical diagnoses, visual fine motor skills, current work samples, and teacher observations; information from outside providers; and input from teachers, special education staff, and parents. The reevaluation identified the Student's strength as use of technology, following routines, use of visual supports, and the capacity to learn new concepts at a slower rate with the right supports.

[25] The IWAR concluded that based on current evaluation and observation, the Student displayed a non-categorical delay disability and needed special education services due to significant development delay in the areas of cognition, fine motor, communication, preacademic, socialization, and adaptive skills. The IWAR also concluded that the Student was significantly below average according to "Criteria A: performance at/or below 1.5 Standard Deviations of the mean in any two areas of development." Ex. R51, p. 17. The IWAR concluded that the Student's language skills have a significant impact on [redacted] ability to participate in educational/developmentally appropriate settings and that [redacted] qualifies for language services. The IWAR recommended continued services in the areas of reading, writing, and math; incorporating

a variety of modalities and teaching strategies to combine low preference and high preference tasks; scaffolded instruction focusing on the Student's ability to engage in tasks and building stamina to remain engaged; continued speech/language therapy focused on receptive language skills; using the Student's best learning style to increase engagement, attention and stamina; and to consider using distracting techniques and other trauma informed practices in the school.

[26] According to the District, [redacted] was not concerned with observing the timeline for the IWAR or IEP review. After several meetings, the District felt a point was reach where they had comprehensively discussed all issues with [redacted]. The District wanted [redacted] to be heard but at the same time the District wanted to complete the IWAR so the IEP could be completed. Thus, the District asked [redacted] to document [redacted] disagreements with the draft. [redacted] provided a statement of disagreement dated November 24, 2020 which was incorporated into the IWAR. [redacted] disagreed with how several of the assessments were performed, how the assessments were scored, and how the assessment results were interpreted and applied. [redacted] also expressed dissatisfaction in [redacted] ability to participate in the development of the IWAR and what [redacted] perceived as a lack of response from the District to [redacted] inquiries regarding the IWAR.

[27] While the IEP team was completing the reevaluation, the team was also updating and amending the IEP. Approximately seven to eight team meetings were held to review and amend the Student's IEP and complete the IWAR, which is significantly more meetings than normal for an IEP review. District staff had conversations outside of the team meetings about the development of the IWAR and IEP which were later shared with [redacted] at meetings. No unilateral decisions were made about the resources for the Student outside of team meetings.

[28] The IEP lists a meeting date of October 21, 2020 although the IEP was discussed over the course of several meetings. The IEP identifies special factors/needs as communication needs, assistive technology, and positive behavioral interventions, supports, and strategies. The IEP identified nine goals in the areas of reading, mathematics, writing, health-enhancing behaviors, language, speaking and listening, and physical education. Many of the goals specified several objectives. Progress reports would be provided three times a year and sent home with report cards. The IEP contained 21 adaptations and educational services including use of the iPad as an AAC, one to one (1:1) para support for the entire school day, and a positive behavioral support plan. The least restrictive environment was designated as setting C – inside regular class for less than 40 percent of the day. The service grid provided for individualized instruction in reading of 300 minutes per week, individualized instruction in written language 200 minutes per week, individualized instruction in math 300 minutes per week, assistive technology 30 minutes of indirect service per month, speech language 300 minutes per month, instructional aide 200 minutes per week, occupational therapy 30 minutes per a six day rotation, social skills 100 minutes per week, physical education consult 30 minutes of indirect service per month, occupational therapy/art consult 10 minutes of indirect service per month, and transportation. The IEP called for full school days and determined an extended school year was needed.

[29] According to the assessments, the Student did not qualify for special instruction in physical education (PE). The IEP team decided that small group PE and adaptive PE was appropriate. Small group PE was offered as an accommodation. Adaptive PE used grade level standards but modified tasks. Adaptive PE is not always offered with grade level peers.

[30] While the IEP team did not adopt all the requests or suggestions from [redacted] had a lot of input during the IEP review process. Some of the IEP goals were modified at the

request of [redacted]. Other goals were modified to allow the District more flexibility in delivering services to the Student especially in the event one of [redacted] providers was absent from school. The goals were also modified to address team concerns that while the Student had made progress, the progress was not as good as what they thought it could be. The District believed the Student was frustrated with the level of academic rigor which was thought to contribute to some of the lack of progress. The team also tried to focus the goals on foundational strategies and goals. The goals were not modified to create the appearance that progress was being made.

