

**ARKANSAS DEPARTMENT OF EDUCATION
Special Education Unit**

IN RE:

XXXXXXXXXXXX, Parents of
XXXXXXXXXXXX, Student

PETITIONER

VS.

CASE NO. H-23-10

LITTLE ROCK SCHOOL DISTRICT

RESPONDENT

HEARING OFFICER’S FINAL DECISION AND ORDER

ISSUES PRESENTED:

Whether the Little Rock School District (hereinafter “District” or “Respondent”) denied XXXXXXX (hereinafter “Student”) a free, appropriate, public education (hereinafter “FAPE”) between February 25, 2022 and September 6, 2022 in violation of certain procedural and substantive requirements of the Individuals with Disabilities in Education Act of 2004, 20 U.S.C. §§ 1400-1485, as amended (hereinafter referred to as “IDEA”), which requires an analysis of the following sub-issues:

(1) whether the District provided Student FAPE in a timely manner by providing appropriate supports and services to address Student’s characteristics of Dyslexia and academic deficits in the areas of reading and math; and

(2) whether Christ Little Rock is an appropriate placement for Student.

PROCEDURAL HISTORY:

This matter is the second of two hearings between these parties. The first hearing was H-22-34. That matter was heard between July and August of 2022. *See generally* H-22-34 Tr. Vols. I-VII and Ex. Vols. I-V. The prior Hearing Officer issued her Order in H-22-

34 on September 9, 2022 with a finding in favor of Petitioners that the District denied FAPE to the student in this matter between February 25, 2020 and February 25, 2022. *See* Order in H-22-34. The request for private school placement was withdrawn in H-22-34, so there were no findings as to that matter. *See* H-22-34 Tr. Vol. I p. 14. The complaint in this matter, H-23-10, picks up on February 25, 2022, where H-22-34 left off.

On September 6, 2022, the Arkansas Department of Education (hereinafter referred to as “Department”) received a second written request to initiate due process hearing procedures from XXXXX and XXXXXX (hereinafter referred to as “Parents” or “Petitioners”), the Parents and legal guardian of Student. Parents requested the hearing because they believed that District failed to comply with the IDEA, as well as regulations set forth by the Department, from February 25, 2022 to September 6, 2022 by failing to provide Student with appropriate supports and services to address Dyslexia and academic deficits, as well as failing to address Student’s deficits in communication, social and behavioral skills. *See* Petitioners’ Complaint. Parents seek a compensatory education in the form of private school placement and sought a Dyslexia program until his reading deficit is fully remediated. *Id.*

In response to Parents’ request for hearing, the Department assigned the case to an impartial hearing officer who initially scheduled the due process hearing in Case H-23-10 for October 24-26, 2022 and held a prehearing conference on October 20, 2022 after the parties failed to reach resolution at their resolution conference held October 10, 2022. The request for a Dyslexia program was withdrawn in the prehearing conference on October 20, 2022, which leaves the remaining request of private school tuition reimbursement. *See* Prehearing Conf. Tr. Vol. at pp. 19-21. Thereafter, following continuances granted for good

cause in this case, March 8, 2023 was set as the date on which a hearing would commence if the Parents and District failed to reach resolution prior to that time.

Having been given jurisdiction and authority to conduct the hearing pursuant to Public Law 108-446, as amended, and Arkansas Code Annotated §§ 6-41-202 through 6-41-223, Debby Linton Ferguson, J.D., Hearing Officer for the Arkansas Department of Education, conducted a closed impartial hearing. The hearing began as scheduled, and testimony was heard on March 8, 9, 10, and 17 and May 1 and 2, 2023. In the interest of judicial efficiency, the parties incorporated transcriptions from H-22-34. *See Id.* at pp. 23 and 26-27 and *see generally* H-22-34 Tr. Vols. I-VII and Ex. Vols. I-V.

Parents were represented by Theresa Caldwell (Little Rock, Arkansas) and District was represented by Khayyam Eddings (Little Rock, Arkansas). Also, present for the hearing were Cassandra Steele, District Special Education Director; Melinda Schmitt, District Special Education Supervisor; Audie Alumbaugh, (“Parent Advocate”); and XXXX and XXXXX (“Parents”). The following witnesses testified in this matter: Cassandra Steele (“District Special Education Director”), Jenny Mangham (“Resource Teacher”), Kimberly Lawrence (“Licensed Psychological Examiner” or “LPE”), Nathalie Coulter (“Assistant Principal Coulter”), Julie Stewart (“Assistant Principal Stewart”), Aimee Littrell (“Speech Pathologist”), Dr. Tracy Morrison (“Occupational Therapist” or “OT”), Jeff Whitlow (“General Education Teacher”), Marquis Cooper (“School Counselor”), Steven Helmick (“Principal Helmick”), and each of the Parents. Both parties were offered the opportunity to provide post-hearing briefs in lieu of closing statements, and both parties submitted a timely brief for consideration.

BACKGROUND FINDINGS OF FACT FROM ORDER IN H-22-34:

Student is an eleven-year-old male that resides in the Little Rock School District and attended school in the District since kindergarten. *See* Petitioner’s Complaint. In August of 2016, just prior to Student’s kindergarten year at Chenal Elementary, Student was diagnosed as having Autism Spectrum Disorder (hereinafter “ASD”) and Attention Deficit Hyperactivity Disorder (hereinafter “ADHD”). *See* H-22-34 Tr. Vol. V. pp. 9-10. Student was functioning within the low average range of intelligence, and he was then functioning academically at a level consistent with his IQ scores. *See* H-22-34 Parent Ex. p. 166. Student has received special education services pursuant to the IDEA the entire time that he has been enrolled in District. *See* H-22-34 Parent Ex. p. 139.

Third Grade Year (2020-2021)

As Student entered the third grade, his reading level, pursuant to testing conducted at the end of his second grade year, was equivalent to that of a first grader (third month). *See* H-22-34 Tr. Vol. I p. 36. In the spring semester of 2020, specifically on March 12, 2020, Student began receiving services pursuant to an IEP with duration from March 12, 2020 through March 11, 2021.¹ *See* H-22-34 Parent Ex. pp. 23-34. Student’s 2020 IEP noted that the most recent evaluation of Student was in March 2019. *Id.* Pursuant to the psychoeducational assessment conducted in March 2019, Student was administered the following assessments: (1) Systematic Observation of Student Performance for a Specific Learning Disability - Literacy; (2) Kaufman Assessment Battery for Children, Second

¹ The statutory period covered in H-22-34 was February 25, 2020 through February 25, 2022, so only the spring of 2020 was addressed in that matter.

Edition Normative Update (KABC-II NU); (3) Kaufman Test of Educational Achievement, Third Edition (KTEA-3); (4) Comprehensive Test of Phonological Processing, Second Edition (CTOPP-2); (5) Behavior Assessment for Children, Third Edition (Parent and Teacher Rating Scales); and (6) Autism Spectrum Rating Scales (Parent and Teacher Rating Scales). See H-22-34 Parent Ex. pp. 139-159.

Regarding the Kaufman Assessment Battery, Student was administered five scales, specifically the Sequential (Short-Term Memory), Planning (Fluid Reasoning), Simultaneous (Visual Processing), Learning (Long-Term Storage & Retrieval), and Knowledge (Crystallized Ability) scales. *Id.* at p. 145. Student's scores on all scales fell within the average range, with the exception of the Sequential (Short-Term Memory) scale, which was below average and placed Student in the 6th percentile. *Id.* at p. 145. The composite index of all of these scales was 87, which was also in the average range.

Regarding the Kaufman Test of Educational Achievement, Student's was administered thirteen subtests to determine whether Student had academic deficits. *Id.* at p. 146. Student was below average in the areas of phonological processing (10th percentile), letter and word recognition (12th percentile), reading comprehension (10th percentile), and written expression (6th percentile). *Id.* He was in the lower extreme in the category of silent reading fluency. *Id.* All other areas, including nonsense word decoding, word recognition fluency, object naming facility, letter naming facility, spelling, math computation, and math concepts and application were in the average range. *Id.*

Regarding the Comprehensive Test of Phonological Processing, Student fell below average on subtests pertaining to blending words (16th percentile), phoneme isolation (16th percentile), nonword repetition (16th percentile), and blending nonwords (16th

percentile). *Id.* at p. 148-49. His phonological awareness composite score fell below average (14th percentile), as did his phonological memory composite score (21st percentile). *Id.* Student's scores fell in the very poor and poor categories, respectively, with regard to segmenting nonwords (1st percentile) and alternative phonological awareness (2nd percentile). *Id.* Student's performance was within the average range in the areas of ellision, memory for digits, rapid digit naming, rapid letter naming, and rapid symbolic naming. *Id.*

Regarding the Behavior Assessment for Children, which assesses adaptive behavior skills, Student's Parents and teachers, completed rating scales. *Id.* at pp. 150-51. Parents' ratings placed Student "at risk" in the areas of internalizing problems, behavioral symptoms, anxiety, and withdrawal. *Id.* Teachers' ratings indicated that Student was "at risk" in internalizing problems, school problems, attention problems, learning problems, adaptability, social skills, leadership, and study skills. *Id.* In addition, a review of the teachers' ratings showed "clinically significant" scores in several other areas, including externalizing problems, behavior symptoms, adaptive skills, hyperactivity, aggression, conduct problems, anxiety, depression, atypicality, withdrawal, functional communication, anger control, bullying, developmental social disorders, emotional self-control, executive functioning, negative emotionality, resiliency, ADHD probability, Autism probability, and functional impairment. *Id.* Essentially, every teacher rating score with the exception of one, somatization, was in the "at risk" or "clinically significant" range. *Id.* Regarding the Autism Spectrum Disorder Rating Scales, Student's teachers and Parents completed rating scales. All rating scores fell within the average range, with the exception of those pertaining to peer socialization which was slightly elevated. *Id.* at pp. 154-55.

After considering the results of these various assessments, District's psychoeducational evaluator concluded that Student was of average intellectual ability, but that he had a "personal and normative weakness" in the area of short-term memory, which is the ability to maintain information and immediately reproduce the information. *Id.* at 157. The evaluator also noted that this was related to attention issues, noting that Student's poor impulse control affected Student's ability to gain knowledge, retain information, and maintain focus in the general education classroom and curriculum. Finally, the evaluator noted that Student exhibited characteristics of Dyslexia. *Id.* The evaluator recommendations included, but were not limited to, the following: gearing instruction to Student's level of achievement, expecting completion of assignments or tasks and providing rewards or consequences based on same, providing frequent monitoring of progress, providing activities to improve self-concept, setting up communication system between home and school, using a multi-sensory approach with manipulatives to improve learning, using hands-on experiences with concrete materials to enhance learning, matching auditory information with visual cues, reducing amount of instructions given to Student, breaking tasks into small segments, reviewing and reteaching to improve recall and retention of material, allowing extra time to complete assignments, reading materials to Student, providing Student with a quiet place to calm down, using behavior contracts, allowing Student to select rewards, allowing Student to change activities frequently, seating Student away from distractions, wording oral directions clearly, monitoring Student understanding, encouraging Student to ask for direction or information, teaching sight vocabulary, providing written or pictorial models, writing key terms on the board, and repeating important information. *Id.* at 157-58.

