

Before the
Administrative Hearing Commission
State of Missouri



, in the interest of,)	
)	
Petitioner,)	
)	
vs.)	No. 19-1148
)	
BELTON SCHOOL DISTRICT,)	
)	
Respondent.)	

DECISION

(Parent) filed a due process complaint against the Belton School District (District) alleging that the District failed to provide (Student) with a free appropriate public education (FAPE) pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 et seq., because his individualized education program (IEP) team plans to change Student’s placement to a placement that is not in his least restrictive environment (LRE). The District argues that the proposed placement is his LRE.

We find that the District did not deny FAPE to Student because his IEP is reasonably calculated to enable him to make progress appropriate in light of his circumstances and his LRE is Trails West, a Missouri School for the Severely Disabled (MSSD).

Procedure

On August 30, 2019, Parent filed a due process complaint alleging that the District denied Student FAPE by failing to place Student in his LRE and failing to ensure he was educated with

non-disabled peers. We scheduled the hearing for October 3-4, 2019. On September 9, 2019, the District filed a response to the complaint. By order dated September 27, 2019, at the parties' request, we continued the hearing.

On September 25, 2019, Parent filed a motion to file an amended due process complaint preserving the Americans with Disabilities Act (ADA) and *Olmstead*¹ claims, with a copy of the proposed amended complaint. On September 30, 2019, the District filed a memorandum in support of its opposition to Parent's motion for leave to amend due process complaint. On October 7, 2019, Parent filed a reply to the memorandum. By order dated October 15, 2019, we granted the motion to amend Parent's due process complaint. We dismissed certain claims and parties raised in the amended complaint because we lacked jurisdiction to hear them. On October 22, 2019, the District filed a response to the amended complaint.

On December 4 and 5, 2019, we held a hearing. Lisa Sutherland and Will Hack, with Missouri Protection & Advocacy Services, represented Parent. Betsey Helfrich and Joshua Douglass, with Mickes O'Toole, LLC, represented the District. The matter was ready for our decision on January 6, 2020, when the last written argument was filed.

Findings of Fact²

1. Student is currently _____ years old. He resides with his foster mother – Parent – at Missouri.
2. Student is.
3. Student is enrolled in the District and attends Kentucky Trail Elementary School (School or Kentucky Trail). He is in the 4th grade during the 2019/2020 school year.

¹ *Olmstead v. L.C. ex re. Zimwing*, 527 U.S.581 (1999) (Supreme Court case discussing Title II of the ADA and the segregation of persons with disabilities).

² Findings of Fact 1, 3-45 are stipulated by the parties. Joint Ex. 1, Proposed Stipulated Facts. Finding 2 was not part of the Stipulation, but we include it because Parent bases part of her argument on this fact.

4. Student has been diagnosed with cerebral palsy, microcephaly, and epilepsy. He has been identified as a student with an educational diagnosis of Multiple Disabilities under the IDEA. He has an IEP and receives special education services.

5. The District is located in Cass County, Missouri, and, during the 2019/2020 school year, had an enrollment of approximately 4,723 students. The elementary and middle schools have approximately 2,639 students enrolled in grades K through 8.

I. Procedural Background

A. First Due Process Complaint (10/24/18)

6. On October 24, 2018, Parent filed a Due Process Hearing Request (1st DP Compl.) challenging the proposed change of placement for Student from inside a regular classroom less than 40% of the time to a public separate school.

7. A hearing regarding the 1st DP Compl. was scheduled for January 24 and January 25, 2019; however, prior to the hearing, the parties were able to come to an amicable resolution and the 1st DP Compl. was voluntarily dismissed by Parent on December 3, 2018.³

8. In order to resolve the 1st DP Compl., the parties agreed that an Independent Educational Evaluation (IEE) would be conducted within 90 days of agreement on the areas to be tested; that the District could conduct its own re-evaluation; and that the implementation of the stay-put March, 2018 IEP would continue, with the exceptions of the potty-training and wheelchair cessation goals.

B. Second Due Process Complaint (5/24/19)

9. On May 24, 2019, Parent filed a Due Process Hearing Request (2nd DP Compl.) challenging the proposed change of placement from inside a regular classroom less than 40% of the time to a public separate school, and an issue related to parental participation at a May 17, 2019, IEP meeting regarding access to legal counsel.

³ In the Joint Stipulation Findings of Fact, this date was in 2019.

10. A hearing regarding the 2nd DP Compl. was scheduled for September 4 through September 6, 2019; however, prior to the hearing, the parties were able to come to an amicable resolution and the 2nd DP Compl. was voluntarily dismissed by Parent on July 22, 2019.

11. In order to resolve the 2nd DP Compl., the parties agreed that Student's IEP team would reconvene to obtain and consider Parent's input regarding Student's goals, services and placement; and the District would maintain Student's current placement until the conclusion of the reconvened IEP team meeting and thereafter would make a determination regarding Student's placement.

C. Third Due Process Complaint (8/30/19)

12. An IEP meeting was held on August 23, 2019, to obtain and consider Parent's input regarding Student's goals, services and placement. At this meeting, a change of placement for Student from inside regular classroom less than 40% of the time to Public Separate School was proposed.

13. On August 30, 2019, Parent, on behalf of Student, filed the due process complaint in this matter with DESE.

14. On August 30, 2019, DESE referred this matter to the Missouri Administrative Hearing Commission (AHC).

15. On August 30, 2019, the AHC issued a Notice scheduling the instant matter for hearing on October 3, 2019.

16. On September 25, 2019, Parent filed a First Amended Due Process Complaint. On October 15, 2019, the Commissioner granted Parent's Motion to Amend the Due Process Complaint.

