STATE OF NORTH DAKOTA

DEPARTMENT OF PUBLIC INSTRUCTION

IN THE MATTER OF: [redacted]., a [redacted], by and through [redacted] parent, [redacted], Petitioner, vs. [redacted] Public School District, Respondent.	)	**ORDER GRANTING MOTION FOR DIRECTED VERDICT** **OAH File No. [redacted]**

. . . . . .

DIGEST OF CASE HISTORY AND ISSUES

[1] On May 1, 2023, a Due Process Complaint and Request for Administrative Hearing was filed with the Department of Public Instruction (DPI) by [redacted], on behalf of [redacted] minor [redacted] (the Student) against [redacted] Public School District (District). [redacted] represented [redacted] in this proceeding. The District is represented by Attorneys [redacted] and [redacted]

[2] On May 4, 2023, 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] was designated to preside in this matter.

[3] The District filed a Motion to Dismiss and Response dated May 19, 2023. An Order dated May 31, 2023 was issued denying the motion.

[4] This proceeding commenced on May 1, 2023, the date the Complaint was served on the District. The parties signed a written Waiver of Resolution Meeting with [redacted] signing on

May 22, 2023 and the District signing on May 24, 2023. The parties did not attend mediation. The decision deadline is July 9, 2023.

[5] A prehearing conference was held by telephone conference on May 12, 2023.

[6] The following prehearing orders were issued: Summary of Prehearing Conference, Notice of Hearing, and Prehearing Order dated May 16, 2023; and Order on Motion to Dismiss dated May 31, 2023.

[7] The hearing commenced, as scheduled, on April 14, 2023 and continued on April 15, 2023. The hearing was held in the Board Room at the [redacted] Public School's District Office in [redacted], North Dakota.

[8] The ALJ set the issues for hearing as:

> 1. In the 2021-22 and 2022-23 school years, the Student's special education services were either modified or stopped with or without the Parent's permission;
>
> 2. In the 2021-22 and 2022-23 school years, the Student's behaviors were not adequately addressed or appropriately programmed for;
>
> 3. In the 2021-22 and 2022-23 school years, outside service providers were not allowed in the school; and
>
> 4. These issues caused a failure to provide a free appropriate public education in the 2021-22 and 2022-23 school years.

[9] The District filed a prehearing brief dated June 9, 2023. [redacted] did not file a prehearing brief.

[10] [redacted] appeared for the hearing personally and without an attorney. The District was represented by attorneys [redacted] and [redacted] and District general counsel [redacted]

[11] By request of [redacted], the hearing was open to the public. [redacted] testified on [redacted] own behalf and called [redacted] to testify. The District called [redacted] to testify. [redacted] testimony was taken out of order and at the beginning of the hearing.

[12] [redacted] offered exhibits P1, P2, P3, P8, P9, and P10. The District objected to P1, P2, P3, and P8. P1, P2, and P3 are partial documents and were admitted over the objection of the District and were given what weight they warranted. P8 is a Guidance document regarding Virginia law. P8 was not admitted because it is not applicable in the state of North Dakota. P10 was also received into the record. The District offered exhibits R1 through R71, [redacted] did not object and the exhibits were admitted into the record.

[13] At the close of [redacted] testimony, the District moved for a directed verdict which was granted. This order documents the evidence received and granting of the motion.

FINDINGS OF FACT

[14] In February 2021, the Student received a diagnostic assessment from [redacted] due to significant behavioral concerns at daycare and preschool. The assessment recommended individual skills training, family skills training, psychotherapy, and case management services. [redacted] provided support services to the Student thereafter.

[15] In April 2021, the Student was assessed through the [redacted] Special Education Unit. After formal testing and informal observations by Early Childhood Services, it was determined the Student qualified for special education services. [redacted] consented to the Student's initial placement in special education. An Individualized Education Program (IEP) dated April 2021 was adopted. The Student's primary disability was non-categorical delay. The IEP had one goal – to improve attention, interest, and ability to sustain focus in large and small group learning.

Specifically, the Student will follow directions for an average of 70% of the school week. The Student's educational environment was Setting A – inside the regular class 80 percent or more of the day. Service minutes included 600 minutes per week of group instruction, 300 minutes per month of social-emotional learning, and 20 minutes per month of indirect occupational therapy.

[16] The Student started kindergarten the fall of 2021 and attended kindergarten (2021-2022 school year) and first grate (2022-2023) at [redacted] Elementary School.