Student was also evaluated by an occupational therapist (hereinafter “OT”) at District in March 2020. Ultimately, the OT determined that Student did not need OT minutes as a related service; however, she did set goals that Student needed to continue working in the general education classroom. *Id.* at pp. 402-03. Those goals were as follows: (1) decrease pressure when using writing tools, “as evidenced by no creases on the back of the paper caused by his pencil, 3 consecutive sessions, 100%”; (2) improve ability to organize a task “as evidenced by set up and completion of a game or activity from start to finish, less than 2 verbal cues, 100%, 3 consecutive session; and (3) improve coordination and motor planning “through a variety of tasks or exercises to challenge his ability to perform the task independently upon command, 100%, 3 consecutive sessions.” *Id.*

Student’s March 12, 2020 IEP, with duration through March 11, 2021 listed Student’s IDEA category of eligibility as Other Health Impairment (hereinafter “OHI”) and included a statement of present levels of academic achievement that was consistent with the evaluation results described herein. *Id.* at pp. 24-25. It was also noted in the present levels section of the IEP that Student had been on a Behavior Intervention Plan (hereinafter “BIP”) since December 18, 2019. *Id.* The IEP stated that Student exhibited characteristics of Dyslexia and that his difficulties in the areas of basic reading skills and reading comprehension affected Student’s learning in all areas. *Id.* Finally, it was noted that Student had experienced difficulties with social situations and, based on pragmatics testing, would receive speech/language therapy to address these deficits. *Id.*

In addition, Student’s March 12, 2020 IEP, included a statement of modifications and accommodations, specifically (1) preferential seating; (2) clearly defined limits, rules, and consequences posted and implemented; (3) redirection of inappropriate behavior; (4)

reduction of assignments; (5) short instructions; (6) extra time for completing assignments; and (7) redirection during testing and seat work. *Id.* at p. 26. The March 12, 2020 IEP also included three goals, one each in the areas of resource reading, resource math, and speech-language therapy. *Id.* at p. 28. Student's resource reading goal provided that Student would "be able to apply word analysis skills in order to read fluently and comprehend on his current reading level and answer questions related to main idea/supporting details, summarizing, cause/effect and inference with 80% accuracy by the end of the IEP period." *Id.* It was noted that progress pertaining to this goal would be based on work samples and grades. *Id.* Student's resource math goal provided that Student would "represent, compute, and solve math problems involving addition, subtraction, multiplication and division of whole numbers while utilizing grade-appropriate mathematical language and reasoning skills as demonstrated by 80% accuracy." *Id.* It was noted that progress pertaining to this goal would be based on observation charts and work samples. *Id.* Student's speech-language therapy goal provided that Student, when presented with age-appropriate books, scripts, role-playing activities, and real-life situations, would "demonstrate improved social communication skills by (a) inferring feelings and ideas of others, (b) exhibiting reciprocity in interactions . . . (c) playing appropriately with peers in structured and unstructured settings . . . , and (d) role-playing cause and effect problem-solving with at least 80% accuracy across three consecutive sessions by March 11, 2021." *Id.* It was noticed that progress pertaining to this goal would be based on scoring rubrics and "data response." *Id.* None of the goals included specific objectives. *Id.*

The December 18, 2019 BIP referenced in Student's IEP was developed in response to a Functional Behavior Assessment (hereinafter "FBA") conducted for Student in October and November 2019. *Id.* at pp. 199-205. During the fall semester of the 2019-2020 school year, Student engaged in numerous negative behaviors that were documented by the District. *Id.* The noted behaviors included threatening to kill another student, pushing and elbowing peers, making fun of other students, horseplay, kicking doors, fighting and physical aggression with peers, arguing with teachers, and disrespectful behavior in the classroom. *Id.* The resulting BIP that was developed for Student addressed strategies for preventing problem behaviors, encouraging appropriate behaviors, decreasing inappropriate behaviors, providing effective motivators and rewards, handling misbehavior, and collaborating with Parents. *Id.* at pp. 206-07.

Student's March 12, 2020 IEP provided for Student to receive 30 minutes per week of speech/language services in social skills, 60 minutes per week of direct instruction in reading, 30 minutes per week of direct instruction in math, 30 minutes per month of occupational therapy, and 30 minutes per week of social skills training. *Id.* at p. 29. Student's March 12, 2020 IEP was signed by Parents, a general education teacher, a special education teacher, a speech language pathologist, the assistant principal, and the LEA for Chenal Elementary. *Id.* at p. 32.

Student's March 12, 2020 IEP did not specifically address a Dyslexia intervention program to be provided to Student via special education or in the general education curriculum; however, Student's resource teacher during third grade, Kim Swindler used the Take Flight program with Student during the 2019-2020 school year. *See* H-22-34, Tr. Vol. VI p. 146. Ms. Swindler testified that Take Flight should be administered 5 days a week for

45 minutes, or 4 days a week for 60 minutes in order for the program to be taught with fidelity. *Id.* She testified that, although she saw Student on a daily basis, she did not use Take Flight every day, but she tailored Student's lessons to what he needed at that time. *Id.* at p. 148.

Student's NWEA scores in the academic area of reading indicated that he was in the 17th percentile in the fall of 2019, the 12th percentile in the winter of 2020, and the 6th percentile in the spring of 2020. *See* H-22-34 Parent Ex. p. 240. All measured skills were in the low or low average range across all test administrations. *Id.* Student's NWEA scores in the academic area of math indicated that he was in the 17th percentile in the fall of 2019, the 6th percentile in the winter of 2020, and the 7th percentile in the spring of 2020. *Id.* Student scored low on all composite areas for math at each test administration. *Id.* Student's NWEA scores in the academic area of science indicated that he was in the 36th percentile in the fall of 2019, the 3rd percentile in the winter of 2020, and the 12th percentile in the spring of 2020. *Id.*

Fourth Grade Year (2020-2021)

Student's IEP and special education programming for the fall 2020 was the same as that described for the spring semester of 2020 (Student's third grade year) because Student's IEP was not on a standard school year calendar but, alternatively, had a duration from March 12, 2020 to March 11, 2021. *Id.*

Prior to Student's annual review conference on January 29, 2021, there was an incident on January 20, 2021 in which Student eloped from school. *Id.* at 210-211. On the day in question, Student attended school and reportedly had a good morning in class. His class watched the U.S. Presidential Inauguration (kids' program) that morning and

completed many related projects and activities. *Id.* At the conclusion of these events, Student, along with the remainder of his class, was taken to the playground by another staff member for a short recess. *Id.* No recess issues were reported. *Id.* When students returned to the classroom after recess, activities resumed and, unfortunately, Student's teacher did not realize that Student was missing. *Id.* Eventually, the principal, Steven Helmick, contacted Student's teacher and inquired about what happened. *Id.* It was then reported that Student had left school, wandered to the house of a stranger, and requested a ride home. *See* H-22-34 Transcript, Vol. IV, pp. 151. Neither the school nor Student's parents knew that Student had left school until Student arrived home with the stranger who had given him a ride. *Id.* Mr. Helmick recalled having discussions with Parents following this meeting, but could not remember specific details of the meetings. *See* H-22-34 Transcript, Vol. VI, pp. 187-88.

On January 29, 2021, a new IEP was implemented as a result of Student's annual programming conference; the duration of this IEP was from January 29, 2021 through January 24, 2022. *See* H-22-34 Parent Ex. pp. 11-22. Student's IEP included a statement of present levels of academic achievement, noting Student's academic abilities in math and reading. *Id.* Regarding Student's math abilities, it was noted that Student was able to add and subtract three-digit numbers with regrouping, answer multi-step word problems with subtraction and addition, identify equivalent fractions, write a fraction from a shaded diagram, and identify numbers within 1000 using base ten blocks. *Id.* at pp. 12-13. It was also noted that Student was able to multiply two digit by one digit multiplication problems. *Id.* Student, however, was struggling as of date of this IEP with understanding concepts of division and fourth grade math concepts. *Id.* Regarding the academic area of reading,

Student was described as being able to apply grade-level phonics and word analysis skills in decoding. Student's DRA level was stated as level 40, which was noted to be the reading level equivalent to that expected of students in the middle of the fourth grade year. *Id.* Student was able to make three predictions and create three questions after reading the beginning paragraphs of a story. *Id.* In addition, after reading text independently, he was able to list three facts about the main character, predict the character's emotion during the story, and make inferences beyond the text. *Id.* Finally, it was explained that Student had difficulty answering questions in complete sentences and summarizing ideas and thoughts when writing. *Id.* Student was more likely to use correct sentence structure, capitalization, punctuation, and grammar when able to use reminder checklists. *Id.*

In addition to addressing Student's specific academic abilities and difficulties, the present levels section of his January 29, 2021 IEP reiterated that Student continued to have short-term memory issues and poor impulse control, both of which impact Student's ability to gain and retain information. It was also noted that Student was continuing to show characteristics of Dyslexia, with notation that Student's deficits in the areas of basic reading skills, reading comprehension, and fluency had an effect on Student's ability to learn all subjects. *Id.*

Student's January 29, 2021 IEP also included a statement of modifications and accommodations, specifically (1) preferential seating; (2) clearly defined limits, rules, and consequences posted and implemented; (3) redirection of inappropriate behavior; (4) short breaks; (5) opportunity to respond orally; (6) reduction of assignments; (7) short instructions; (8) extra time for completing assignments; (9) redirection during testing and seat work; (10) positive praise check ins; and (11) multiplication chart with multi-step

problems. *Id.* at p. 14 and 21. The IEP also included three goals, one each in the areas of reading/writing, math, and speech-language therapy. *Id.* at p. 16 and 22. Student's reading/writing goal provided that Student, when presented with an instructional level nonfiction reading passage, would "summarize the information, using writing rubrics and scaffolding as needed to write a paragraph with a topic sentence, three supportive sentences and a conclusion with correct punctuation and capitalization with 80% accuracy by the end of the IEP cycle." *Id.* It was noted that progress pertaining to this goal would be based on work samples and grades. *Id.* Student's math goal provided that Student would "represent, compute, and solve math problems involving multiplication and division of whole numbers while utilizing grade-appropriate mathematical language and reasoning skills as demonstrated by 80% accuracy." *Id.* It was noted that progress pertaining to this goal would be based on observation charts and work samples. *Id.* Student's speech-language therapy goal provided that Student, when presented with age-appropriate books, scripts, role-playing activities, and real-life situations, would "demonstrate improved social communication skills by (a) inferring feelings and ideas of others, (b) exhibiting reciprocity in interactions . . . (c) playing appropriately with peers in structured and unstructured settings . . . , and (d) role-playing cause and effect problem-solving with at least 80% accuracy across three consecutive sessions by March 11, 2021." *Id.* It was noted that progress pertaining to this goal would be based on scoring rubrics and "data response." *Id.* None of the goals included specific objectives. *Id.* Student's December 18, 2019 BIP remained in place during the duration of this IEP as well, and the team discussed the incident that had occurred on January 20, 2021 in which Student eloped from school. *Id.* at 14.