[31] The only description of the medical trauma alleged by [redacted] is found under medical background and diagnoses, the IEP addresses psychiatric which states:

> [redacted], DO (Child and Adolescent Psychiatry Fellow): Unspecified anxiety disorder (could be [generalized anxiety disorder], social phobia), possible [post-traumatic stress disorder] due to medical trauma. [The Student] has a history of early involvement with the medical system due to early work-up and eventual diagnosis of Noonan Syndrome, as well as treatment for the various sequela of this syndrome. It would appear that these experiences were quite impactful and distressing for [the Student], as [redacted] has become quite dysregulated at visits with health care providers. With limited ability to communicate [redacted] thoughts and feelings it is difficult to say what is truly happening, but certainly within reason that being in a clinical setting could trigger anxiety about past distressful experiences. It is likewise difficult to say what specifically is driving the behaviors seen at school, could be general vs. social anxiety or teachers/other authority figures could be similarly triggering memories of distressful past medical experiences. Fortunately, [the Student] has very strong social support from [redacted] parents who have shown to be quite dedicated to [redacted] care and engaged in a number of services both in home and at school. I strongly encourage continued engagement with these services, while also recognizing the limitations in what skills [the Student] may ultimately be able to develop. As such, it is reasonable to provide an as needed medication which can be used in situations which are known to provoke anxiety such as before a doctor visit. Discussed options for this and parents were most comfortable with PRN hydroxyzine which will be used at a low dose which can be increase if found to be ineffective.

Ex. R55, p. 7. The District and the IEP team never doubted or questioned the Student's trauma history.

[32] The Student's IEP was provided to any individual who needed to see it such as the paraprofessionals working with the Student. The teachers and paraprofessionals who worked with the Student were trained to use [redacted] iPad.

[33] At the request of [redacted], a Safety Plan was developed on December 2, 2020 for when the Student elopes.

[34] A Positive Behavior Support Plan was developed on December 15, 2020. The plan was developed using the results of the FBA and the goal was to find the function of the Student's behavior and target that behavior. According to the District, [redacted] was not supportive of developing the plan, but [redacted] provided input when it was developed.

[35] Throughout the school year, the Student's teachers and paraprofessionals routinely tracked data with a tracking document that traveled with the Student throughout the day. The data was reviewed throughout the day. The data was also reviewed and discussed at several of the IEP meetings. The data was used to determine whether programming was effective and appropriate. [redacted] was not satisfied with how data was collected and tracked. [redacted] wanted data graphed or visually represented. The IEP team tried to collaborate and show data in a way that was easier for [redacted] to understand, however the way [redacted] wanted data collected and tracked was not useful for the providers.

[36] The Student spent, to the maximum extent appropriate, time in the general education classroom with [redacted] peers. The Student's general education teacher, [redacted], provided a very structured classroom and [redacted] had a good working relationship with the special education department and the Student's case manager. [redacted] room accommodations included use of visual board, including on [redacted] iPad, and modeling of activities for the Student. The Student had an excellent working relationship with [redacted], [redacted] 1:1 assigned paraprofessional. [redacted]

worked with both the general education and special education teachers to ensure [redacted] could model on the Student's iPad. The iPad was loaded with photographs of [redacted] peers and other things in the school to assist with the Students ability to communicate.

[37] The Student's special education teacher was [redacted]. [redacted] had a good working relationship with the Student. [redacted] created a workspace in [redacted] room specially for the Student to help increase [redacted] focus and stamina. The Student's attention was a challenge and efforts were made to create an environment to support [redacted] focus. Many services were provided in a 1:1 setting to provide the Student the level of engagement [redacted] needed and to eliminate distractions.

[38] In addition to [redacted] iPad, assistive communication tools included adaptive books, communication board, flip books with core words, print outs, and picture cards. Many of the AAC tools were created by [redacted], the speech language pathologist at [redacted]. The focus of school speech services was use of the iPad as the District was aware that the Student was receiving speech services with an outside provider and the focus of those services was verbalization. All the paraprofessionals that worked with the Student were trained in using [redacted] iPad.

[39] During this school year, the Student used the Strategies for Teaching based on Autism Research (STAR) program which is a curriculum which incorporates certain applied behavior analysis (ABA) methods such as discrete trial training. Decisions regarding curriculum do not require parental consent. According to the District, [redacted] disagreed with applying ABA principles with the Student as the Student has never been diagnosed with autism. The District believes that while the Student does not have autism, the type of strategies developed for autism curriculum worked well for the Student and the STAR program is not limited to only students with autism.