II. Student's IEP, Evaluation, and Special Education and Related Services during the 2018/2019 and 2019/2020 School Year

17. Student transferred to the District in the spring of 2018.

18. Prior to enrollment in the District, Student attended the Hickman Mills School District.

19. In September 2016, Student was administered the Wechsler Nonverbal Scale of Ability (WNV) by the North Kansas City School District. Student obtained a full scale IQ score of 36.

20. Once enrolled in the District, Student's IEP team met on March 22, 2018. At that time, the team determined Student's placement would be inside the regular class less than 40% of the time.

21. Student's IEP team met on May 3, 2018, to revise Student's IEP, and that during that meeting, the District advised Parent that the District would like to see if Student would qualify to attend MSSD. The IEP team advised Parent to schedule a tour of Trails West, a MSSD school.

22. On May 15, 2018, Jessica Hoots, Director of Special Education, sent an email to Parent and advised her that the District would be starting the application process for MSSD for Student. Hoots offered to assist Parent in scheduling a tour of MSSD.

23. On May 16, 2018, Parent sent an email to Hoots and advised that she would like a tour. Parent also stated that she has not authorized any proceedings towards a change in placement for Student, and that she would like to check into a couple of other schools.

24. On May 16, 2018, Hoots sent an email to Parent and advised her that the application process to MSSD is not making a change in placement but, rather, if Student was found eligible to attend MSSD, the IEP team would still need to meet to decide on placement, which Parent would be a part of. Hoots again offered to assist Parent in scheduling a tour of MSSD.

25. Parent toured MSSD on May 21, 2018.

26. In July 2018, the District sent a request to the MSSD to determine if Student was eligible for referral to MSSD.

27. Following their request for eligibility determination, the District received a letter from MSSD dated August 30, 2018, which stated Student was eligible for educational services provided by the State Board of Education through MSSD based on a review of the special education evaluation report, IEP and justification for separate placement statements.

28. On August 27, 2018, a notice of meeting was sent to Parent scheduling a meeting to review/revise Student's IEP for September 14, 2018.

29. Student's IEP team met on September 14, 2018, and discussed placement options for Student, as well as other information and concerns Parent shared. Because Student's case worker needed to leave before the meeting could be concluded, the IEP meeting was scheduled to reconvene on October 1 or October 2, 2018.

30. On September 18, 2018, Parent submitted a request for a facilitated IEP meeting.

31. On October 15, 2018, Student's IEP team determined Student's placement should be changed from inside regular classroom less than 40% of the time to Public Separate School. A notice of action proposing this change of placement and services was sent to Parent on October 17, 2018.

32. On October 24, 2018, Parent filed a Due Process Hearing Request (1st DP Compl.) challenging the proposed change of placement from inside regular classroom less than 40% of the time to Public Separate School.

33. Prior to the hearing, the parties were able to come to an amicable resolution and the 1st DP Compl. was voluntarily dismissed by Parent on December 3, 2019.

34. In order to resolve the 1st DP Compl., the parties agreed that an IEE would be conducted within 90 days of agreement on the areas to be tested; that the District could conduct its own re-evaluation; and that the implementation of the stay-put March, 2018 IEP would continue, with the exceptions of the potty-training and wheelchair cessation goals.

35. On December 11, 2018, Student's team met for the review of existing data meeting and determined a re-evaluation of Student would be conducted.

36. The District agreed to conduct its own evaluations and to pay for an IEE. The District scheduled a subsequent IEP meeting on April 26, 2019 to draft Student's IEP based on the new evaluation data. At the meeting, Parent requested a functional behavioral assessment (FBA), and the District agreed to complete an FBA.

37. Following Parent's request for an FBA, at the meeting on April 26, 2019, the District conducted a Review of Existing Data (RED) meeting for the purpose of conducting a FBA to determine if a Behavior Intervention Plan (BIP) was warranted.

38. An IEP meeting was scheduled for May 17, 2019, to discuss eligibility following evaluation, review the FBA, and complete the IEP started on April 26, 2019.

39. Student's IEP team met on May 17, 2019. The IEP team discussed Student's IEP goals, services and placement. A notice of action proposing a change of Student's placement and services from inside the regular classroom less than 40% of the time to Public Separate School was sent to Parent on May 28, 2019.

40. Student's IEP team did not develop a BIP for Student based on the FBA. A health plan was developed for Student.

41. On May 24, 2019, Parent filed a Due Process Hearing Request (2nd DP Compl.) challenging the proposed change of placement from inside regular classroom less than 40% of the time to Public Separate School.

42. A hearing regarding the 2nd DP Compl. was scheduled for September 4 through September 6, 2019; however, prior to the hearing, the parties were able to come to an amicable resolution and the 2nd DP Compl. was dismissed by Parent on July 22, 2019.

43. In order to resolve the 2nd DP Compl., the parties agreed that Student's IEP team would reconvene to obtain and consider Parent's input regarding Student's goals, services and

placement; and the District would maintain Student's current placement until the conclusion of the reconvened IEP team meeting and thereafter would make a determination regarding Student's placement.

44. The District rescheduled the May 17, 2019, IEP meeting for August 23, 2019. The IEP team discussed Student's IEP goals, services and placement. A notice of action proposing a change of Student's placement and services from inside the regular classroom less than 40% of the time to Public Separate School was sent to Parent on August 29, 2019.

45. On August 30, 2019, Parent filed a Due Process Hearing Request (3rd DP Compl.) challenging the proposed change of placement from inside regular classroom less than 40% of the time to Public Separate School.

III. Witnesses at Hearing

A. Parent's Witnesses

46. Jessica Hoots is the director of special education for the District. She has a bachelor of science degree in special education and a master's degree in teaching and in education leadership. She has a special education administration certification and a "superintendency degree in educational specialist." Tr. at 12.