Student's January 29, 2021 IEP provided for Student to receive 60 minutes per week of speech/language services in social skills, 60 minutes per week of direct instruction in reading, 60 minutes per week of direct instruction in math, and 60 minutes per week of social skills training. *Id.* at p. 17. Student was not scheduled to receive occupational therapy. *Id.* The IEP did not specifically address a Dyslexia intervention program to be provided to Student via special education or in the general education curriculum. *Id.* at pp. 11-22. Student's resource teacher confirmed that she did not provide a Dyslexia intervention program in her work with Student. *See* H-22-23 Tr. Vol. II p. 104. Student's January 29, 2021 IEP was signed by parents, a general education teacher, a special education teacher, a speech language pathologist, the assistant principal, and the LEA for Chenal Elementary. *See* H-22-34 Parent Ex. p. 20.

Student's NWEA scores in the academic area of reading indicated that he was in the 27th percentile in the fall of 2020, the 22th percentile in the winter of 2021, and the 21st percentile in the spring of 2021. *Id.* at p. 240. Student's Lexile score was 245L-395L, which is the equivalent of approximately a first grade reading level. *Id.* *See also* H-22-34 Parent Ex. p. 356. All measured skills were in the low or low average range across all test administrations. *Id.* at p. 240. Student's NWEA scores in the academic area of math indicated that he was in the 8th percentile in the fall of 2020, the 5th percentile in the winter of 2021, and the 8th percentile in the spring of 2021. *Id.* Student scored low on all composite areas for math at each test administration. *Id.* Student's NWEA scores in the academic area of science indicated that he was in the 29th percentile in the fall of 2020, the 5th percentile in the winter of 2021, and the 12th percentile in the spring of 2021. *Id.*

Student was administered the ACT Aspire in the spring of 2021. This test evaluated Student's performance in the academic areas of English, reading, math, and science. *Id.* at p. 238. Student's scores in English and math were "close" to the stated benchmark, and his scores in reading and science were "in need of support." *Id.* Student's English score was in the 17th percentile, his reading score was in the 28th percentile, his science score was in the 9th percentile, and his math score was in the 44th percentile. *Id.*

Fifth Grade Year (2021-2022)

Student's IEP and special education programming for the fall 2021 was the same as the spring semester of 2021 (Student's fourth grade year) because Student's IEP was not on a standard school year calendar but, alternatively, had a duration from January 29, 2021 to January 24, 2022. *See* H-22-34 Parent Ex. pp. 11-22.

On October 21, 2021, Student threatened to commit suicide while at school, prompting District to contact a mobile assessment unit to evaluate Student. *See* H-23-10 Parent Ex. p. 186. Following Student's evaluation at school for suicidal threats, Student began seeing a counselor, specifically Molly Bloom, at Napa Valley Counseling Center. *Id.*

On October 28, 2021, Parents sent an email to the principal, alleging parents of other students reached out to inform them that Student was being bullied *See* H-22-34 Parent Ex. pp. 285-287. Parent's email alleged that Student was being told by other classmates that he "belonged in hell" and to "go fuck himself," and that this had made Student contemplate suicide. *Id.* Parents addressed these allegations with Student, and Student told Parents that two different kids had targeted him. *Id.* The following day, on October 29, 2021, the principal responded to Parent's concerns via email, and let them know that he was working on the situation and trying to gain an understanding of what was going on. *Id.*

When questioned about whether Student was bullied, Student's fourth and fifth grade resource teacher testified that Student often replayed events from the past, but that what he was reporting did not comport with what was happening in the classroom *See* H-22-34 Tr. Vol. II pp. 173-74. For example, Student constantly talked about being in the self-contained classroom and kids making fun of him, even though he had not been in that classroom for three years. *Id.* Student continually alleged that a peer told him to die in a ditch, which happened a couple of years prior, but was not happening in fifth grade at the time that Student was continually making these allegations. *Id.* Finally, Student often talked about a teacher that he thought was mean to him, but the teacher in question had not worked with Student since the third grade. *Id.* Student's resource teacher explained that she believed that these experiences were part of Student's "story," but that the things he was alleging were not actively happening in the classroom. *Id.* Student's fifth grade general education teacher also reported that Student obsessed about past events. *See* H-22-34 Tr. Vol. III pp. 46-50. He stated that Student had experienced some name calling by two different students on the playground toward the beginning of fifth grade, but that the situation had been addressed and Student's reference to this throughout the year was not founded. *Id.* at p. 157.

In a counseling note dated November 3, 2021, Ms. Bloom assessed Student's thought processes as "perseveration," and also noted that Student's thought content contained "obsessions." *See* H-22-34 Parent Ex. p. 217. Finally, Ms. Bloom assessed Student's mental status as it related to perception to be affected by "auditory hallucinations." *Id.* Throughout the time that Ms. Bloom treated Student, Student's feelings of suicidal ideation decreased, however, Ms. Bloom continually noted that Student had intrusive thoughts

pertaining to bullying. In one therapy note, Ms. Bloom stated that the issue of bullying was very real to Student, even if bullying was not occurring in reality. *Id.* at pp. 217-227.

On January 25, 2022, Student's IEP team intended to meet for Student's annual review and development of a new IEP; however, Parents requested that the IEP meeting be rescheduled. *See* H-22-34 Tr. Vol. II p. 194. Student's resource teacher testified that she continued providing the services from Student's prior IEP, the one that ended January 24, 2022, until a new IEP was developed for Student. *See* H-22-34 Tr. Vol. II p. 194. Student's IEP team met on February 8, 2022 to develop a new IEP. *See* H-22-34 Parent Ex. pp. 1, 63.

Eight days later, on February 16, 2022, Student eloped for the first time in fifth grade. *See* Parent Ex. pp. 78-79. On this date, Student was in his general education class learning math. Student reportedly had a typical day with his teacher and peers, and had not needed redirection during math in order to complete his work. *Id.* Throughout the class period, Student continually asked if he could leave the classroom and go visit with Mr. Helmick; however, this was not unusual for Student. *Id.* Student's teacher reported that after Student completed his work, Student was permitted to go to the office and see Mr. Helmick. *Id.* Student did not go to the principal's office, however, and instead left campus. *Id.* Student's teacher contacted the office after Student had not returned in a normal time period, and a search was immediately commenced. *Id.* In addition, District security and Student's parents were contacted, while the building administrator for the school began driving around the area searching for Student. *Id.* Student was later located by the building administrator, and Student willingly got in the car and returned to school. *Id.*

To address the February 16, 2022 elopement, the IEP Team met again on February 17, 2022 and amended Student's IEP. *See* H-22-34 Parent Ex. pp. 1, 63, 78. The duration of

this IEP was February 17, 2022 through January 27, 2023. *Id.* at p. 1. The reason noted for the February 17, 2022 amendment to Student's IEP was Student safety. *Id.* Student's category of disability for purposes of this IEP was listed as Other Health Impairment on account of his ADHD Diagnosis. *Id.* at p. 2. Also, on February 17, 2022, District provided to Parents a Notice of Action, outlining the IEP meeting that occurred on this same date and referencing the implementation of a Safety Plan for Student. *Id.* at p. 37.

Parents, administrative personnel, and Student attended the February 17, 2022 IEP meeting. *See* H-22-34 Parent Ex. p. 78. In addition, Parents invited Student's counselor, Ms. Bloom to join the meeting. Ms. Bloom advised that, based on her conversations with Student, it appeared that the event unfolded very quickly for him when he began to experience stress. *Id.* Student's IEP team sought consent to conduct an FBA for Student and offered school based mental health services. *Id.* Parents verbally consented to the FBA, but chose for Student to continue counseling services with Ms. Bloom as opposed to utilizing school based mental health services. *Id.* At this same meeting on February 17, 2022, modifications were made to Student's January 25, 2022 IEP for the purpose of addressing Student's safety at school. *Id.*

Student's February 17, 2022 IEP included a statement of present levels of academic achievement, noting that Student typically arrived at school on time and was prepared and ready to engage in the classroom *See* H-22-34 Parent Ex. pp. 1-10. Student's teacher also noted that Student enjoyed being engaged in large and small group settings and was not hesitant to ask questions, but noted that he often attempted to control his environment by "asking repeatedly to leave the classroom to visit the principal" or take breaks. *Id.* at p. 2.

Regarding social skills, Student's IEP team noted that he struggled with his peers and being able to appropriately process worries of not fitting in. *Id.* Specifically, the present levels section of the IEP states as follows: "He will lash out when he has these feelings by making inappropriate comments or accusations. Often it consumes his day and he needs support of administration or the school counselor until he is able to reason. [Student] needs strict structure and understanding of any routine changes that may occur." *Id.* Regarding reading, Student's IEP noted that Student had a strong vocabulary as compared to his peers and was able to make inferences from a text. *Id.* It was also noted that Student excelled in both comprehension from reading, as well as auditory comprehension. *Id.* Regarding writing, it was noted that Student needed prompts to stay on task and benefited from writing rubrics and graphic organizers. *Id.* Finally, regarding the academic area of math, Student's IEP team noted that Student struggled with attention in breaking down word problems into manageable chunks and identifying place values with decimals; however, he was "successful with grade level standards and minimal support in the area of math." *Id.*

Student's February 17, 2022 IEP also included a statement of modifications and accommodations, specifically (1) preferential seating; (2) clearly defined limits, rules, and consequences posted and implemented; (3) redirection of inappropriate behavior; (4) redirection during testing and seat work; (5) positive praise check-ins; (6) reduced writing assignments; (7) small group or 1:1 intervention; (8) peer tutoring; (9) adult accompaniment for transitions outside of the classroom; (10) notification to admin/office if student ran away from adult; (11) check in and check out by an adult during recess; (12) plans for substitute teachers regarding transitions; (13) Student located away from

classroom doors; (14) Student seated close to teacher; (15) positive reinforcement for work completion; and (16) Student instruction of replacement behaviors. *Id.* at p. 4.