Kindergarten Year (2021-2022):

[17] After the start of the kindergarten school year, [redacted] requested that [redacted] be brought into the school setting. [redacted] asserts [redacted] made numerous requests to bring [redacted] into the school but was unable to indicate the date the first request was made. The District indicates the first request to bring [redacted] in was made in October 2021. [redacted] is an outside provider but is an approved partner of the District. The District was not opposed to involvement with [redacted] and the IEP team determined that [redacted] should come in and partner and collaborate with the District. The goal was to coordinate and for both entities to work on similar skills, similar interventions, and similar vocabulary.

[18] On October 28, 2021, [redacted] signed a release of information for [redacted] Following the release being signed, coordination with [redacted] was delayed because of staff absences of both the District and [redacted], [redacted] staff schedule, and school breaks.

[19] On November 2, 2021, [redacted] provided the District a copy of the Student's February 2021 diagnostic assessment.

[20] On November 22, 2021, [redacted], from [redacted], left a voicemail message for [redacted], from the District, in which [redacted] stated:

> Hi [redacted], this is [redacted] with [redacted]. I'm giving you a call back about [the Student]. Sorry it's been a little bit since you called me. But just reaching out to

> answer your questions that you had for me. I am leaving the office here, but I can email. It's just [redacted]. Otherwise, I can give you a call back Wednesday, as I am out of the office tomorrow. But again, email, or I will reach out again on Wednesday. Thank you. Bye.

Ex. 13.

[21] On January 17, 2022, [redacted] executed a Visitation/Observation Agreement to allow [redacted] to come into the school to observe the Student. During the kindergarten school year, [redacted] came into the school on two occasions for observations – once in January 2022 and once later in the school year. [redacted] was not an IEP team member, but at the request of [redacted] was brought into the discussion regarding services.

[22] [redacted], the Student's special education teacher, testified that [redacted] did not do hands-on work with the Student but observed and would occasionally give the paraprofessionals tips. [redacted] did not train or otherwise direct programming in the school for the Student. The collaboration with [redacted] resulted in a decrease in intensity, frequency, and duration of the Student's behaviors which resulted in an increase in learning.

[23] During the kindergarten school year, progress was documented on November 19, 2021 and March 3, 2022. On November 19, 2021, the Student had made some progress towards the IEP goal. Data indicated that the Student followed direction for an average of 40% of the school week, an increase from the last progress monitoring report on May 26, 2021 which indicated an average of 30% compliance. However, on March 3, 2022, data indicated a decrease to 32% average. The March 3, 2022 report also indicates that the Student spent less time in the general education classroom, preferred to be in the office or resource room, tended not to participate in activities not of [redacted] choosing or preference, and refused to participate in social skills on average once a week.

[24] In March 2022, the IEP team met for the Student's annual IEP review. The IEP team agreed the Student's behavior impacted [redacted] learning and that [redacted] should continue to receive special

education services for social skills and reading. [redacted] also consented to Functional Behavioral Assessment (FBA) of the Student. The FBA was to address the Student's aggressive behavior, [redacted] elopement out of the classroom, refusal of tasks which continued to elevate during the year.

[25] The revised IEP dated March 9, 2022, contained two goals: (1) to know and apply grade-level phonics and word analysis skills in decoding words, the Student will increase from 2 to 60 [redacted] sight words; and (2) the Student will demonstrate compliance across settings and expectations without refusals, eloping or becoming physically aggressive from 7% to an average 75% of the time over 3 data collecting periods. The Student's environmental setting remained at setting A and [redacted] services minutes included 400 minutes of monthly small reading group, 360 monthly minutes of small group social skills, and 15 minutes of indirect occupational therapy.

[26] On April 6, 2022, A Brief Functional Behavior Assessment report was issued.

[27] On April 7, 2022, the IEP team met at the request of [redacted] to discuss a neuropsychology assessment of the Student arranged by [redacted] and to be completed by an outside provider. Due to a long waiting list, the District offered additional evaluations to assist in educational programming and to later share with the neuropsychological evaluator. The District proposed evaluations in the areas of cognitive functioning, academic performance, and emotional/social development. A Student Profile and Assessment Plan were developed. On April 11, 2022, [redacted] signed a consent for evaluation.

[28] On May 14, 2022, [redacted] requested to meet the school psychologist that would assist in completing the educational evaluation. Arrangements were made for the school psychologist to attend the next IEP team meeting scheduled for May 18, 2022. The meeting was held via Zoom video conference. A room and computer were made available to [redacted] at the district office

to attend. [redacted] came to the district office but did not log on to the meeting. The meeting was canceled because [redacted] did not attend. Thereafter, [redacted] contacted [redacted] to try and reschedule. In an email dated May 19, 2022, [redacted] informed the District the Zoom platform did not work for [redacted] and [redacted] requested that any assessments, reports, or any other type of data no longer occur or be collected. Following receipt of the email, the evaluation was halted and not completed.