47. Amy McMullen has been a process coordinator with the District for eight years. She attends IEP meetings, does compliance checks, is the MAP-A coordinator,⁴ and acts as the liaison between the District and Trails West. Before this, she was a special education teacher for 14 years.

48. Lori Crabtree is a physical therapist for the District. She has worked for the District for four months and worked with Student from August 2019 through the beginning of September 2019, when his physical therapy prescription expired.

⁴ Missouri Assessment Program –Alternate Assessment.

49. Susan McAllister is an occupational therapist for the District. She has worked for the District since August of 2006, and has worked with Student since he entered the District in February 2018. She has attended all of Student's IEP meetings.

50. Denise Sterling is a speech pathologist for the District. She has worked at the District for 16 years and works with Student. She joined Student's IEP team on March 22, 2018, and helped develop the IEP and several goals for him.

51. Elizabeth Hart is a special education teacher at the District. She is Student's classroom teacher. Hart was awarded the District's "teacher of the year" in 2018, then awarded the Kansas City regional teacher of the year, and went on to be a finalist for the Missouri state teacher of the year. Hart participates in ongoing training from the District. As a special education teacher, Hart is trained to work with mild to moderate cognitive disability levels.

52. Dr. Peter Blanck⁵ has a Ph.D. from Harvard University and was a Post-Doctoral Fellow at that university. He has a B.A. in psychology from the University of Rochester. He is currently a University Professor at Syracuse University, and has been a professor of law and psychology at universities since 1993.

53. Keisha Miller is a clinical case manager at ReDiscover and has held this position for a year and a half. Before this position, she was an alternative care worker who worked with children who were brought into foster care to establish permanency. She worked with Student in the latter position for approximately two years.

54. Jennifer Owens⁶ is a physical therapist at Children's Mercy Hospital. She has worked as a physical therapist for 21 years. She met Student about two years ago and provided services to him.

⁵ Blanck's testimony was subject to an objection that we took with the case and will address later in this decision.

⁶ Owens' testimony was subject to an objection that we took with the case and will address later in this decision.

55. Nancy Sullivan is an occupational therapist at Children’s Mercy Hospital. She has worked as an occupational therapist for 31 years. She saw Student for therapy.

56. Sandy Calvert worked at the Office of the Guardian Ad Litem as a child advocate specialist. She retired on November 15, 2019. She worked with Student for over a year.

57. Princess Banks works for the Missouri Parents Act (MPACT) as a multicultural coordinator. She knows about Student through her friendship with Parent, but has never met him. She attended some of Student’s IEP meetings as support for Parent.

58. Dr. Gina Jones is a child neurologist at Children’s Mercy Hospital. Jones has been a doctor for seven years, and her license is in good standing. Student has been her patient since March of 2016.

59. Rebekah Hess is a certified occupational therapist at Ability KC. She has worked with Student setting up equipment for adapted access to the computer and teaching him to use it to develop skills for communication. She is not currently providing OT services to Student.

60. Parent testified. She is a “parent mentor” with MPACT. Tr. at 436.

B. District’s Witnesses

61. Amy McMullen (see above) testified as a District witness.

62. Elizabeth Hart (see above) testified as a District witness.

63. Denise Sterling (see above) testified as a District witness.

64. Louann Hoover is employed at Trails West and has been employed there for 40 years. She has a bachelor’s degree in regular and special education, and a certification in students with severe and profound disabilities.

65. Susan McAllister (see above) testified as a District witness.

66. Jennifer Landes is employed by the District and has been for 15 years. She has a bachelor’s degree in therapeutic recreation and a master’s degree in special education with an

emphasis in behavior disorders. She has over 20 years' experience in education. Landes provided a FBA for Student.

67. Patrick Crawford is a process coordinator in assistive technology. He has a bachelor's degree in communications and a master's degree in special education – cross-categorical. Crawford is on Student's IEP team and assesses devices that could help Student with his communication, such as switches and buttons.

68. Jennifer Hoots (see above) testified as a District witness.

IV. Student's Goals

A. Student's March 22, 2018 IEP Annual Goals (IEP currently being implemented)

69. Goal #1:

Functional Skills: given instruction and practice, [Student] will increase his functional skills by engaging in a functional activity (pushing buttons, filling/dumping containers, grasping a writing tool and taking it to paper, opening/turning pages in a board book) for up to 5 minutes on 4 of 5 trials on 4 of 5 data days by the end of the IEP year.

Baseline: 30 seconds.

Petitioner's Ex. 26 at 212.

70. Goal #2:

Functional Skills: Given instruction and activity, [Student] will grasp a pre-loaded feeding utensil from his tray, take a bite, and return the utensil to the tray on 4 of 5 opportunities on 4 of 5 data days by the end of the IEP year.

Baseline: [Student] requires physical assistance to use feeding utensils.

Id. at 214.

71. Goal #3:

Language: In order to improve language skills [Student] will use eye gaze and/or touch to choose between two activities on 2

out of 3 opportunities on 3 consecutive data days by the end of the IEP year.

Id. at 216.

72. Goal #4:

Language: In order to improve language skills, [Student] will use a variety of switches to ask for more, make choices, and operate cause/effect activities, on 2 out of 3 opportunities, 3 consecutive data days by the end of the IEP year.

Id. at 218.

73. Goal #5:

Gross Motor: [Student] will demonstrate increased trunk strength and muscle control by independently maintaining static and dynamic sitting with upright posture in wheelchair and adapted seating or standard classroom chair for 5 minutes while performing functional activities (feeding, table top activities, pre-writing) and maintain standing at support surface with contact guard assistance/supervision for 2 minutes on 2 of 3 trials on out of 4 consecutive data days per IEP year.