[40] During the middle of the school year, [redacted], District Special Education Director and [redacted], [redacted] Principal, met with [redacted] to work through some of the issues and [redacted] questions. [redacted] was not in favor of these meetings and felt all meetings should occur with the full IEP team. According to [redacted], the purpose of the smaller meetings was to work through [redacted] concerns and provide some respite to the other team members. [redacted] testified that there was staff fatigue and frustration over the lengthy reevaluation and IEP review process and addressing [redacted] demands. Specifically, [redacted] mentioned the number of emails from [redacted], level of communication [redacted] wanted and timeliness of responses to [redacted]. [redacted] also testified that there were many lengthy meetings which required the IEP team members to get coverage for other students and to make up provider minutes with students. The providers expressed concerns about meeting their workload with all of [redacted] demands and that [redacted] made them feel unqualified. [redacted] stated that [redacted] had many conversations with [redacted] about [redacted] concerns and it was difficult to understand what the concerns were or to narrow them down.

[41] Progress reports were issued on March 1 and May 24, 2021. Progress on each of the IEP goals was documented as follows:

	March 1, 2021	**May 24, 2021**
Goal #1 – reading	Some progress	some progress
Goal #2 – math	very little progress	very little progress
Goal #3 – writing	very little progress	very little progress
Goal #4 – health behaviors	some progress	some progress
Goal #5 – receptive language	some progress	[no coding]
Goal #6 – expressive language	some progress	some progress
Goal #7 – language	no progress	very little progress
Goal #8 – speaking and listening	some progress	some progress

[42] The Student's report card for the 2020-2021 school year showed mainly 2s and 3s. According to the grading scale, a 2 means approaching and a 3 means proficient. Many of the

grades were based on a modified curriculum as indicated by an asterisk. The Student's grades were mainly consistent throughout the year meaning there was no increase or decrease in scores.

[43] The Student's elopement decreased over the school year and [redacted] was more engaged, increased [redacted] stamina for activities, and at times was able to independently transition between activities. The Student's behaviors also decreased which was attributed to [redacted] increased ability to communicate. [redacted] observed the Student progress socially. The Student learned to approach [redacted] and greet [redacted] or share a photograph from [redacted] iPad with [redacted]. According to [redacted], the Student also increased [redacted] ability to follow structured routines and by the end of the year was able to complete common routine items either unprompted or with one visual cue. [redacted] also observed the Student progress with [redacted] ability to engage with [redacted] peers in the classroom. Progress was noticed in the Student's ability to recognize and manage [redacted] emotions and independently engage in calming strategies. At times, especially towards the beginning of the year, the Student had a low tolerance for using the iPad and would turn it off or throw it across the room. [redacted] observed an increase in the Student's ability and tolerance to communicate using the iPad.

[44] The IEP team met on March 12, 2021 and April 22, 2021 to discuss the March 1, 2021 progress report. Following the April 22, 2021 meeting, the District issued a PWN with its proposal to change the wording of Goals five and six to "allow for clearer measurement of [the Student's] knowledge this [sic] areas." Ex. R75, p. 1. The PWN also indicates the IEP discussed extended school year (ESY) plan. The District proposed an ESY plan which included four goals in pre-reading skills, math, writing process, and vocabulary. The ESY plan proposed 550 minutes per week of academic services, 50 minutes per week of speech/language services, and 20 minutes per week of occupational therapy. [redacted] declined ESY services during the summer of 2021.

According to [redacted] written response, [redacted] felt it was in the best interest of their family to take a break from school.

[45] A meeting was held on May 17, 2021 regarding the proposal to modify goals five and six. The meeting notes indicate that [redacted] expressed disagreement with how data was collected or reported in that [redacted] was unable to track the Student's progress. [redacted] also requested assessments for the effects of trauma on educational environment, a full AAC assessment, and auditory-visual-sensory processing assessments. [redacted] wanted the team to revisit goals in the fall.

2021-2022 School Year – Second Grade:

[46] Prior to the start of the 2021-2022 school year, the Student's family moved to [redacted] requested that the Student continue attending [redacted], but the District was unable to provide transportation. The decision was made that the Student would attend second grade at [redacted]

[47] [redacted] met with the Student's new special education teacher, [redacted] prior to the start of the school year to discuss the Student's programming, schedule, work station, and paraprofessional needs. [redacted] was at [redacted] for the first week of school to assist in the Student's transition. Some of the Student's other education providers such as [redacted], school psychologist, and [redacted], assistive technology consultant for the District, served both schools so the Student continued to work with them at [redacted] passed [redacted] materials concerning the Student on to [redacted], District Speech Language Pathologist, who was taking over the Student's speech language services. [redacted] also met with [redacted] to go through the Student's iPad and P2Q.