[29] The District followed up with [redacted] and proposed to meet with [redacted] to go over the proposed evaluations and answer questions. Meeting times were proposed. On May 22, 2022, the District received an email from [redacted] which the District interpreted as revoking consent for the education evaluations. The District accepted the request to stop the evaluation and felt it could continue to serve the Student without further evaluation. [redacted] testified [redacted] never received a request from [redacted] to stop special education services. Neither the May 19 nor the May 22, 2022 emails were offered into the record by either party.

[30] [redacted] testified that in May 2022 [redacted] requested all special education services cease. [redacted] stated [redacted] communicated [redacted] request to end services in several emails although [redacted] did not produce any of the emails. When questioned why [redacted] wanted services to stop, [redacted] stated, "I was tired of dealing with [redacted] and – [redacted] was – [redacted] called the shots . . . and because I could never – I could not get [redacted] that could provide the help to --." Tr., pg. 286-87. [redacted] testified that the Student benefitted from special education services and thanked [redacted] for [redacted] work with the Student. [redacted] presented no evidence that [redacted] trained District paraprofessionals or teachers.

[31] Thus, the only evidence available regarding the nature of [redacted] revocation is the testimony of the parties. Considering the credible testimony offered by [redacted] testimony is insufficient to satisfy [redacted] burden of proof.

[32] Progress reporting on May 24, 2022, indicated that for Goad #1 - the Student knew 11 [redacted] sight words; and on Goal #2 - the Student demonstrated compliance across settings and expectations without refusals 44 percent of the time.

[33] The Student's Kindergarten report card indicates [redacted] was either consistent in [redacted] skill level or increased [redacted] skill level. Specific to behavior, self-management and social awareness, the Student inconsistently demonstrated these skills in the first and second quarters of the year. The Student's third quarter marks indicate [redacted] consistently demonstrated all skills in the category. For Literacy categories, the Student had increased scores in understanding spoken words and sounds, understanding rhyming and syllables, reading grade-level text with purpose and understandings, and reading high frequency words. [redacted] testified that science and math have been strengths for the Student and not an area of concern.

[34] [redacted] testified that the Student met [redacted] sight word goal by the end of the school year.

[35] During the 2022 summer, the Student received intensive support with [redacted]. [redacted] attributes the Student's success in first grade to [redacted] hard work during the summer months.

<u>First Grade Year (2022-2023)</u>:

[36] On November 11, 2022, the Student's IEP was amended to include one on one para-educator support; additional supports of scheduled breaks, token economy, pre-teaching, visual schedule, and alternate space to complete tasks; and an additional 800 minutes of indirect resource

minutes per month. The Student's environmental setting was also amended from setting A to setting B – inside regular classroom no more than 79 percent of the day but not less than 40 percent of the day. The setting change was to reflect the time the Student was spending outside the general education classroom.

[37] Progress reporting on the IEP goals indicated the following:

- On Goal #1: the Student knew 20 [redacted] sight words on September 1, 2022, 37 sight words on October 3, 2022, 43 sight words on November 2, 2022; and 53 sight words on November 14, 2022.
- On Goal #2: the Student demonstrated compliance across settings and expectations without refusals 50 percent of the time on November 14, 2022.

[38] On February 14, 2023, the Student's IEP was reviewed and revised. The IEP still contained two goals – one for reading and one for social skills but the specific goals were amended. The reading goal was to increase frequency from 30% to 85% of correctly reading CVC, CVCC, and CCVC words, and the social skills goals was to increase compliance across settings without refusals or elopements from 60% to 85%. The Behavioral Intervention Plan was also reviewed and revised.

[39] Progress reporting on February 27, 2023 showed no progress towards the reading goal. On April 27, 2023, the Student was able to read 60% correctly. On February 27, 2023, the Student was 70% compliant towards the social skills goal. On April 27, 2023, reporting indicated the Student had ups and downs but was meeting [redacted] goal of remaining in the classroom with para support 85% of the school day.

[40] The Student's first grade report card indicates the Student increased [redacted] skills for self-management but lacked consistency with self-awareness and responsible decision-making. The Student's literacy skills increased in all categories.

[41] [redacted] testified that between kindergarten and first grade, the Student made "huge gains" in social-emotional progress. For example, [redacted] indicated at the beginning of the first-grade year, the Student would not participate for more than a minute or two in lunch bunch; by the end of the year, the Student would stay through the entire lunch and want to stay 10-15 minutes longer. [redacted] also indicated the Student went from two to three minutes of participation with social dice to lasting up to 45 minutes by the end of the school year. [redacted] also stated that the Student made significant progress with peer social skills. [redacted] stated the Student went from only seeking contact with adults in kindergarten to spending time with and enjoying [redacted] first-grade peers. [redacted] attributed the Student's success to acclimating to school, the staff and teachers, [redacted] peers, and the building.