Student's February 17, 2022 IEP, as in prior school years, included three goals, one each in the areas of reading/writing, math, and speech-language therapy. *Id.* at p. 6. Student's reading/writing goal provided that Student, when presented with an opinion based writing prompt, would produce a written work that included three paragraphs, an introduction/claim, three pieces of evidence to support the claim, and an opposing view statement, and conclusion (with correct punctuation and capitalization) with 80% accuracy by the end of the IEP cycle. *Id.* It was noted that progress pertaining to this goal would be based on work samples and grades. *Id.* Student's math goal provided that Student would "represent, compute, and solve math problems involving multiplication and division of fractions while utilizing grade-appropriate mathematical language and reasoning skills as demonstrated by 80% accuracy." *Id.* It was noted that progress pertaining to this goal would be based on observation charts and work samples. *Id.* Student's speech-language therapy goal provided that Student, when presented with age-appropriate books, scripts, role-playing activities, and real-life situations, would "demonstrate improved social communication skills by (a) inferring feelings and ideas of others, (b) exhibiting reciprocity in interactions . . . (c) playing appropriately with peers in structured and unstructured settings . . . , and (d) role-playing cause and effect problem-solving with at least 80% accuracy across three consecutive sessions by 2/7/2023." *Id.* It was noted that progress pertaining to this goal would be based on scoring rubrics and "data response." *Id.* None of the goals included specific objectives. *Id.*

Student's February 17, 2022 IEP provided for Student to receive 240 minutes per quarter (four hours) of speech/language services in social skills, 30 minutes per week of direct instruction in reading, and 30 minutes per week of direct instruction in math. *Id.* at p. 7. Student was not scheduled to receive occupational therapy. *Id.* The IEP did not specifically address a Dyslexia intervention program to be provided to Student via special education or in the general education curriculum. *Id.* Student's February 17, 2022 IEP was signed by Parents (father), a general education teacher, a special education teacher, a speech language pathologist, the assistant principal, the LEAs for Chenal Elementary, and the school counselor. *Id.* at p. 10.

Student's general education teacher reported that Student was reading on approximately a 3.5-4.5 grade level when he began fifth grade (2021-2022 school year). *Id.* at p. 154. District's Dyslexia specialist testified that based on Student's scores on two screeners, specifically, the Hegarty and the WIST, it was her opinion that Student no longer had characteristics of Dyslexia that needed to be addressed during the fifth grade. *See* H-22-34 Tr. Vol. VI pp. 135-36.

On February 22, 2022, Student eloped a second time in fifth grade; Student was again in math class. He continually asked to leave the classroom during the lesson; however, Student's teacher declined to let him leave the room. *See* H-22-34 Tr. Vol. VI p. 193-197. Student ran out of the classroom anyway, and his peers began yelling at the teacher that Student had left the classroom. *Id.* Student's General Education Teacher and Mr. Helmick both chased Student until it was apparent that Student had left school property, after which 911 was dispatched and Parents were called. *Id.* Student was ultimately found in a ravine in a nearby neighborhood after approximately one and one half hours. *Id.*

Following Student's second elopement on February 22, 2022, a Student Elopement Plan, with start date of February 25, 2022, was created for Student. *Id.* at p. 80. The plan outlined protocols for notifying the office and staff roles in case of Student's elopement. *Id.* Specifically, the document provides that, in case of elopement, Student's aid will follow him and immediately alert a support team of the elopement. *Id.* In response, assigned staff will go to surrounding exit doors, while continuously communicating with Student's aid via walkie talkies. *Id.* Finally, the team will communicate when the student is secure and will follow up by immediately informing Parents. *Id.*

Student's NWEA scores in the academic area of reading indicated that he was in the 26th percentile in the fall of 2021, the 20th percentile in the winter of 2022, and the 4th percentile in the spring of 2022. *See* H-22-34 Parent Ex. p. 229. Student's Lexile score was 245L-395L, which is the equivalent of approximately a first grade reading level, and the same as the prior year. *Id.* at pp. 229, 356. All measured skills were in the low range across all test administrations. *Id.* at pp. 229. Student's NWEA scores in the academic area of math indicated that he was in the 14th percentile in the fall of 2021, the 20th percentile in the winter of 2022, and the 18th percentile in the spring of 2022. *Id.* Student scored low on all composite areas for math at each test administration, with the exception of one that was average (operations and algebraic thinking). *Id.* Student's NWEA scores in science indicated that he was in the 36th percentile in the fall of 2021, the 23rd percentile in the winter of 2022, and the 15th percentile in the spring of 2022. *Id.* During the first and second quarters of the 2021-2022 school year, Student earned As and Bs in all classes on his report card. *Id.* at p. 251. In the third quarter of the school year, Student earned As and Bs, with the exception of one class, specifically language arts, in which he earned a C. *Id.*

FINDINGS OF FACT IN H-23-10:

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

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

1. Student's second grade evaluation dated March 1, 2019 included Student's Kaufman Test of Educational Achievement (KTEA-3) and standard scores were: 81 in Phonological Processing, 82 in Letter and Word Recognition, 90 in Nonsense Word Decoding, 67 in Silent Reading Fluency, 95 in Word Recognition Fluency, 81 in Reading Comprehension, 118 in Associational Fluency, 106 in Object Naming Facility, 89 in Letter Naming Facility, 77 in Written Expression, 88 in Spelling, 93 in Math Computation, and 93 in Math Concepts & Application. *See* H-23-10 Dist. Ex. p. 37. Student's Intelligence Quotient on the Kaufman Assessment Battery for Children (KABC-II NU) was 87, which was the 19th percentile. *Id.*

2. Student's fourth grade IEP that ran from 1/29/21 to 1/24/22 reflected that Student "struggles to understand concepts of division and fourth grade math concepts" but that Student was "reading on a DRA level 40 (mid-4th grade)." *See* H-23-10 Dist. Ex. p. 106.
3. Student's fifth grade General Education Teacher reported to Parents that Student was reading on approximately a 3.5-4.5 grade level on February 8, 2022; although Student's NWEA Map scores were lower, the teacher noted they were "not indicative of what [Student] can do." *See* H-23-10 Parent Ex. p. 161-62; Tr. Vol. V pp. 43-46, 61.
4. In the hearing of H-23-10, the Principal clarified that at the February 17, 2022 IEP meeting, the IEP team added some modifications to assist with Student's safety in light of the February 16, 2022 elopement under the Consideration of Special Factors. *See* H-23-10 Tr. Vol. I p. 93; Tr. Vol. IV p. 138-139; Parent Ex. p. 4.
5. Student's February 17, 2022 IEP included a statement of present levels of academic achievement, noting that Student typically arrived at school on time and was prepared and ready to engage in the classroom *See* H-22-34 Parent Ex. pp. 1-10. Student's teacher also noted that Student enjoyed being engaged in large and small group settings and was not hesitant to ask questions, but noted that he often attempted to control his environment by "asking repeatedly to leave the classroom to visit the principal" or take breaks. *Id.* at p. 2.
6. Regarding social skills, Student's February 17, 2022 IEP noted that he struggled with his peers and being able to appropriately process worries of not fitting in. *Id.* Specifically, the present levels section of the IEP states as follows: "He will lash out when he has these feelings by making inappropriate comments or accusations. Often it consumes his day and he needs support of administration or the school counselor until he is able to reason. [Student] needs strict structure and understanding of any routine changes that may occur."

Id. Regarding reading, Student's IEP noted that Student had a strong vocabulary as compared to his peers and was able to make inferences from a text. *Id.* It was also noted that Student excelled in both comprehension from reading, as well as auditory comprehension. *Id.* Regarding writing, it was noted that Student needed prompts to stay on task and benefited from writing rubrics and graphic organizers. *Id.* Finally, regarding the academic area of math, Student's IEP team noted that Student struggled with attention in breaking down word problems into manageable chunks and identifying place values with decimals; however, he was "successful with grade level standards and minimal support in the area of math." *Id.*

7. Student's February 17, 2022 IEP also included a statement of modifications and accommodations, specifically (1) preferential seating; (2) clearly defined limits, rules, and consequences posted and implemented; (3) redirection of inappropriate behavior; (4) redirection during testing and seat work; (5) positive praise check-ins; (6) reduced writing assignments; (7) small group or 1:1 intervention; (8) peer tutoring; (9) adult accompaniment for transitions outside of the classroom; (10) notification to admin/office if student ran away from adult; (11) check in and check out by an adult during recess; (12) plans for substitute teachers regarding transitions; (13) Student located away from classroom doors; (14) Student seated close to teacher; (15) positive reinforcement for work completion; and (16) Student instruction of replacement behaviors. *Id.* at p. 4.

8. Student's February 17, 2022 IEP, as in prior school years, included three goals, one each in the areas of reading/writing, math, and speech-language therapy. *Id.* at p. 6. Student's reading/writing goal provided that Student, when presented with an opinion based writing prompt, would produce a written work that included three paragraphs, an

introduction/claim, three pieces of evidence to support the claim, and an opposing view statement, and conclusion (with correct punctuation and capitalization) with 80% accuracy by the end of the IEP cycle. *Id.* It was noted that progress pertaining to this goal would be based on work samples and grades. *Id.* Student’s math goal provided that Student would “represent, compute, and solve math problems involving multiplication and division of fractions while utilizing grade-appropriate mathematical language and reasoning skills as demonstrated by 80% accuracy.” *Id.* It was noted that progress pertaining to this goal would be based on observation charts and work samples. *Id.* Student’s speech-language therapy goal provided that Student, when presented with age-appropriate books, scripts, role-playing activities, and real-life situations, would “demonstrate improved social communication skills by (a) inferring feelings and ideas of others, (b) exhibiting reciprocity in interactions . . . (c) playing appropriately with peers in structured and unstructured settings . . . , and (d) role-playing cause and effect problem-solving with at least 80% accuracy across three consecutive sessions by 2/7/2023.” *Id.* It was noted that progress pertaining to this goal would be based on scoring rubrics and “data response.” *Id.* None of the goals included specific objectives. *Id.*

9. Student’s February 17, 2022 IEP provided for Student to receive 240 minutes per quarter (four hours) of speech/language services in social skills, 30 minutes per week of direct instruction in reading, and 30 minutes per week of direct instruction in math. *Id.* at p. 7. Student was not scheduled to receive occupational therapy. *Id.* The IEP did not specifically address a Dyslexia intervention program to be provided to Student via special education or in the general education curriculum. *Id.* Student’s February 17, 2022 IEP was signed by Parents (father), a general education teacher, a special education teacher, a speech language

pathologist, the assistant principal, the LEAs for Chenal Elementary, and the school counselor. *Id.* at p. 10.

10. In the February 25, 2022 IEP meeting, the IEP Team developed some of the content of the Student Elopement Plan. *See* H-23-10 Parent Ex. p. 42. However, the document titled Student Elopement Plan was drafted by the District Principal after the IEP meeting was dismissed and emailed to Parents. *See* H-23-10 Tr. Vol. IV pp. 138-40.