[48] Prior to the start of school, [redacted] reviewed the Student's IWAR, FBA, behavior plan, and IEP. The goal at [redacted] was to mimic the programming at [redacted]. The Student's schedule would be different, but [redacted] environment was set up similarly.

[49] Initially, elopements and self-injurious behaviors increased during the first few weeks of school as the Student adjusted. As the Student adjusted to [redacted], elopement and self-injurious behaviors decreased. The providers consistently monitored the behavioral data to see if a new FBA was warranted.

[50] In September 2021, the District started the annual review of the Student's IEP. The IEP was reviewed and modified over the course of two team meetings. The IEP dated October 7, 2021 contains six goals in the areas of reading, mathematics, writing, interpersonal communication skills, and comprehension and collaboration. The least restrictive environment remained setting C – inside regular class for less than 40 percent of the day. The service grid provided the following:

- 100 minutes per week for reading small group;
- 200 minutes per week of one on one (hereinafter referenced as "1:1") in reading;
- 100 minutes per week for math small group;
- 200 minutes per week of 1:1 in math;
- 100 minutes per week of written language small group;
- 200 minutes per week of 1:1 in written language;
- 40 minutes per week in 1:1 in social skills with the school psychologist;
- 100 minutes per week 1:1 social skills with either special education teacher or school psychologist;
- 320 minutes per month for language with the speech-language pathologist;
- 80 minutes per month for direct language consultation with speech-language pathologist; and
- 100 minutes per week for 1:1 functional skills.

There were also minutes for related services of physical education consultation, occupational therapy, transportation, assistive technology consolation, and 2,000 minutes per week for 1:1 aide. The IEP also contained 20 adaptations for services.

[51] During development of the IEP, the team discussed that the Student's academic performance varied from day to day although no conclusions were reached about the cause. The

previous goals focused on letters and numbers. While that continued in the beginning of second grade, little progress was made so a decision was made to take a different approach to goals and targets. [redacted], District Special Education Coordinator, reviewed the data and decided minor curriculum changes should be made. They tried to break down sets to get more consistent responses. They tried to make academic activities more engaging. In December 2021, the Edmark curriculum was added. This change was not discussed with [redacted] as parental consent is not required for curriculum decisions. The Edmark curriculum targets sight words and employs different methods than the STAR curriculum such as increased repetition. The STAR curriculum continued to be used along with other activities.

[52] During the year, [redacted] discussed concerns regarding the Student with the other team members but not always with [redacted] determined some of the concerns did not rise to the level of notifying a parent. [redacted] addressed a few behavioral concerns with [redacted] throughout the year when [redacted] deemed it necessary.

[53] The Student's report card for the 2021-2022 school year showed mainly 2s and 3s but also had 1s for third trimester in phonics (no curriculum modification) and number and operations base ten (no curriculum modification), and trimester one of music – all categories. According to the grading scale, a 1 means novice, 2 means approaching, and a 3 means proficient. Many of the grades were based on a modified curriculum as indicated by an asterisk. The Student's grades were mainly consistent throughout the year meaning there was no increase or decrease in scores.

[54] [redacted] observed that not all progress can be quantified by data. [redacted] observed that over the course of the year, the Student increased [redacted] ability to communicate [redacted] wants and needs, increased spontaneous use of the iPad, increased [redacted] knowledge and ability to use the iPad, increased both [redacted] use of coping strategies and ability to "be a student," increased [redacted] participation

in specials such as art and PE, and increased [redacted] social interaction with [redacted] peers. [redacted] also opined that it would be difficult to say whether the Student exhibits a trauma response but regardless of the root cause, the response is treated the same and that programming is based on the needs of the Student.

[55] [redacted] testified that the Student made progress using [redacted] iPad and the P2Q. [redacted] started working with the Student during the 2017-2018 school year and has observed [redacted] on numerous occasions over the years. [redacted] stated that [redacted] can now navigate seven layers deep on the P2Q and can ask questions and make comments with [redacted] device. [redacted] stated that the Student knows it is [redacted] device and takes ownership of it. [redacted] testified that [redacted] has observed growth in [redacted] behavior and maturity, [redacted] stamina has increased for activities such as PE, and [redacted] has seen social progress with interacting with [redacted] peers and with such activities as walking in the hall.