[42] [redacted] testified that the Student made progress during his first-grade year and that the school year went great.

[43] [redacted] main contention is that Solutions was not brought into school programming sooner. [redacted] believes the Student's behaviors during [redacted] kindergarten year would have decreased if [redacted] was involved. When asked, [redacted] was unable to specify what [redacted] did within the school setting to facilitate the decrease in the Student's behavior other than allegedly train staff, and [redacted] was unable to describe what would have changed if [redacted] was brought in sooner. [redacted] blames [redacted], school principal, for failing to bring in [redacted] sooner. [redacted] was unable to provide any evidence that [redacted] prevent or blocked [redacted] from coming into the school. As for proposed remedies, [redacted]

testified that [redacted] would like the District staff to receive additional training and give back to the community

CONCLUSIONS OF LAW

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

[45] 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.

[46] 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).

[47] The standard for a direct verdict is the same as that of a judgment as a matter of law or judgment notwithstanding the verdict and is summarized as, "whether the evidence, when viewed in the light most favorable to the party against whom the motion is made, leads to but one conclusion as to the verdict about which there can be no reasonable difference of opinion." *Arnegard v. Arnegard Twp.*, 2018 ND 80, ¶ 24, 908 N.W.2d 737.

[48] In this case, the District's motion for a directed verdict came at the close of [redacted] presentation of testimony. The District presented one witness at the beginning of the hearing and stated it would not call further witnesses before making the motion for directed verdict. When considering the evidence provided, the only conclusion to be reached was that [redacted] failed to satisfy [redacted] burden of proof on the issues presented for hearing.

[49] The greater weight of the evidence establishes that in May 2022 [redacted] requested the neuropsychological evaluations the District started be terminated. The District honored that request. The evidence does not establish that [redacted] requested all special education services be stopped. The only evidence to support [redacted] allegation is [redacted] own testimony and this testimony is inconsistent and not supported by [redacted] actions after the alleged request was made.

[50] The greater weight of the evidence establishes that the District appropriately programed for the Student's behaviors. [redacted] alleges the District failed to bring in [redacted] earlier in

the school year. The evidence establishes that [redacted] collaborated with the District to provide consistent programming for the Student both in school and outside of school. [redacted] was unable to articulate what school programming was attributed solely to [redacted] and how the programming was necessary for the Student to receive a FAPE. Services from [redacted] was not required under the IEP. The purpose was to coordinate services to ultimately benefit the Student both in school and home. There was approximately a three-month gap between when the District recorded the request and when [redacted] made its first observation. The time lag was attributed to processing the request and coordinating schedules. Given those issues, three months is not an unreasonable amount of time especially since [redacted] was observing the Student and coordinating with the District. The school continued to provide the Student the services specified in the IEP; there was no lapse in providing services.

[51] The greater weight of the evidence establishes that the District did not prevent [redacted] from coming into the school, observing the Student, and collaborating with the Student's providers. [redacted] alleges the District was derelict in bringing [redacted] into the School. [redacted] only evidence to support [redacted] assertions is [redacted] own testimony which is contrary to the testimony of District staff and other evidence such as the voicemail message of [redacted]. There is no evidence that the time lag was due to the District's actions.

[52] The greater weight of the evidence establishes the Student was provided a FAPE. Progress monitoring, report cards, and the testimony of the Student's service providers all indicate that Student made progress on both of [redacted] IEP goals. While there were some setbacks in the Student's kindergarten year especially with social skills, those lapses were attributed to adjustment to school, programming, and implementation of a behavior plan. Overall, the progress made on the social

skills goal was described as huge. [redacted] also testified that the Student made progress in both the kindergarten and first grade year.

IT IS HEREBY ORDERED:

[53] The District's Motion for a directed verdict is **GRANTED.**

Dated at Bismarck, North Dakota, this 5th day of July 2023.

State of North Dakota
Department of Public Instruction

By: _____
[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 that the original **ORDER GRANTING MOTION FOR DIRECTED VERDICT** was sent by electronic mail and mailed, inside mail at the State Capitol on the ____ day of July 2023, to:

[redacted]
Dispute Resolution Coordinator
Department of Public Instruction
Office of Specially Designed Services
600 East Boulevard Avenue
Bismarck, ND 58505-0440

and that a true and correct copy of the above document was sent by electronic mail and mailed, regular mail, on the _____ day of July 2023, to:

OFFICE OF ADMINISTRATIVE HEARINGS
[redacted], Administrative Law Judge

[redacted]