11. Student's speech evaluation in fifth grade reflected that Student was in the normal range. *See* H-22-34 Parent Ex. p. 91-101. The District's Speech Pathologist was treating the Student for pragmatics (social skills) not expressive or receptive language issues. *See* H-23-10 Tr. Vol. II p. 244-50. Minutes were decreased to 30 minutes per week at the February 2022 IEP meeting to reduce the time the Student missed in general education, and the District's Speech Pathologist provided those services till the end of the school year in May of 2022. *Id.* The District's Speech Pathologist's therapy notes reflected Student's progress in social skills. *See* H-23-10 Dist. Ex. 224-37; Tr. Vol. II. P. 249.

12. Student's Special Education Teacher stated Student was on grade level in math despite the NWEA Map scores, but the Student's tests show differently due to Student's behaviors during the assessment. *See* H-23-10 Tr. Vol. I pp. 96-97. She also stated Student is "a beautiful reader, he is very fluent, he is very expressive. . . we would read fifth grade material." *See* H-23-10 Tr. Vol. I pp. 51, 62. She further stated Student would have major task avoidance during the NWEA and the ACT Aspire. *See* H-23-10 Tr. Vol. I p. 61.

13. After discussing the NWEA Map scores, Student's father stated he is "smarter than his test scores" but does not believe he is on a sixth grade level. *See* H-23-10 Tr. Vol. V p. 34.

14. Parents began looking at private schools for Student in January of 2022. *See* H-23-10 Dist. Ex. p. 203-205. Parent's submitted Student's fourth grade IEP with admission documents to the Private School he attends now because it does not mention elopement. *See* H-23-10 Parent Ex. p. 11-15; Tr. Vol. V p. 68-69, 90-91.

15. The District Principal called the IEP meeting on February 25, 2022 to talk about how the school could ensure the Student could come back to school safely. *See* H-23-10 Tr. Vol. IV pp. 20-27. At the February 25, 2022 IEP meeting held to address Student's February 22, 2022 elopement, the Parent Advocate advised the District that if the District could not assure Student's safety, Parents would be place Student in a private school. *See* H-22-34, Parent Ex. 39; Parent Ex. Vol. V Video of February 25, 2022 IEP Meeting.

16. During the February 25, 2022 IEP meeting, the District requested Parents' written consent to perform a functional behavior assessment ("FBA") for Student after the Student's elopements on February 16 and 22, 2022. *See* H-23-10, Tr. Vol. I, p. 30, 38, 114-117; Parent Ex. p. 39. The District did not obtain written consent to conduct a 2022 FBA for the Student. *See* H-23-10 Vol. I p. 112, Vol II p. 9.

17. On February 25, 2022, after the IEP meeting that day, District staff developed a document entitled "School Elopement Plan" to prevent Student from eloping again, and Principal put at the bottom of the document "file with building administrator/office/IEP." *See* H-23-10, Parent Ex. pp. 4, 42-43; Tr. Vol. II pp. 204-08; Tr. Vol. IV pp. 28-29, 134-35. The School Elopement Plan was not incorporated into Student's IEP, but the Safety Plan developed by the IEP team on February 17, 2022 was incorporated into the IEP. *See* H-23-10 Parent Ex. p. 4; Tr. Vol. IV p. 138-139. The District Principal did not consider sending

the Student to an alternative placement. *See* H-23-10, Tr. Vol. IV. pp. 131, 143. The School Elopement Plan and Safety Plan were implemented. *See* H-23-10, Tr. Vol. IV pp. 140-41.

18. The District's Principal and two Assistant Principals talked with the Student after he returned to school after the elopements, told him they were glad he was back at school, told him they expected him to remain on school grounds during school hours, and told him to reach out to them if he needed support. *See* H-23-10 Parent Ex. p. 42-43; Tr. Vol. II pp. 214-215; Tr. Vol. IV pp. 32-43. They explained he would be escorted to a bench for dismissal. *Id.*

19. District's Licensed Psychological Examiner reported that Student was compliant and cooperative during testing. *See* H-23-10, Tr. Vol. II p. 87. District's Licensed Psychological Examiner completed a psychoeducational evaluation of Student on March 10-11, 16-17, 2022. *See* H-23-10, District Ex. pp. 53-68, 359-380; Parent Ex. pp. 52-90. Student was administered the Wechsler Intelligence Scale for Children to measure Student's overall IQ, and Student's overall score was 89, which is considered to be average intelligence and was also commensurate with Student's prior IQ testing. *Id.* at Dist. Ex. p. 59.

20. District's Licensed Psychological Examiner administered the WIAT to Student to determine his academic achievement levels in the following areas of: word reading (score: 95), reading comprehension (score: 95), pseudoword decoding (score: 113), oral reading fluency (score: 112), phonemic proficiency (score: 92), and orthographic fluency (score 103). *Id.* Student performed within the average range on each of those reading subtests, and his overall reading composite was 93, which is in the average range. *Id.* at 59-61. Student's Dyslexia index composite made up of the subtests listed above was 103, which

is also in the average range. *Id.* Based on Student's performance on the Dyslexia index composite on the WIAT, Student was not experiencing any deficit in that area. *See* H-23-10 Tr. Vol. II pp. 66-67; Parent Ex. p. 83. Student's math composite was 88 with subtest scores of: math problem solving (score: 83) and numerical operations (score: 96). *See* H-23-10, District Ex. p. 60. Student's written expression scores were 89 in sentence composition and 103 in spelling. *Id.*

21. According to District's Licensed Psychological Examiner, Student's achievement testing demonstrates that he has the skill set to function at his grade level. *See* H-23-10, Vol. II p. 70.

22. District's Licensed Psychological Examiner reviewed Student's performance on the NWEA Map testing, which was below grade level. *See* H-22-34, Vol. II, p. 86. Because Student's NWEA performance did not align with his grades and his achievement testing with her, District's Licensed Psychological Examiner questioned his Special Education Teacher about his performance on the NWEA Map who reported Student's defiant behavior during the NWEA testing and that the scores do not reflect his ability. *See* H-22-34, Vol. II pp. 76, 86.

23. District's Licensed Psychological Examiner observed Student in class and saw him behaving like a "typical child;" she spoke with his teacher who reported that he "hadn't had any behaviors out of [Student]." *See* H-23-10 Vol. II pp. 13, 57.

24. Student's Special Education Teacher and Fifth Grade General Education Teacher report that Student's NWEA scores are not representative of his capabilities but reflect Student's task avoidance. *See* H-22-34 Vol. II, pp. 179-180; Vol. III pp. 135, 162-163; H-23-10 Parent

Ex. pp. 45, 161-163. When the Special Education Teacher would test the Student in a small group, he would refuse to do the test. *See* H-23-10 Tr. Vol. I pp. 52-53.

25. Between February and March of 2022, the District's Speech Pathologist administered Student examinations needed for his Speech-Language Re-evaluation, which was completed on March 18, 2022 and a report was completed on March 21, 2022. *See* H-23-10 Dist. Ex. pp. 381-391; Parent Ex. pp. 91-101. Student's voice qualities and speech fluency were "adequate," and his articulation skills were in the "average range for his chronological age and gender." *Id.* His receptive and expressive language skills were within the average range, as well as his pragmatics (social skills). It was noted that Student has many strengths in expressive and receptive speech, along with knowledge of age-appropriate pragmatic skills; however, "implementation of these skills in 'real life' situations is sometimes challenging for [Student]." *Id.* The District's Speech Pathologist recommended continuing speech language therapy for the implementation of social skills as an option for the team to consider. *Id.*

26. On March 18, 2022, the Student's IEP Progress Report showed progress on his goals. Student's reading goal progress, which was essentially a writing goal, stated: "[Student] is able to verbally process his introduction and evidence. He excels at writing a hook for a claim. With checklists and in a one on one small group, [Student] needs several prompts to stay on task when given the task of writing. Working at 75% toward independence in writing samples." *See* H-23-10 Dist. Ex. p. 347. Student's progress on his math goal on March 18, 2022 stated: "[Student] is working toward identifying LCM (least common multiple)-80%)." *Id.* His behavior/social skills goal progress stated: Student was able to "demonstrate improved social communication skills by (a) inferring feelings and ideas of

others (90%), (b) exhibiting reciprocity in interactions (95%), playing appropriately with peers in structured and unstructured (90%), and (d) role-playing cause and effect problem-solving with at least 90% accuracy across three consecutive sessions by 2/7/23 (85%).” *Id.*

27. On March 21, 2022, the District gave Parents notice of an evaluation conference to be held on April 7, 2022. *See* H-23-10 Parent Ex. p. 44; Dist. Ex. 393. The District requested Parents consent to a 2022 FBA in writing. *See* H-23-10 Parent Ex. p. 39. Although Parents verbally consented (*see* H-23-10 Parent Ex. p. 37), written consent did not occur, and the District did not conduct a 2022 FBA. *See* H-23-10 Tr. Vol. I p. 17.

28. The evaluation conference was held on April 7, 2022 to review the recent evaluation results and speech-language testing, and Parents and Parent Advocate attended virtually. *See* H-23-10 Parent Ex. pp. 45-46; Dist. Ex. 393. The Notice of Action reflects that the IEP team determined that the Student would remain eligible for special education services under OHI and noted that the Student was in “stay put” due to the due process hearing filing in H-23-10. *See* Dist. Ex. p. 356. The IEP team made no changes to the IEP at that time. *Id.* The Parents were to receive adaptive rating scales to complete, and an addendum to the psycho-educational report would be added. *Id.* In response to the Parents’ questions regarding teacher ratings of the Student on Aggression and Conduct noting no Behavior Incidents, District staff explained that teachers address behaviors in class in the moment, so no referrals to administrators had been warranted. *Id.* The examiner recommended Parents share the evaluation with Student’s counselor. *Id.* Student would continue to receive resource and speech therapy. *Id.* The discrepancies in the NWEA scores and Student’s performance on the psycho-educational achievement tests were discussed. *Id.*

The Special Education Teacher who administered the NWEA explained that the NWEA results are not likely an accurate depiction of Student's abilities because Student rushed through and did not put much effort into doing his best. *Id.* The District's Licensed Psychological Examiner discussed Student's elopements and provided resources to Parents, as well as noting that she observed the District has provided a "para" to assist with the Student's safety in terms of elopement from school. *Id.*

29. As no changes were made to the goals or services in Student's February 17, 2022 IEP, as reviewed on April 7, 2022, that IEP remained in place for the remainder of the spring semester in 2022 and was the IEP in effect when school began in the fall of 2022. *See* H-23-10 Parent Ex. pp. 1-10, 45; Tr. Vol. V pp. 55-56. Elements of the Student's Safety Plan were contained on the Special Factors page. *See* H-23-10 Parent Ex. p. 4.