Baseline: [Student] inconsistently maintains static sitting with upright posture for 1-2 minutes. He maintains standing at a support surface for approximately 30 seconds with minimal assistance.

Id. at 220.

74. Goal #6:

Gross Motor: [Student] will demonstrate increased locomotion by safely walking 50 feet with reverse rolling walker, steering around obstacles with close supervision with less than 3 verbal cues to maintain grip on walker and maintain upright posture on 2 of 3 trials on 3 out of 4 data days per IEP year.

Baseline: [Student] walks 10-15 feet in his reverse walker, without steering around obstacles, with minimal assistance to guide and/or maintain forward movement. Multiple and frequent physical and tactile cues are required to maintain grip on reverse rolling walker.

Id. at 222.

B. Student's August 23, 2019 Annual IEP Goals
(proposed but not implemented)

75. Goal #1:

Functional Skills/Gross Motor:

Given instruction and verbal/visual cues, [Student] will demonstrate increased mobility and muscle control by transitioning to and from varied positions (including sitting on floor, sitting in chair and standing at a support surface with supervision; picking up/carrying highly preferred items in both hands from one surface/location another 5 feet away; and corralling a ball rolled to him from 3 feet away and pushing back to a partner on 4 of 5 opportunities on 4 of 5 consecutive data days by the end of the IEP year.

Baseline: [Student] stands from a chair with supervision to minimal assistance to stabilize. [Student needs minimal assist and tactile cues at his hips to lower his body to sit in a chair. [Student] is inconsistent with how much assistance he needs to stand from the floor, ranging from moderate assistance to supervision only. [Student] has carried a preferred object in two hands on one occasion in PT, but it has not been seen regularly. [Student] does not attempt to corral a ball or roll it back to a partner at this time.

Respondent's Ex. EEE at 635.

76. Goal #2:

Functional Skills/Fine Motor:

Given instruction and activity at mealtime, [Student] will use a fork to stab food items from his plate or tray and bring it to his mouth on 3 of 5 opportunities on 7 of 10 data days by the end of the IEP year.

Baseline: 0 of 5 opportunities.

Id. at 637.

77. Goal #3:

Functional Skills

Given demonstration and practice, [Student] will increase his independent play skills by spontaneously engaging in cause-and-effect play such as pushing buttons to make sounds, stacking and knocking over blocks, pushing/pulling things, etc. for a total of 3 minutes on 4 of 5 opportunities on 4 of 5 consecutive data days by the end of the IEP year.

Baseline: 0.

Id. at 638.

78. Goal # 4:

Functional Skills/Communication:

Upon seeing and wanting a particular item and with real object representation of that item available, [Student] will reach for or touch the real object representation on 8 of 10 opportunities on 4 of 5 consecutive data days by the end of the IEP year.

Baseline: 1 of 10 opportunities.

Id. at 640.

79. Goal #5:

Functional Skills/Language:

Given instruction, modeling and practice, [Student] will increase his functional communication skills by pressing a switch to communicate “more” in a variety of situation, such as for more food, reading, music, leisure activities, etc., on 8 of 10 opportunities on 4 of 5 consecutive data collection days by the end of the IEP year.

Baseline: 0

Id. at 641.

80. Goal #6:

Functional Skills:

Given opportunity to practice, [Student] will grasp pants with two hands to pull down, sit on toilet to try to void for up to 5 minutes and grasp his pants with 2 hands to pull up on 2 of 5 opportunities for 8 of 10 consecutive data days by the end of the IEP year.

Baseline: [Student] has not shown the ability pull up/down pants. [Student] has voided on the toilet on three occasions at school.

Id. at 642.

81. The parties do not disagree on the substance of these goals, but disagree about where they should be implemented. These goals have been “implemented” by the District without

formally being implemented through a required IEP, and all parties were in agreement with this approach pending the hearing. The members of the IEP team (Hart, Sterling, McAllister, Landes, Crawford, McMullen, and Hoots) have agreed on Student's goals and services including the services and six goals listed on the August 23, 2019 IEP.

V. Witness Testimony

Crabtree

82. Student has progressed from use of a walker to walking with handheld assistance.

Miller

83. Miller was Student's initial caseworker. When she met Student, he was very "malnourished," and the only thing he could do was crawl around. Tr. at 196. He would cry for things, and his behavior was very "infant-like." *Id.* at 197. While Miller was working with him, he started eating more and starting walking with a walker.

84. Miller participated in an IEP meeting for Student at Hickman Mills, but did not do so at the District. She has not observed Student at Kentucky Trails or spoken with any of the teachers there.

Blanck

85. Blanck described "implicit bias" as "an unseen, and often even unnoticed by the person who does it, tendency to discriminate against people on the basis of their race, primarily facing African Americans." Tr. at 144.

86. Blanck described "inclusion" as the extent to which people with disabilities have an opportunity to engage meaningfully in all aspects of society. Blanck testified this inclusion is "associated with a better quality of life, generally for children, adults." *Id.* at 149.

87. Blanck believes that students learn from their peers and their conditions improve in an integrated setting, but admits that he cannot predict the future.

88. Blanck related an experience with Student when they were at the library the night before Blanck's testimony. A seven- or eight year-old child approached Student and Blanck and said he knew Student because he went to school with him. Student made eye contact with this child. Blanck called it "a very sweet, cordial interaction in which they made eye contact and it felt positive." Tr. at 155. This was the only time Blanck met Student in person.

89. Blanck testified that the trend of moving students to more restrictive, segregated environments is on the decline. But "there was tendencies [sic] to segregate students on the basis of race, African Americans in particular[.]" *Id.* at 155-56.

90. Blanck believes that students in schools such as Trails West are less mobile than Student.

91. Blanck believes that regression is more likely to occur in a segregated setting.

92. Blanck would recommend against placing Student in a more restrictive setting because he believes this would be harmful to Student.