[56] [redacted] testified that [redacted] initially followed the speech language plan developed by [redacted] under the prior IEP. By the end of second grade, the Student had met most, if not all, of [redacted] speech language goals that were set for [redacted] at [redacted]. [redacted] observed that the Student's ability to use the iPad increased as well has [redacted] ability to stay engaged and focused. [redacted] stated that at the beginning of the school year, the Student required lots of breaks, prompting, and encouragement. By the end of the year, [redacted] stated the Student could work an entire session. The Student now displays a higher desire to verbalize, and [redacted] is clearer with some words. [redacted] opined that one of the reasons for a decrease in the Student's behaviors is [redacted] increased ability to communicate with others. [redacted] also attributed the Student's progress to staff better understanding the Student, that [redacted] needs are being met and honored, and that the Student is more

comfortable in the school and being a student. [redacted] also observed an increase in the Student's tolerance of the general education classroom with things such as noise and commotion.

[57] [redacted], District Psychologist, testified that the Student made improvement in self-regulation which has led to increases in the amount of time [redacted] can engage in an activity. [redacted] quantified that increase from a few minutes at the beginning of the year to up to 20 minutes at the end of the year. [redacted] opined that the Student progressed appropriately for [redacted] strengths and abilities. [redacted] opined that the increase is attributed to work with the parents, new medications, general maturity, success with teaching opportunities, trust and feeling safe in the school setting, and introduction of novel teaching methods. [redacted] opined that the Student's current behaviors seem to indicate [redacted] feels safe at school and does not pace, look around and that [redacted] compassionate, kind, and displays comfortable behaviors. According to [redacted], the FBA and positive behavioral plan were written knowing the Student's trauma background. [redacted] has observed staff responding to the Student in a trauma informed manner and that [redacted] engages universal trauma response strategies, techniques, and language.

[58] On April 8, 2022, the District issued a PWN documenting that ESY services for the 2022 summer were declined.

[59] In April 2022, the District began the process of reviewing the IEP. [redacted] disagreed with holding the IEP meeting in May rather than in the fall after summer break. [redacted] also expressed concerns there was not enough data yet to evaluate the IEP. The team decided they had enough data and proceeded with the IEP review. The PWN for the IEP meeting notes:

> . . . . the May progress reporting period on 4 of the 6 goals that some or minimal progress has been made. The team has tried multiple strategies to address these goals, breaking down the target into small increments, direct instruction, discrete trial, addition of multi-sensory learning opportunities, varying levels of prompting,

> modeling, and video modeling, school team is recommending new goals that can support progress can be made in light of [redacted] circumstances.

Ex. R230a, pp. 1-2. The PWN also notes "socially and behaviorally, [the Student] has made tremendous gains positively interacting with peers and adults. [The Student] comes to school happy and works hard while at school." Ex. R102, p. 2.

[60] All six goals in the IEP were modified. The least restrictive setting remained setting C and while the service hours remained consistent in the allocation to certain subjects, all service was deemed 1:1 and the small group time was removed.

[61] All District staff received training on trauma and mental health. The training and practice addressed what trauma might look like in children and how to handle it. Providers might not always know when there is a trauma issue.

CONCLUSIONS OF LAW

[62] [redacted] filed the Due Process Complaint and has the burden of proof to show by the preponderance of the evidence that [redacted] was denied a Free Appropriate Public Education (FAPE).

[63] The Individuals with Disabilities Education Act (IDEA), and its regulations ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and to ensure that the rights of the children with disabilities and their parents are protected. 20 U.S.C. § 1400(d)(1). A FAPE means special education and related serves that are available to an eligible child at no charge and conform to the child's IEP. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. Special education is instruction specially designed to meet the unique needs of a child with a disability. 20 U.S.C. § 1401(29); 34 C.F.R. § 300.39.

[64] Since the Student entered the [redacted] district, [redacted] has been identified as a student with disabilities and received special education services. The Student has a complex disability profile which required special education services for both behavior and academics.

[65] [redacted] did not testify at the hearing or provide other testimony supporting [redacted] arguments that certain programming is needed or that the Student's needs are not being met. While some of [redacted] thoughts and positions are contained in the exhibits submitted, that information must be weighed against the fact that [redacted] did not testify and was not subject to cross examination.