30. The District was aware the Parents were looking at private school placement for the Student, and the District did not create a plan to transition the Student to the District's Middle School. *See* H-23-10 Tr. Vol. I pp. 46, 73; Tr. Vol. V, pp. 63-64. However, the Student's Fifth Grade General Education Teacher did have the Student complete a middle school placement course recommendation form in March of 2022; the General Education Teacher did not believe the Student should be retained. *See* H-23-10 Tr. Vol. III pp. 154-55. The District's Middle School houses grades sixth, seventh, and eighth, and there are fewer students at the District's Middle School than at the District's Elementary School where the Student attended. *See* H-23-10 Tr. Vol. II, pp. 142-43. The District did not suggest any alternative to the District Middle School at Pinnacle, until the resolution conference. *See* H-23-10 Tr. Vol. V, pp. 82-83.

31. Parents did not request a transfer of Student to another school in the District or in Pulaski County School District to address their concerns regarding bullying at the Student's existing District school placement, but a transfer to another school placement would have addressed Parents' bullying concerns. *See* H-23-10 Tr. Vol. V pp. 121-122.

32. On May 27, 2022, the Student's IEP Progress Report showed continued progress on his reading/writing and math goals. *See* H-23-10 Dist. Ex. pp. 347-48. Student's reading goal, which was essentially a writing goal progress note stated: "[Student] has made progress at 80% with independently working through checklists and rubrics when writing an opinion piece," which was an improvement from 75% in March of 2022. *Id.* On his math goal on May 27, 2022, the progress note stated: "[Student] is able strategies with multiplication of tractions at 80%)." *Id.* Student met his behavior/social skill goal because he was able to "demonstrate improved social communication skills by (a) inferring feelings and ideas of others (93%), (b) exhibiting reciprocity in interactions (94%), playing appropriately with peers in structured and unstructured (90%), and (d) role-playing cause and effect problem-solving with at least 90% accuracy across three consecutive sessions by 2/7/23 (91%)." *Id.*

33. Student's District fifth grade report card reflects the following grades for the third and fourth quarters of 2022: Language Arts (3rd-C, 4th-B), Science (3rd-B, 4th-C), Math (3rd-B, 4th-B), Art (3rd-A, 4th-A), Music (3rd-A, 4th-A), Social Studies (3rd-B, 4th-C), Physical Education (3rd-A, 4th-A). *See* H-23-10 Parent Ex. p. 163.

34. On July 28, 2022, Student received an Occupational Therapy Initial Evaluation by Examiner Tracy Morrison. *See* H-23-10 Dist. Ex. pp. 102-112. Dr. Tracy Morrison,

Independent Occupational Therapist evaluated the Student and stated that the Student needs occupational therapy or physical therapy or speech therapy for two to three hours per work to prevent the Student from becoming frustrated and withdrawing. *See* H-23-10 Tr. Vol. III pp. 17, 71, 87. The Occupational Therapist observed that the Student is age-appropriate in a lot of his cognitive skills, but he is socially behind. *See* H-23-10 Tr. Vol. III p. 13. She observed him for a full day in his school setting and stated he is capable of learning at level, but he struggles with anxiety, particularly when information is not delivered one-on-one. *Id.* at p. 31. She stated: “persons like the Student are intelligent, but they may not test that way because they have high anxiety.” *Id.* at pp. 55-56.

35. Student’s Father asserted private school testing showed Student’s academic skills were consistent with the District’s NWEA map testing, which showed first to second grade levels, but Parents had no documentation to support this. *See* H-23-10 Tr. Vol. V pp. 32, 46, 61, 94. Student’s Mother stated that a private school told her, after some testing, the Student would need to repeat fifth grade. *Id.* at pp. 107-108.

36. In the fall of 2022, Student was admitted to Christ Little Rock (“Private School”), which was chosen after Student admission was declined at other schools. *See* H-23-10 Vol. V pp. 69-70. Because previous private schools had determined the Student could not be placed there due to prior elopements or the behavior rating scales, Parents did not inform the Private School of the past elopements and did not provide Christ Little Rock with Student’s most recent 2022 IEP. *See* H-23-10 Tr. Vol. V pp. 66-72, 95; Tr. Vol. VI pp. 11-12; H-22-34 Tr. Vol. IV pp. 204-205.

37. Since placement at the Private School, NWEA Map testing showed an increase in Student's math score since the beginning of the 2022-2023 school year from 15th to 36th percentile, but Student's reading score was in the 26th percentile first quarter and then 14th percentile second quarter, which the Private School Director attributed to rapid guessing or rushing to finish by the Student. *See* H-23-10 Tr. Vol. V, p. 32; Tr. Vol. VI, p. 17. The Private School Director did not think the NWEA Map scores were a true indication of Student's abilities. *Id.* at p. 18. Conversely, The Student's STAR Reading score went from the 16th percentile in August of 2022 to the 26th percentile in January of 2023. *See* H-23-10 Tr. Vol. VI p. 17. Student is working on executive management skills. *See* H-23-10 Tr. Vol. V p. 75. Student receives special help in reading and math by being pulled out by the Private School's special education teacher into a small group for additional instruction. *Id.* at p. 77; H-23-10 Tr. Vol. VI pp. 12, 19-20.

38. At the District, Student would get in the car crying after school, and he would not want to talk about his day. *See* H-23-10 Tr. Vol. V p. 73, 118-20. At the Private School, Student gets in the car telling his Parents about what he did, and kids at the Private School have been welcoming to the Student. *Id.* at p. 117-120. The Private School is small with 118 students, 16 children are in the Student's class, and the same teachers are with the students wherever they go. *See* H-23-10 Tr. Vol. V pp. 96-97; Tr. Vol. VI pp. 19-20.

39. The Student has enrolled in the Private School's Social Club, which is a pragmatics class after school where students practice interactions with each other in "real life." *See* H-23-10 Tr. Vol. VI p. 16; Tr. Vol. V pp. 78-79; Tr. Vol. VI p. 16. Student's Mother sees improvement in Student's social skills since attending the Private School, such as not interrupting conversations and being more insightful. *See* H-23-10 Tr. Vol. V pp. 117-18.

40. Student is currently repeating fifth grade at the Private School. *See* H-23-10 Tr. Vol. V pp. 35-36, 61. The Private School Director stated the Student's placement in her fifth grade classroom is appropriate. *See* H-23-10 Tr. Vol. VI pp. 10-11.

41. Student's fifth grade report card at Private School lists his semester grades in the fall of 2022 as: Language Arts-B, Religion-A, RO Math-A, Science/Health-C, Social Studies-B. *See* H-23-10 Parent Ex. p. 164. Student's Father conceded the Private School grades are similar to Student's grades in fifth grade at the District, but Student's father asserted Student is no longer graded on a curve. *See* H-23-10 Tr. Vol. V pp. 89-90.

42. From February 25, 2022 to September 6, 2022, Student finished fifth grade at District's Don Roberts Elementary. *See* Complaint H-23-10. Student did not elope again after February 22, 2022. *See* H-23-10 Tr. Vol I p. 15; Tr. Vol. II pp. 214-15; Tr. Vol. V pp. 54, 99.

43. On September 6, 2022, Parents filed Complaint H-23-10, alleging the District failed to provide Student a FAPE within a reasonable period of time and seeking private school tuition reimbursement pursuant to 20 U.S.C. § 1412(a)(10)(C)(ii). *See* H-23-10 Complaint.

44. On September 9, 2022, the prior Hearing Officer entered a Final Decision and Order in H-22-34 finding in favor of the Parents that the District denied Student a FAPE since February 25, 2020, and that the IEPs developed by the District in 2020, 2021, and 2022 were not reasonably calculated to enable the Student to make appropriate progress in reading and math. *See* H-23-10 Parent Ex. pp. 169-208.

CONCLUSIONS OF LAW AND DISCUSSION:

I. Issue Preclusion and Law of the Case

Parents have raised arguments of issue preclusion and law of the case. *See* Parent's Post-Hearing Brief *citing See Alexander v. Pathfinder, Inc.*, 91 F.3d 59, 62 (8th Cir. 1996) (*citing Crockett & Brown, P.A. v. Wilson*, 314 Ark. 578, 581 (1993)); *Plough v. West Des Moines Community School Dist.*, 70 F.3d 512, 515-16 (8th Cir. 1995). It is not required that this Hearing Officer make a finding regarding issue preclusion or law of the case because the timeframe for this matter, H-23-10, is different and has different evidence from that considered by the prior Hearing Officer in H-22-34.

2. Provision of FAPE in a Timely Manner

Pursuant to Part B of the IDEA, states are required to provide a FAPE for all children who are eligible for special education services. 20 U.S.C. § 1412(a); 34 C.F.R. § 300.300(a). FAPE consists of both special education and related services. 20 U.S.C. § 1401(9); 34 C.F.R. § 300.17. In 1982, the U.S. Supreme Court addressed the meaning of FAPE and set forth a two-part analysis that must be made by hearing officers in determining whether a school district has failed to provide FAPE as required by federal law. *See Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-07 (1982). First, a hearing officer must determine whether the State in the form of the local education agency or district, complied with the procedures set forth in IDEA. *Id.* Then, the hearing officer must determine whether a student's IEP was reasonably calculated to enable to the student to receive educational benefit. *Id.* The burden of proof falls on the party seeking relief. *See Snetzer v. Iowa Dep't of Educ.*, 796 F.3d 942, 948 (8th Cir. 2015).

A. Procedural Issues

Regarding whether District complied with the procedures set forth in the IDEA, Petitioners raised a failure by the District to conduct the 2022 FBA as a procedural violation. There were disagreements over the reason that the District did not obtain written consent for the 2022 FBA. However, the evidence was undisputed that no 2022 FBA was conducted. Nonetheless, this Hearing Officer finds that resulted in no harm to the Student's education because the District's plan to prevent elopement was effective as evidence by the fact that Student did not elope again after it was in place. There was no evidence of other behavior issues by the Student. As the elopement issue was effectively addressed, Student's learning was not impaired by the failure to conduct a 2022 FBA.

Parents raised the District's failure to implement the Wilson reading program or Take Flight with fidelity, as well as the failure to identify the reading programs on the Student's IEP with measurable goals as procedural violations by the District. Again, this Hearing Officer finds this resulted in no harm to the Student's education or the Parents' opportunity to participate in the decision-making process for the Student, as Student's was no longer exhibiting indications of Dyslexia. Thus, Student's education was not harmed by any lack of fidelity in implementing those programs.