93. Blanck's opinion is that Students progress is "inching" forward. *Id.* at 164.

94. Blanck was not available to the IEP team and was not present at any of the IEP meetings. His information was not considered when making a placement decision. He has not talked to any of Student's teachers.

95. Blanck has never been to an MSSD school. His information comes from brochures and materials from the State and his familiarity with other similar types of schools in other states.

96. Blanck was paid for his testimony.

97. Most of Blanck's work is in the area of the ADA and less so for § 504 and the IDEA.

98. Blanck does not have any degrees in the area of education or special education.

Owens

99. Owens described Student as "mostly nonverbal," "active," and "very social." Tr. at 323.

100. Owens has seen Student improve in that he is he is walking with minimal assistance, is starting to walk up and down stairs with assistance, sits well in a chair, and his balance is better. He can sit for several minutes without getting up.

101. If Student is sleepy or not engaging, Owens provides more stimulation, such as having him bounce on a ball or swing. If Student is upset, vibration and music calm him.

102. Student has shown growth in Owens' sessions. "[T]hings that he wasn't doing two years ago, he is doing now." Tr. at 328.

103. Owens has never participated in an IEP meeting, has never observed Student in the school environment, and has never consulted or spoken with the District's physical therapist.

104. Owens believes that Student would benefit from a higher intensity therapy instead of little mini sessions.

Sullivan

105. Sullivan worked with Student on his sensory processing skills. She has worked with Student using aquatic therapy to give him stimulation and improve his body awareness.

106. Sullivan believes that Student is "under sensitive" in that he seeks out more input and touches more things.

107. Sullivan has seen Student gain skills. She stated she does not "have a reason to say that he won't gain any more . . . He hasn't regressed." *Id.* at 342-43.

108. Student has progressed to a level of cause and effect. He can push a button to request something again.

109. Sullivan has never participated in an IEP meeting, has never observed Student in the school environment, and has never consulted or spoken with the District's staff.

Calvert

110. Calvert attended several of Student's IEP meetings.

111. Calvert believes Student has made progress and should stay at Kentucky Trail School.

Banks

112. Banks has attended several of Student's IEP meetings.

113. Banks understood that the District was recommending a change of placement to a very restrictive environment. She was concerned about Student regressing.

Jones

114. Jones treated Student's seizures and noted that his seizures are very well controlled. Student has not had a seizure in years.

115. Jones noted how Student has improved. When she first saw him, he was non-ambulatory, did not have any verbal output, and seemed distant. Over the years, he has learned to walk, is happy, verbalizes with sounds, and his behaviors and self stimulation behaviors have improved. He is able to follow simple commands and is able to maintain eye contact.

116. Jones has never participated in an IEP meeting, has never observed Student in the school environment, and has never reviewed any of his school records.

Hess

117. Student has shown progress in working with switches. When Hess started working with Student, he needed help, such as bringing his hand to press the switch and prompting to bring his attention to pressing the switch. He has progressed to initiating the process of pressing the switch.

118. Hess has never participated in an IEP meeting and is not familiar with his IEP goals at school.

Hart

119. After an evaluation of Student at age 7, he was determined to be at a cognitive age equivalent of zero years, three months. Dr. Jordan, who performed Student's IEE in January 2019, placed Student at a cognitive level of about six months, receptive communication of about

three months, expressive communication at three months, fine motor at six months, and gross motor at twelve months. At this level, Student does not participate in the general curriculum in any way.

120. Student always has a paraprofessional (para) to help him do everything. Student does not participate in group activities in the classroom because he works with his para at his level in areas that focus on his goals.

121. Student does not have any life area that does not need a pervasive level of support. He needs constant adult assistance in every aspect of his life.

122. Student has significant disabilities and requires significant supports throughout the day. He does not have functional communication skills. Student has bouts of vomiting and requires care within the classroom.

123. When the goals for the March 22, 2018 IEP were developed, Student did not respond to any verbal prompts, and there was no way of communicating with him.

124. Hart is Student's classroom teacher. She has 12 students and four adult paras in her classroom, as well as occasional service providers who come in and out of the classroom.

125. Hart has taught communication skills to other cognitively impaired students, but has never worked with the barriers presented by Student's cognitive levels.

126. Student's disabilities are severe and, in Hart's nine years of experience, Student is unique for her in that she has not had the same challenges with any other student as she has had with Student.

127. At Kentucky Trail, Student is in the most restrictive environment the District can offer. Student does not attend classes with non-disabled peers. His interaction with non-disabled peers is limited to recess and transitions in the hallway.

128. Student and other students are pulled out of Hart's classroom for therapies because therapies are not provided in the classroom at Kentucky Trail. There are various groups and different things going on at the same time throughout the day.

129. Student's ability to maintain attention and process all of the sensory input happening in the classroom is "very, very delicate. It's very difficult for him." Tr. at 112. Hart's classroom can be very loud and difficult for Student to manage. Student's sensory input can take him off task from learning. Student gets completely distracted by stimuli, including someone walking into the classroom or coming in the room.

130. If Student is sleepy, they try to do something to make him more alert like bouncing on a ball. If he is overstimulated or hyper, they swing him in a therapy swing or do something more calming. Student needs one-on-one adult supervision for these tasks.

131. Student sometimes bites during times of transitions. Student has a sensory diet that addresses sensory issues that sometimes lead to the biting.

132. There is no toileting goal in the March 2018 IEP, but at Parent's request, the District has been working on potty-training with Student. Student does not appear to connect potty-training with the bodily function he needs to perform. He is on a schedule to go to the bathroom, and he doesn't exhibit any prompts that suggest he needs to go to the restroom.