[66] [redacted] Closing Brief is 34 pages long. The first 15 pages contain a recital of the IDEA requirements regarding review of evaluation data, assessment, IWAR, development of the IEP, consideration of special factors, required IEP components, progress reports, and IEP reviewing and revising. The next section of the brief labeled Statement of Fact and Argument contains [redacted] explanation of the Student's testing, development of the IWAR and IEP, reporting, and communications with District representation. Finally, [redacted] requested relief is 3,850 hours of compensatory education with little explanation of how that number was calculated. Each paragraph of [redacted] Statement of Fact and Argument alleges some form of violation, yet [redacted] has not linked the alleged violation to the IDEA provision [redacted] believes was violated. Thus, it is extremely difficult to link [redacted] alleged violations with the statement of issue.

1. Whether [redacted] denied the Student a FAPE by committing repeated procedural violations that inhibited parental participation, compromised the Student's access to FAPE, and deprived [redacted] of education benefits.

[67] [redacted] alleges [redacted] was not provided sufficient notice for certain meetings, that meetings were too short, that [redacted] was not given adequate time to review documents prior to the

meetings, that [redacted] was not given adequate responses to [redacted] concerns, and that the IEP team did not involve [redacted] in all discussion regarding the Student.

[68] To substantively provide a FAPE, the school district must comply with the procedural requirements under the IDEA and the IEP must be reasonably calculated to enable the child to receive "some educational benefit." *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176; *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1027 (8th Cir. 2003). The program must be reasonably calculated to enable the student to make progress considering the student's unique circumstances. *Endrew F. v. Douglas Cty. Sch. Dist. RE-1,* 137 S. Ct. 988, 1001 (2017). The IDEA "does not promise any particular education outcome." *Id.* at 998-99. A substantive FAPE is measured at the time the IEP team makes their decision and not with the benefit of hindsight. *See*, e.g., *R.E. v. N.Y.C. Dep't of Educ.*, 694 F.3d 167 (2d Cir. 2012); *Lessard v. Wilton Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18, 29 (1st Cir. 2008); *Adams v. State of Oregon.*, 195 F.3d 1141, 1149 (9th Cir. 1999); *Fuhrmann v. E. Hanover Bd. of Educ.*, 993 F.2d 1031, 1041 (3d Cir. 1993). The Eighth Circuit has said a school district need not maximize a "student's potential or provide the best possible education at public expense, nor does it require specific results." *Minnetonka Pub. Sch., Indep. Sch. Dist. No. 276 v. M.L.K, ex rel. S.K.,* 42 F.4th 847, 853 (8th Cir. 2022).

[69] A hearing officer may determine that FAPE was denied if the procedural violations:

> (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 provision of a FAPE to the parent's child; or
> (iii) Caused a deprivation of educational benefit.

34 C.F.R. § 300.513(a)(2).

[70] Regarding parent participation, the IDEA provides:

> *Public agency responsibility - general.* Each public agency must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate, including -
>
> (1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and
>
> (2) Scheduling the meeting at a mutually agreed on time and place.

34 C.F.R. § 300-322(a).

[71] The greater weight of the evidence does not establish that the District committed repeated procedural violation or that the Student was denied FAPE. [redacted] did not testify at the hearing so [redacted] perspective on the procedural violations must be derived from the exhibits and [redacted] closing arguments. While [redacted] has named several alleged procedural violations, it's difficult to fully understand how [redacted] believes the Student was denied FAPE by the alleged violations.

[72] It appears that [redacted] was ultimately unhappy that the District did not fully adopt [redacted] recommendations and suggestions, something the District is not required to do. [redacted] also alleges [redacted] did not have sufficient time to review certain documents before meetings. The drafts of several of the documents are lengthy but the greater weight of the evidence does not establish that [redacted] was denied appropriate time to comment or review documents before or after meetings. While perhaps [redacted] desired more opportunity to participate, the evidence does not show that any of [redacted] allegations significantly impeded [redacted] opportunity to participate in the decision-making process.

[73] Additionally, [redacted] alleges [redacted] was not always given a 10-day notice for hearings. [redacted] does not establish that a 10-day meeting notice is an IDEA requirement. Even if [redacted] did, [redacted] attended all meetings and has failed to explain how [redacted] participation would have been different had [redacted] more notice of the meeting.

[74] The evidence in this case demonstrates that [redacted] has been very involved with the Student's services, evaluations, and drafting of the IEPs. The amount of information requested from the District and interaction with the District was substantial. According to the testimony received, the District did its best to involve [redacted], incorporate [redacted] feedback, answer [redacted] questions, and be responsive to [redacted] concerns. The greater weight of the evidence does not demonstrate that any alleged procedural violation impeded the Student's right to FAPE or deprived [redacted] of educational benefit.