This Hearing Officer did not find by a preponderance of the evidence that the District predetermined that it would not revise the February 17, 2022 IEP at the April 2022 meeting. In the April 7, 2022 Notice of Action, the fact that the Student was in "stay put" was in a separate sentence from the statement that there were no revisions to the IEP. The notes reflect that Parents and staff participated in a thorough discussion of Student's performance at that meeting, and the IEP team rejected the option of dismissing Student

from services. Based on the evaluation of the District's Licensed Psychological Examiner discussed below and other information from educators, Student's achievement was on grade level and Student was progressing, so there would have been no harm to Student's education even if there had been a procedural violation and parental participation was not harmed. There was no need to revise the IEP in light of the new information given regarding Student's grade level achievement scores.

For the reasons stated above, this Hearing Officer finds that if there were procedural violations by the District, they did not result in the denial of FAPE to the Student or his Parents' participation.

B. Substantive Issues

The next analysis is whether the District substantively denied FAPE to Student, *i.e.* whether the District failed to provide an IEP that was reasonably calculated to enable Student to make appropriate progress in light of his individual circumstances. In 2017, the United States Supreme Court "rejected the 'merely more than *de minimis*' standard that had previously been the law in the Eighth Circuit." *Paris Sch. Dist. v. A.H.*, 2017 WL 1234151, 4 (W.D. Ark 2017). (citing *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1, No. 15-827*, 2017 WL 1066260, 580 U.S. ___ (2017), 137 S.Ct. 988 (2017)). In *Endrew F.*, 137 S. Ct. at 1000. The Court stated the following:

It cannot be the case that the Act typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than *de minimis* progress for those who cannot. When all is said and done, a student offered an educational program providing "merely more than *de minimis*" progress from year to year can hardly be said to have been offered an education at all."

Endrew F., 137 S.Ct. at 1001 (citations omitted). The U.S. Supreme Court held that the IDEA

requires that students under the Act be provided with an “educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Id.*

An IEP is a comprehensive program prepared by a child’s “IEP Team,” which includes teachers, school officials, the local education agency (LEA) representative, and the child’s parents; an IEP must be drafted in compliance with a detailed set of procedures. 20 U.S.C. §1414(d)(1)(B). Every IEP, pursuant to the IDEA, is required to include the following: (1) a statement of a student’s present levels of academic achievement and functional performance; (2) a description of how a student’s disability affects his or her involvement and progress in the general education curriculum; (3) annual goals that are measurable, as well as a description as to how progress toward stated goals will be measured; and (4) a description of special education and related services provided to student. 20 U.S.C. § 1414(d)(1)(A)(i)(I)-(IV).

“Special education” is “specially designed instruction . . . to meet the unique needs of a child with a disability”; “related services” are the support services “required to assist a child . . . to benefit from” that instruction. *Id.* §§ 1401(26), (29). A school district must provide a child with disabilities such special education and related services “in conformity with the [child’s] individualized education program,” or “IEP.” 20 U.S.C. §1409(9)(D). The IEP is the guiding document and primary method for providing special education services to disabled children under the IDEA. *Honig v. Doe*, 484 U.S. 305, 311 (1988). “Through the development and implementation of an IEP, the school provides a FAPE that is ‘tailored to the unique needs of a particular child.’” *Paris Sch. Dist.*, 2017 WL 1234151, at *5 (citing *Andrew F.*, 2017 WL 1066260, at *1000). An IEP is not designed to be merely a form but,

instead, a substantive document developed only after a district has carefully considered a student's "present levels of achievement, disability, and potential for growth." *Id.*

Pursuant to *Andrew F.*, a district "must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." 2017 WL 1066260, at *1000. For most students, to comply with this standard, providing FAPE "will involve integration in the regular classroom and individualized special education calculated to achieve advancement from grade to grade." *Id.* However, in the event that this is not possible, the education of a disabled child still needs to be "appropriately ambitious" in light of a student's individual circumstances. *Id.*

1. FAPE: Dyslexia and Academic Deficits

a. The February 17, 2022 IEP Remained in Place.

The February 17, 2022 IEP that was in place as of the date this complaint, H-23-10, was filed on February 25, 2022 continued throughout the timeframe of H-23-10. Based on the evidence, this Hearing Officer finds Student's February 17, 2022 IEP included an appropriate statement of Student's present levels of academic achievement and functional performance, appropriate accommodations, and an adequate description of how Student's disability affected his involvement and progress in the general education curriculum.

Student's IEP had one reading goal which provided that Student, when presented with an opinion-based writing prompt, would produce a written work that included three paragraphs, an introduction/claim, three pieces of evidence to support the claim, and an opposing view statement, and conclusion (with correct punctuation and capitalization) with 80% accuracy by the end of the IEP cycle. Per the notes in the February 17, 2022 IEP, this goal addressed Student's primary weakness in language arts, which was difficulty in putting

his thoughts in writing after reading. The goal had no objectives, and there was minimal documentation of progress monitoring. Student was not provided with any Dyslexia services as the Dyslexia specialist found he no longer exhibited characteristics of Dyslexia on two screeners, the Hegrity and the WIST. Student received 30 minutes per week of special education minutes in the area of reading/writing.

Student's February 17, 2017 IEP had one math goal, which provided that Student would "represent, compute, and solve math problems involving multiplication and division of fractions while utilizing grade-appropriate mathematical language and reasoning skills as demonstrated by 80% accuracy." Student received 30 minutes of special education minutes weekly to support his progress in math.

b. Student's NWEA and ACT Aspire scores do not reflect his abilities.

As discussed above, in the first case between these parties, H-22-34, Parents alleged that District did not provide FAPE to Student between February 25, 2020 and February 25, 2022, by failing to provide appropriate supports and services to address characteristics of Dyslexia and academic deficits and, also, by failing to address Student's communication, social and behavioral deficits resulting from Autism Spectrum Disorder. The prior Hearing Officer found that the District's IEPs for 2019-2020 (beginning February 25, 2020), 2020-2021, and 2021-2022 (through February 25, 2022) school years were not reasonably calculated to enable Student to make appropriate progress in reading and math. See H-22-34 Order p. 37. In making her findings, the prior Hearing Officer cited Student's standardized test scores on the NWEA and ACT Aspire as a reflection of Student's failure to progress in reading and math. Student's NWEA scores in reading were in the 26th percentile in the fall of 2021, 20th percentile in winter of 2022, and 4th percentile in spring of 2022. Student's NWEA

scores in math were in the 14th percentile in the fall of 2021, 20th percentile in the winter of 2022, and 18th percentile in the spring of 2022.

Since beginning at the Private School for the 2022-2023 school year, NWEA Map testing showed Student's academic skills in math improved from 15th to 36th percentile, but Student's reading score was in the 26th percentile first quarter and then 14th percentile second quarter, which the Private School Director notably attributed to rapid guessing or rushing to finish by the Student. The Student's STAR Reading score increased from the 16th percentile in August of 2022 to the 26th percentile in January of 2023, which is particularly remarkable when compared with Student's NWEA Map scores for those timeframes, which reflect the opposite movement in Student's reading percentiles over that same time period.

Student's increase in Star Reading score and decrease in NWEA Map score for the same time period at Private School highlights the dubious reliability of NWEA Map and ACT tests results for this Student. Although the value of nationally normed standardized testing as a measure of performance for most students is not lost on this Hearing Officer, for the reasons discussed herein, this Hearing Officer finds this Student's performance on the NWEA Map and ACT test unreliable as a measure of this Student's academic abilities in light of evidence available in the timeframe of H-23-10.

In H-23-10, Special Education Teacher, the General Education Teacher, the Psychological Examiner, the independent Occupational Therapist, and even the father all stated Student's NWEA and ACT Aspire ("NWEA and ACT") scores were not accurate reflections of Student's academic achievement and abilities. Student's Special Education Teacher who was with the Student during NWEA testing explained that the NWEA testing results were not accurate for Student due to his defiant behavior during the NWEA testing.

Student's Special Education Teacher further stated when she would test the Student in a small group, as in the NWEA and ACT, Student would refuse to do the test or, as she put it another way, "would have major task avoidance." Prior to any due process complaint being filed, Student's fifth grade General Education Teacher noted in writing on Student's reading performance report that Student's NWEA Map scores did not reflect Student's ability.

Without no background in the case, the Private School Director testified that Student's NWEA Map scores are not a true indication of Student's abilities. The Parent's expert witness, Occupational Therapist testified "persons like the Student are intelligent, but they may not test that way because they have high anxiety." The Occupational Therapist also noted that Student would struggle with information not presented one on one, such as the setting for the NWEA Map and Act Aspire testing. Even Student's Father admitted that Student is "smarter than his test scores."

With witnesses for both parties in agreement, it is clear that the NWEA Map and ACT Aspire scores were not accurate measures of Student's academic abilities. Thus, other available measures must be reviewed to determine Student's level of academic performance and progress.

c. Knowledgeable Opinions

The opinions of persons with knowledge and expertise in education reflect Student's achievement in reading and math was on grade level. Student's fifth grade General Education Teacher reported that Student was reading on approximately a 3.5-4.5 grade level on February 8, 2022; although Student's NWEA Map scores were lower, the teacher noted they were "not indicative of what [Student] can do." Student's Special Education

Teacher stated Student was on grade level in math despite the NWEA Map scores, but the Student's tests show differently due to Student's behaviors during the assessment. She also stated Student is "a beautiful reader, he is very fluent, he is very expressive. . . we would read fifth grade material."

Dr. Tracy Morrison, an Independent Occupational Therapist, gave the Student an Occupational Therapy Initial Evaluation in July of 2022. Among her other findings, the Occupational Therapist observed that the Student is age-appropriate in a lot of his cognitive skills, although socially behind. After observing him for a full day in his school setting, she stated he is capable of learning at level, but he struggles with anxiety, particularly when information is not delivered in a one-on-one context. She further stated: "persons like the Student are intelligent, but they may not test that way because they have high anxiety." Her assessments as an expert on behalf of Parents align with the assessments of the Special Education Teacher and the General Education Teacher above, and the Psychological Examiner below. In addition, the Occupational Therapist provided insight into the reason that Student's NWEA and ACT test scores do not align with his classroom performance: his struggle with anxiety.

Student's Father admitted that Student is "smarter than his test scores," though he did not believe Student is on a sixth grade level. Although Student's Father asserted private school testing showed Student's academic skills were consistent with the District's NWEA map testing, which showed first to second grade levels, Parents had no documentation to support the assertion. Student's Mother stated that a private school told her, after some testing, the Student would need to repeat fifth grade, which is different from stating that the Student is at a first or second grade level.

d. Grades and Goal Progress

Student's report cards reflect that Student is working at grade level. Student's fifth-grade report card from the District reflects the following grades for the third and fourth quarters of 2022: Language Arts (3rd-C, 4th-B), Science (3rd-B, 4th-C), Math (3rd-B, 4th-B), Art (3rd-A, 4th-A), Music (3rd-A, 4th-A), Social Studies (3rd-B, 4th-C), Physical Education (3rd-A, 4th-A). Student is currently repeating fifth grade at Private School, and his semester grades in the fall of 2022 were: B in Language Arts, A in Religion, A in RO Math, C in Science/Health, B in Social Studies. Student's grades at Private School are remarkably similar to Student's grades in fifth grade at the District.