133. Other than Student's developmental progress on his gross motor goal, Student's progress is "very minimal and inconsistent" with regard to functional activities. Tr. at 119.

134. Student receives services 100 percent in the special education setting, so other than recess and transitions in the hallway, he is in Hart's classroom. He does not initiate interaction with peers. When a classmate from the special education classroom interacts with him, he makes eye contact and will sometimes smile or clap.

135. Student has recess with non-disabled students at Kentucky Trail, but has no interaction with them. The general education peers play around him, but he's not actively

interacting with these students. At recess with non-disabled peers, Student is very focused on his own activities, and he doesn't acknowledge or look for contact with his non-disabled peers.

136. At recess, Student likes to lie on the warm asphalt or swing. He needs assistance to get in and out of the swing and to move back and forth on the swing.

137. Hart originally created a schedule for Student in May 2018. She has modified Student's schedule to reduce the number of transitions outside the classroom in order to maintain his focus within the classroom. Hart has eliminated transition for leaving the room for meals.

138. Hart tries to have Student participate in group activities in the classroom, such as joining for circle time or beginning the morning meeting with music, when he is able to attend and is interested and engaged. However, it tends to become overstimulating for him, or he may engage in self-stimulatory activities (i.e. hooting, vocalizing) instead of focusing on doing what the group is doing. There is no way to consistently direct him to pay attention and join the group activity.

139. Student has different kinds of assistive technology in Hart's classroom, including a swing, iPad, switches, and a Jelly Bean switch.

140. As part of Student's evaluation by the District, Hart completed the Vineland Adaptive Scales. Student scored 20 (the lowest score possible) in all areas.

141. As Student's special education teacher, Hart was required to be present at all of Student's IEP meetings since he enrolled in the District, and has been present for all discussions of his goals and services.

142. Hart does not keep independent data for IEP Goals 1-5, but works on those goals with Student in the classroom.

143. Student is pulled out of Hart's classroom to go to another environment to work on goals with his therapist.

144. Student appears to be healthier now than when he first went to Hart's classroom. Student has had gross motor development and is walking and maneuvering through the classroom. Student has met one goal regarding trunk strength and maintaining a seated position. Student has gotten better at walking versus arriving in a wheelchair and using a wheelchair to get from place to place for longer distances.

145. As Student gets older, Hart would want to see his progress trend go up. Instead, the gap between Student and his peers is getting bigger as Student ages. Student's skills are remaining the same.

146. Based on her observations and data collected regarding Student, Hart wrote the present-level assessments in Student's October 2018 IEP, which state Student's teachers and/or trained staff work with him one on one to implement IEP goals throughout his day, and that Student has great difficulty attending to any activity without prompts and redirection for more than an average of 30 seconds.

147. During transitions out of the classroom, Student will bring both hands up to his ears, cover his ears, and sometimes drop to the ground.

148. Student's symptomology is the same today as how it was described in the October 2018 IEP present-level description, with the exception being that he no longer uses a wheelchair or walker. Student's functional skills in Hart's classroom have not improved.

149. Hart provided an example of working with Student on an activity, such as using the fireworks app on the iPad. Hart may initially use hand-over-hand to trigger Student to know what activity she is seeking; she may continue to use hand-over-hand if he does not imitate or attempt to reach for it on his own. The length of the activity depends on Student's stamina. He has about a 30-second to 1-minute attention span.

150. If someone walks in the classroom, Student will turn his head, and they will need to start over, go back to hand-over-hand, and re-engage him in the activity. That type of distraction in her classroom will not be present at Trails West.

151. Student did not make any progress on IEP Goal No. 1 regarding functional skills as of May 3, 2018 and May 16, 2018. On June 21, 2018, Student was making minimal progress (he went from 20.6 seconds to 25.2 seconds on average), but he was having a difficult time in the extended school year (ESY) and was unable to maintain attention for more than 30 seconds. On July 19, 2018, Student had not made any progress on Goal No. 1; he was still at or below 25.2 seconds. On October 15, 2018, Student made minimal progress to an average of 31 seconds when he was in the special education classroom setting and an average of 40.8 seconds in the related services/therapy setting (working one on one in a separate setting outside the special education classroom).

152. Between December 20, 2018 and October 14, 2019, Student had regressed on Goal No. 1 while in the therapy room (from 55 seconds to 53 seconds) and has only minimally improved progress in the special education classroom (from 40 seconds to 43 seconds).

153. Hart collected data measuring Student's time on task and/or engaging in an activity to create a graph that would show Student's progress in regard to his IEP goal of engaging in functional activity (such as putting Lego blocks into a container or turning pages in a board book) for up to five minutes. Student's average time engaged in an activity is 30 seconds to 1 minute. Student's time on task has not appropriately increased over the last 18 months.

154. Student's progress on Goal No. 2 went up and down. Exhibit KKK is the aggregate of Hart's disaggregated data from December 14, 2018, through November 5, 2019, for Student's IEP goal of taking a bite off of a utensil and returning it to the tray.

155. Student's Goal No. 2 baseline on May 3, 2018 was that he was unable to grasp a preloaded utensil from his tray and take a bite and return it to this tray; he required hand-over-hand assistance.

156. Student's use of the utensil has not changed significantly from May 2018 to the date of the hearing. At the beginning of the school year, there was some regression, but since August he has leveled back up to noticing the utensil and picking it up rather than grabbing the food with his hands. Student cannot load the utensil.

157. On October 14, 2019, Student had not made any progress as he continued to require hand-over-hand assistance to redirect him to return the eating utensil to the tray. Further, Student had reverted back to trying to grab the food rather than look for and use the utensil.

158. Hart does not think Student would achieve any meaningful benefit if he was to stay in her classroom because he is unable to filter out the distractions that are unavoidable in the classroom setting and, therefore, "they hinder his ability to learn." Tr. at 543.