2. Whether the District developed IEPs for the Student that were reasonably calculated to enable the Student to make appropriate progress in light of [redacted] circumstances when it failed to evaluate the Student in all areas of suspected disability, administer assessments using trained and knowledgeable personnel, or individualized special education instruction.

[75] To be eligible for special education, a student must be a "child with a disability." The IDEA defined a child with a disability as:

> a child evaluated in accordance with §§ 300.304 through 300.311 as having an intellectual disability, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in this part as "emotional disturbance"), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services.

34 CFR 300.8(a)(1). IDEA requires that all children with disabilities are identified, located, and evaluated. 34 CFR 300.111(a)(1)(i). A child need not be classified by his or her disability as long as special education and related services are met. 20 U.S.C. § 1412(a)(3)(B). "The IDEA concerns itself not with labels, but with whether a student is receiving a free and appropriate education. A disabled child's individual education plan must be tailored to the unique needs of that particular child. . . . The IDEA charges the school with developing an appropriate education, not with coming

up with a proper label with which to describe [a student's] multiple disabilities." *Heather S. v. State of Wis.*, 125 F.3d 1045, 1055 (7th Cir. 1997).

[76] [redacted] makes broad allegations that the District failed to perform appropriate assessments. [redacted] also challenges the validity of many of the assessments and the use of the information.

[77] The 2020 IWAR completed by the District was extensive and addressed the following areas: adaptive functioning including attention, early academic skills, social-emotional-behavioral skills, speech/language skills, and assistive technology; IQ with testing specific for non-verbal learners; speech and language; communication, writing and reading; review of medical diagnoses, visual fine motor skills, current work samples, fine motor, cognitive functioning, and adaptive physical education.

[78] In response to the IWAR, [redacted] provided a multiple page response that details some corrections of information, asked questions about some of the assessments, and shares concerns regarding some of the assessments. Referencing an exhibit, it appears [redacted] believes the Student should have been assessed for the effect of trauma on the educational environment, full AAC assessment, and auditory-visual-sensory processing. It is not clear what areas or skills were not addressed through those evaluations and what importance that additional evaluation would have added to development of the IEP or educational programming.

[79] [redacted] requested an assessment of the effect of trauma on the Student's education which was denied by the District. [redacted] did not request an independent education evaluation even though [redacted] was advised [redacted] had a right to do so.

[80] Even though the District denied the trauma assessment, the evidence established that the District did not question the Student's trauma history or that it could be playing a factor in [redacted]

behavior or responses at school. The District formulated a safety plan and positive behavior plan with the understanding that trauma may be playing a role in [redacted] actions. According to the District, they do not always know when trauma is at play with a student and have generally adopted trauma informed practices. The District programs to target the behavior regardless of the source.

[81] [redacted] has not established that the District's assessments were incomplete or lacking. [redacted] has also not established that a trauma assessment was necessary or warranted. The evidence showed that over the course of first grade at [redacted] and second grate at [redacted] the Student's behaviors decreased which was attributed to [redacted] increased ability to communicate and comfort with the school, providers, and peers.

3. Whether the District implemented an appropriate IEP.

4. Whether the District denied the Student FAPE by failing to review and revise the Student's IEPs despite increased behavioral concerns and lack of progress on goals.

[82] These issues will be considered together as it is not clear which allegations are specific to each issue. [redacted] allegations regarding both issues are not clear. [redacted] seems to allege that the District did not have sufficient data to support the goals selected, there was no "meaningful interpretation" of the data and assessments, and that the team repeated information from one IEP to the next.

[83] Under the IDEA, an IEP team:

> (i) Reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and
> (ii) Revises the IEP, as appropriate, to address -
> (A) Any lack of expected progress toward the annual goals described in § 300.320(a)(2), and in the general education curriculum, if appropriate;
> (B) The results of any reevaluation conducted under § 300.303;
> (C) Information about the child provided to, or by, the parents, as described under § 300.305(a)(2);
> (D) The child's anticipated needs; or
> (E) Other matters.

34 C.F.R. § 300.324(b)(1).

[84] The law does not require a school district to follow a plan perfectly.

> [T]o prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. This approach affords local agencies some flexibility in implementing IEP's, but it still holds those agencies accountable for material failures and for providing the disabled child a meaningful educational benefit.

Denny v. Bertha-Hewit Pub. Sch., No. CV 16-1954 (DWF/LIB), 2017 WL 4355968, at *28 (D. Minn. Sept. 29, 2017).