IEP progress notes also evidenced that Student is working at or near grade level. Student's fourth grade IEP that ran from 1/29/21 to 1/24/22 reflected that Student "struggles to understand concepts of division and fourth grade math concepts" but that Student was "reading on a DRA level 40 (mid-4th grade)." On March 18, 2022, the Student's IEP Progress Report reflected Student's progress on his goals. Regarding his reading/writing goal, the notes reflect: "[Student] is able to verbally process his introduction and evidence. He excels at writing a hook for a claim. With checklists and in a one on one small group, [Student] needs several prompts to stay on task when given the task of writing. Working at 75% toward independence in writing samples." On his math goal, the notes reflect: "[Student] is working toward identifying LCM (least common multiple)-80%)." Student's May 27, 2022 IEP Progress Report showed continued progress on his reading/writing and math goals: "[Student] has made progress at 80% with independently working through checklists and rubrics when writing an opinion piece," which was an improvement from 75% in March of 2022, and "[Student] is able strategies with multiplication of fractions at 80%)."

Notably, these progress reports reflect Student is working on skills far above the level that he should be able to if the NWEA and ACT scores had been accurate, and some of the progress reports were written prior to the filing of the due process hearing, so there is no reason to suspect bias.

e. District's Psychological Evaluation in March of 2022

In March of 2022, District's Licensed Psychological Examiner completed a psychoeducational evaluation. Student's overall Intelligence Quotient measured 89. Student's achievement scores on the WIAT in the following areas were: word reading (score: 95), reading comprehension (score: 95), pseudoword decoding (score: 113), oral reading fluency (score: 112), phonemic proficiency (score: 92), and orthographic fluency (score 103). *Id.* Student performed within the average range on each of those reading subtests, and his overall reading composite was 93, which is in the average range. The Psychological Examiner found no deficits in the Dyslexia screener administered. Student's math composite was 88 with subtest scores of: math problem solving (score: 83) and numerical operations (score: 96). Student's written expression scores were 89 in sentence composition and 103 in spelling. In summary, according to District's Licensed Psychological Examiner, Student's achievement testing measured at or near grade level.

This Hearing Officer took note that District's Licensed Psychological Examiner reviewed Student's performance on the NWEA map testing, which was below grade level and acknowledged that the NWEA scores raised questions for her also. Because Student's performance did not align with his grades and his achievement testing, District's Licensed Psychological Examiner questioned his Special Education Teacher about his performance on the NWEA Map and received an explanation from Student's Special Education Teacher

who was with the Student during NWEA testing and explained that the NWEA testing results were not accurate for Student due to his defiant behavior during the NWEA testing. The discrepancies in the NWEA scores and Student's performance on the psycho-educational achievement tests were discussed at Student's evaluation conference on April 7, 2022. In the meeting, the Special Education Teacher who administered the NWEA explained to Parents more delicately that the NWEA results are not likely an accurate depiction of Students abilities because Student rushed through and did not put much effort into doing his best, which is similar to the statement made by the Private School Director regarding Student's NWEA scores while at her school.

In reviewing the record, this Hearing Officer placed weight on the consistency of the District's Psychological Examiner's findings with the findings of another psychological examiner who conducted the Student's second-grade evaluation dated March 1, 2019. In comparing the 2019 psychological evaluation to the 2022 psychological evaluation, this Hearing Officer noticed that the Student's 2019 Intelligence Quotient measured 87 and his 2022 Intelligence Quotient measured within 2 points of the old measure at 89. Further, this Hearing Officer noted that the 2019 achievement test results all measured above or near the Student's Intelligence Quotient, and the same was true for the 2022 achievement test results, in which the Student's scores all measured above or near the Student's Intelligence Quotient and within the average range.

Due to the Student's history of scoring significantly below grade level on the NWEA and ACT and the fact that the 2022 Psychological Evaluation occurred after the first due process complaint was filed, this Hearing Officer at first questioned the accuracy of the District's Psychological Examiner's test results, but after scouring the record, based on the

evidence recited herein, this Hearing Officer concludes that the District's Psychological Examiner's test results are the best existing measure of the Student's academic abilities because the Student was cooperative and compliant when working with her on the one-on-one testing setting, as opposed to the task avoidance he historically exhibits in a small group test setting. In addition, this Hearing Officer found the District's Psychological Examiner credible and competent.

f. Conclusion

After this Hearing Officer's examination of the record, it is the opinion of this Hearing Officer that the Student academic levels in reading and math were at or near grade level from February 25, 2022 to September 6, 2022. Student's IEP goals were tailored to provide him support in his weakest areas, which were math and reading/written expression, and the number of minutes of special education provided in these areas were reasonably calculated to allow Student to continue to progress academically, which was evidenced by the facts above showing Student's academic achievement at or near grade level in reading/written expression and math, particularly the April 2022 psychological evaluation. The IDEA requires that the IEP be reasonably calculated to allow Student to progress academically; it does not require that an IEP be reasonably calculated to allow Student's standardized test scores to show progress.

FAPE: Communication, Social, and Behavior Deficits.

Parents alleged in due process complaint H-23-10 that District failed to appropriately address Student's deficits in communication, social skills, and behavior. "When a child's learning is impeded by behavioral issues, the IDEA requires that the IEP team 'consider the

use of positive behavioral interventions and supports, and other strategies, including positive behavioral interventions.” See *M.M. ex. rel. L.M. v. Dist. 0001 Lancaster County Sch.*, 702 F.2d 479 (8th Cir. 2012) (citing 20 U.S.C. 1414(d)(3)(B)(i)). Failure to address behavioral issues appropriately can amount to a denial of FAPE for a student. *Neosho R-V School District v. Clark*, 315 F.3d 1022 (8th Cir. 2003). However, the Eighth Circuit Court of Appeals has stated, “it is ‘largely irrelevant’ if the school district could have employed ‘more positive behavior interventions’ as long as it made a ‘good faith effort’ to help the student achieve the educational goals outline in his IEP.” See *M.M.*, 702 F.2d at 479. A district must consider all outside evaluations, it is not required that such recommendations be adopted; to require this from a district would result in “requiring a school to change methodologies based on the preferences of each parent” and would create the potential that a school district could be required to provide more than one method for different students based on parents with different preferences. *Id.*

I. Communication and Social Skills

In H-23-10, this Hearing Officer finds the IEP in place provided for special education minutes and speech language therapy minutes to address Student’s social skills or pragmatics. Although Student’s annual goal pertaining to these areas lacked objectives, the testimony of Student’s teachers through the years indicated that Student’s communication and social skills were significantly improving year by year, and the District’s Speech Pathologist’s therapy notes reflected Student’s continued progress in social skills. Further, the District’s Speech Pathologist’s report from March of 2022 reflects that the Student’s speech, language, and knowledge of social skills were at grade level; however, Student continued to struggle to implement his knowledge in “real life” situations. For this reason, she recommended

the team consider continued speech/language time to continue to work on pragmatics/social skills. Instead of terminating speech therapy, the IEP team determined that a reduction of Student's speech minutes was appropriate to allow Student to receive more general education time, and the District continued to provide such time during the remainder of Student's tenure at the District. For these reasons, this Hearing Officer finds that the District's February 2022 IEP continuing speech therapy to work on social skills was appropriately calculated to allow Student to continue to make progress on his social skills. This Hearing Officer finds that the District did not fail to provide FAPE to the Student in the area of his social skills.

As for behavior, Student's BIP remained in place during the timeframe of H-23-10. Student's fourth and fifth grade teachers testified that Student's behavior had improved to the point that the BIP was not needed on a continual basis. Student's General Education Teacher for fifth grade reported he hadn't had any behaviors out of the Student. There was no evidence of other behavioral incidents on the part of the Student during the timeframe at issue here. The Occupational Therapist did not issue her report until July of 2022, and there is no evidence Parents requested an IEP meeting after that date to consider her recommendations. Thus, there is no evidence that Student's behavior impaired his learning.

Although Student had three elopements during the 2020-2021 and 2021-2022 school years, those elopements were during the timeframe of H-22-34, and the prior Hearing Officer found the District quickly responded to those events and created additional safety and behavior plans to address Student's behavior. The evidence in H-23-10 reflected that Student had no additional elopements after the District put the School Elopement Plan as well as the Safety Plan reflected in the IEP in place.

For the reasons discussed above, this Hearing Officer finds the District did not fail to provide FAPE to the Student in the areas of communication, social skills, and behavior, and therefore, did not commit a substantive violation of IDEA in these areas during the time covered by H-23-10.

Much of the hearing in H-23-10 focused on Student's episodes of suicidal ideation and elopement, the District and Parents' responses to those events, and whether those events were a result of Student being bullied or a result of Student's perseveration on past occurrences, which largely occurred during the time of H-22-34. Although this Hearing Officer empathized with how disturbing those events were for Parents and District officials, this Hearing Officer lacks jurisdiction over matters regarding Arkansas' anti-bullying laws and regulations, so this Hearing Officer therefore declines to make any related findings or conclusions.

PRIVATE SCHOOL PLACEMENT:

As this Hearing Officer has found no denial of FAPE by the District during the timeframe at issue in H-23-10, it is not necessary to analyze whether the Private School placement is appropriate for the Student. Parent requests for tuition reimbursement, transportation, and any other compensatory education are denied.

FINAL CONCLUSIONS AND ORDERS:

Upon consideration of all the testimony and evidence, this Hearing Officer finds that a preponderance of the evidence warrants the following:

1. This Hearing Officer finds no denial of FAPE to Student or substantive violations of IDEA by the District; therefore, Parents' request for tuition reimbursement, transportation any other compensatory education are denied; and

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

FINALITY OF ORDER AND RIGHT TO APPEAL:

The decision of this Hearing Officer is final. A party aggrieved by this decision has the right to file a civil action in either Federal District Court or a State Court of competent jurisdiction, pursuant to the Individuals with Disabilities Education Act, within ninety (90) days after the date on which the Hearing Officer’s Decision is filed with the Arkansas Department of Education.

Pursuant to Section 10.01.36.5, *Special Education and Related Services: Procedural Requirements and Program Standards*, Arkansas Department of Education 2008, the Hearing Officer has no further jurisdiction over the parties to the hearing.

IT IS SO ORDERED.

/s/ Debby Linton Ferguson

HEARING OFFICER

05/26/2023

DATE