159. There are no materials or supplies that Hart does not already have in her classroom that would help Student make progress, nor are there any other modifications or methods that would help Student achieve meaningful benefit in her classroom. Hart feels "like I've exhausted all options." *Id.* at 544.

160. The IEP team discussed all of the placement options at the August 23, 2019 IEP meeting, including Sherwood and one private school in Grandview. During that meeting, Parent requested Student be placed at a private school. Parent also suggested that Student stay in Hart's special education classroom.

161. Based on Hart's experience with Student in her classroom, the August 23, 2019 IEP would not provide any meaningful benefit for Student if it was implemented at Kentucky Trail; however, it would provide Student meaningful benefit at Trails West because it offers a much

calmer setting that would allow Student to stay on task and stay focused in a way that Hart's classroom simply does not offer.

162. Trails West can provide a more holistic integrated program for Student and provide wraparound services where the therapies are provided in the classroom where students work on those items more together in a calmer, less distracting setting.

163. At Trails West, therapists come into the classroom to provide services and they are provided throughout the day. The services are based on students' IEPs, but services and therapies are integrated.

164. Because Hart was not seeing the progress she had hoped to see in her classroom, the team explored placement at Trails West. As Hart got to know Student better, she realized his needs were quite significant. Hart based her opinion on her review of Student's transfer documents from North Kansas City and Hickman, and her observations of Student from February 2018 - May 3, 2018.

165. Hart's classroom "is a busy place, there are distractions that are unavoidable. . . ." Tr. at 110. Hart has tried to eliminate transitions and distractions for Student but there are 12 different K-4 students in Hart's classroom, all of whom are on different schedules and have different therapies, so there is a lot of coming and going and noise in her classroom. These distractions would be greatly reduced at Trails West.

166. Student would be in a classroom at Trails West similar to what he is now, but with fewer students. The room at Trails West is set up to allow students to move around. Student will be able to exercise more autonomy at Trails West than he can at Kentucky Trail.

Sterling

167. Sterling has had a caseload of approximately 50 to 60 students each year.

168. Sterling has worked with Student since he enrolled at the District and has attended every IEP meeting, including those in which placement was determined. Sterling has tried to take very detailed data for Student, such as recording every response and what type of response.

169. Sterling provided 90 minutes per week (3 sessions, 30 minutes long) of language therapy to Student. During those sessions, Student may stay on task with assistance and varied activities depending on his demeanor that day.

170. Although Sterling is qualified to work with speech, she does not work with Student on speech because he is not using functional speech as a way to communicate. Student is not likely to develop speech in the future, as his age and cognitive abilities are below the 12-month level.

171. For her sessions with Student, Sterling would bring Student to her classroom where she works on his IEP goals through activities such as presenting him with options and gauging by his eye gaze or reach what he wanted to participate in; working on switches that record a song and he can press to play (which used to require hand-over-hand, but his level of independence has changed over time); activating a cause-and-effect activity such as pressing or holding a switch to control a light; and pressing a switch to indicate he wants “more” of an activity such as bubbles or a song. The purpose of these techniques to improve Student’s quality of life to be able to choose between activities and to communicate. Sterling is trying to teach Student cause and effect, identifying that his actions can create an exterior reaction, to be the foundation of developing further language skills. “It’s very foundational skills that he needs to learn.” Tr. at 560.

172. Sterling helped develop Goals 3 and 4 in Student’s IEP regarding improving his language, and she prepared data of Student’s progress on these goals to document on his IEP benchmarks.

173. When working on Goal No. 3 with Student, Sterling shows Student two items that he likes to play with by putting them in his field of view and allowing him to reach for the one he wants to interact with. Student will hold the item for a while and sometimes put it in his mouth.

If he drops it, he forgets about it. Sterling will have to get the item and re-present the choices if he drops it. Sterling gauges Student's success on this goal if he looks at one of the preferred items or he reaches for an item. Sterling has worked with Student about 18 months on this goal and there is no way to predict how he will perform on the goal. Some days he comes in and reaches for both items, and some days he sits there and will not reach or look at either item, and "nothing will engage him." Tr. at 100.

174. Any progress Student has made on Goal No. 3 cannot necessarily be attributed to the services provided at the District because he has been in a consistent environment at home and school and has physically developed.

175. Sterling has tried to expand on Goal No. 3 by showing Student a photo of an object, but he does not recognize that the picture means that toy; he is not showing recognition or skill regarding the picture/object representation. Student will not reach for a picture the same way he will reach for an actual toy. This is important because he will not always have all of his choices spread out before him, but he could have a representation of a wider variety of options down the road. Student did not progress with the next logical step of the goal.

176. Student's working IEP is from March 2018. Rather than being "stuck", Student needs to continue to the next logical step of the goal, which is to choose between pictures and not actual objects. Student did not progress with the next logical step of the goal.

177. Student has not shown readiness to meet Goal No. 4, and switches have not been used with him at this point to make choices because "in order to use a switch to make a choice, he would need to understand that this switch or this picture on the switch represents the choice that he's been given, and he doesn't yet make those connections. So making choices with using switches has not yet been addressed as part of this goal." Tr. at 94-95.

178. According to the October 2019 Goal No. 4 update, when using a switch to play music, Student required more prompting than the last reporting period. He required hand-over-hand

assistance 17 percent of the time, a physical prompt 69 percent of the time, and was independent 7 percent of the time, and then resisted a prompt on 7 percent of the opportunities. Accordingly, Student declined during this reporting period. Student's trend line to use a switch to request more is going down.

179. Sterling was employed by Lakeview Woods, which is a school operated by DESE located in Lee's Summit. Sterling also worked at a school in the MSSD system, through a contract company prior to working at Lakeview Woods. Therefore, she is familiar with the environments in Trails West and other schools operated by DESE.