[85] The evidence establishes the Student had a complex learning profile and that the District created an IEP after a comprehensive evaluation process and input from many professionals including teachers, speech language pathologists, school psychologist, assistive technology coordinator, outside providers, and the parent. The District acknowledges the progress made during the first and second grade were not what was hoped for and reassessed strategies. The evidence also establishes that while the Student's academic progress was little, or slow, [redacted] made progress in other areas which seems to support more rigorous focus on academic areas such as reading and math. For instance, the testimony was consistent that the Student has made great progress in use of AAC which has helped [redacted] sustain focus and attention, [redacted] has progressed in use of coping strategies, and has made gains with social skills.

[86] After the Student transferred to [redacted] significant changes to the IEP were made to address the Student's lack of progress. The District tried multiple strategies, broke down goals, incorporated new curriculum, and used other alternative teaching strategies.

[87] Regarding behavior, the evidence establishes that behavior was tracked and monitored daily. The District offered several witnesses that spoke to their observations regarding behavior

and how behaviors and elopement decreased as communication and other social skills increased and a positive, structured educational environment was created. Behavior was also addressed through a behavioral plan which [redacted] was not in favor of.

[88] [redacted] also takes issue with the District's implementation of both the STAR and Edmark curriculum without [redacted] input or consent. Under the IDEA, "the screening of a student by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation shall not be considered to be an evaluation for eligibility for special education and related services." 34 CFR 300.302[redacted] provided no evidence that the STAR and Edmark programs were used for a purpose other than implementing the curriculum.

[89] The evidence establishes the District implement an appropriate IEP and evidence does not establish the Student was denied FAPE due to a failure to review and revise the IEPs despite increased behavioral concerns and lack of progress on goals. Regarding assessment of the IEPs, the review cannot be hindsight. [redacted] has not established that at the time the IEPs were created, the IEP was not reasonably calculated to enable the Student to make progress when considering [redacted] unique needs and circumstances.

[90] While the IEP must be individualized and appropriate for the student, the school district is not required to satisfy each parental request. *Blackmon ex rel. Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 658 (8th Cir. 1999). "The purpose of the IDEA is "more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.'" [citation omitted]. *Id.*

5. Whether the District prevented the Student and [redacted] parents from filing for a due process by making specific misrepresentations as to the resolution of issues raised by [redacted] parents and withholding information from [redacted] parents in violation of the IDEA.

[91] [redacted] has not shown by a preponderance of the evidence that the District made any specific misrepresentations or withheld information which prevented [redacted] from filing due process.

[92] There is no question [redacted] had a contentious relationship with the District. The voluminous exhibits offered in this case demonstrate the complexity of the Student's learning profile and the amount of coordination between the parent and IEP team members in evaluation, drafting the IEP, and programming. The relationship was not always positive and clearly frustration dictated some poor responses.

[93] [redacted] alleges many discussions occurred without [redacted] notice or input. The District does not deny, and the evidence shows, that providers often consulted each other prior to meetings, reviewed draft documents, and requested and reviewed data. [redacted] seems to allege decisions were pre-made outside of the team meetings, but it is not clear what decisions [redacted] believes were made without [redacted] input or consent. The evidence does not establish that the District made misrepresentations or in any way prevented [redacted] from pursuing a due process hearing.

ORDER

[94] From September 6, 2020 to September 6, 2022, [redacted] Public Schools provided the Student a Free Appropriate Public Education.

Dated at Bismarck, North Dakota, this 8th day of June 2023.

State of North Dakota
Department of Public Instruction

[redacted]
Administrative Law Judge
Office of Administrative Hearings
2911 North 14th Street – Suite 303
Bismarck, North Dakota 58503
Telephone: (701) 328-3200

STATE OF NORTH DAKOTA

DEPARTMENT OF PUBLIC INSTRUCTION

IN THE MATTER OF: [redacted] a minor, by and through [redacted] parent, [redacted], Petitioner, vs. [redacted] Public School District Respondent.	)	**CERTIFICATE OF SERVICE** **OAH File No.** [redacted]

. . . . . .

The undersigned certifies a that the original **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was mailed, inside mail, at the State Capitol on the ____ day of June 2023, to:

Mary McCarvel-O'Connor, Director
Office of Specially Designed Services
600 East Boulevard Avenue
Bismarck, ND 58505

and that true and correct copies of the above documents were sent by electronic mail and mailed, regular mail, on the _____ day of June 2023, to:

Office of Administrative Hearings
[redacted], Administrative Law Judge

_____