180. Sterling delivered speech and language therapy in the classroom in those schools because the classroom setting was not loud, busy, or distracting, so she could provide therapy successfully without interruptions or distractions. Further, providing services in that setting helps for generalizing skills in that setting as opposed to a student who is pulled out having difficulty transferring those skills back to other classrooms.

181. Student would benefit from service delivery that was provided in the classroom – bring the services to him instead of bringing him to the services.

182. Sterling could not provide services to Student in the special education classroom at Kentucky Trail because even the most restrictive classroom at Kentucky Trail cannot provide the quiet, interruption-free, distraction-free environment that DESE schools can because students are going in and out all day due to some having regular education integration. Student would get distracted by someone coming into the room, so Sterling would have to start all over again.

183. Sterling agreed with placement at Trails West for Student because Student has low cognitive abilities, low language abilities, a short attention span, distractibility, and global delays. “[I]t takes [Student] so much effort just to function at Kentucky Trail with 435 students that it doesn't leave him any cognitive bandwidth or availability for learning what we need to

teach him at school. He just struggles so hard just to survive that it's really difficult for him to focus on the learning tasks." Tr. at 569.

184. Sterling was involved in Student's re-evaluation last winter and this spring. She did the Communication Matrix, which is a breakdown of skills of early language development. Sterling spoke with Student's personal para and Hart to determine his level of functioning and where he might show some splinter skills (skills he might display at a higher level, but not consistently; emerging skills). Because the Communication Matrix had previously been done in 2016 at the North Kansas City School District, it was a good comparison for growth. In 2016, Student was at the 0-3 month level; 27 months later, when Sterling did the same evaluation, Student was at the 3-6 month level. Sterling would expect greater growth over a 27-month period.

185. During the August 23, 2019 IEP meeting, no one suggested that Student was not eligible to attend Trails West.

186. Sterling believes Parent asked for Student to stay at Kentucky Trail at the end of the August 23, 2019 IEP meeting after the team had discussed Trails West and a private separate school.

187. Sterling does not think the goals and services developed in the August 23, 2019 IEP would provide meaningful benefit to Student if implemented at Kentucky Trail because the environment is too overstimulating for Student. Based on Sterling's knowledge of what the environment is like at Trails West and other similar DESE schools, the August 23, 2019 IEP would provide meaningful benefit if it were implemented at Trails West.

188. Sterling recommended a change of Student's placement to Trails West based on her observations of Student in the environment, his ability to learn and his ability to progress on the goals she has written in the environment he is in.

189. Sterling has observed Hart's classroom. She is in there every day and has seen Hart working with her students. Sterling does not think there is anything that Hart has not tried to do with Student at Kentucky Trail.

190. A change in personnel will not make a difference for Student, but a change in environment will. Transitioning in the hallway from Hart's room to Sterling's room is too overwhelming to Student. Student will do better in a quieter environment, a smaller class size with fewer distractions.

191. Sterling would have found it very helpful to know if Student was receiving therapies outside of the school so she could collaborate on goals and progress.

192. Sterling has never had a student progress as slowly as Student. This is the worst outcome of any therapy delivery Sterling has ever provided in the District.

McAllister

193. McAllister wrote Goal No. 2 with the special education teacher and felt it was a realistic goal for Student when drafted. Student has made some progress on this goal in that instead of having to hand the utensil to him, he now will 70 to 75% of the time pick the utensil up from the tray once it is loaded with food. Student is approaching two out of the three steps on this goal. There is no success on the third step of the goal – returning the utensil to the tray. Student has not accomplished any of his benchmarks for Goal No. 2, as each of the benchmarks include all three steps of the goal. Benchmarks are measurable objectives used to step the achievement to a goal or break it down.

194. McAllister has been a part of all of Student's IEP meetings since he enrolled in the District. McAllister has maintained data on Student since she started working with him.

195. McAllister has not been able to show through the data she has collected that Student is receiving a meaningful benefit to the occupational therapy services she has provided per his IEP.

196. No one on the IEP team has suggested that McAllister's provision of occupational therapy for Student was inappropriate, or that she should be doing something other than what she was doing.

197. McAllister pulls Student out of the classroom most of the time to work on Student's IEP Goals 1 and 2 in a separate, one-on-one setting. McAllister will present him with an activity and encourage him to participate, and if he does not show any engagement, then she will encourage him further by assisting him physically. Once he is engaged, McAllister will use a stopwatch to time his engagement in the activity.

198. There is a difference in how Student responds between the two environments (classroom and one-on-one). There generally has been a trend for Student's ability to engage with activities a slightly greater period of time when he is in one on one versus being in a classroom setting.

199. As of October 15, 2018, Student could engage for an average of 40.8 seconds. As of December 20, 2018, on Goal No. 1, Student was averaging 55.34 seconds of staying on task (eye contact, holding on to materials, cooperating with her assistance). As of April 26, 2019, on Goal No. 1, Student was averaging 54 seconds and later was averaging 41 seconds on October 14, 2019, indicating that Student was losing ground.

200. Student still reaches for food and grabs it with his hand and eats it.

201. McAllister conducted the school function assessment (SFA) portion of Student's March 2019 evaluation. After scoring Student on over 250 items in the assessment, she determined his scores were significantly below the criterion cut-off scores for kindergarten through 3rd grade students in general education setting. Student required significant assistance in the majority of his school day. Student's functional communication was a major area of concern because he was not able to follow commands or attend to classroom activities. Student's

cognitive and behavioral challenges were impacting his physical performance. Student's scores were significantly below what would be expected for his age.

202. During IEP meetings, the IEP team members have requested to speak to Student's outside therapy providers, but Parent has not allowed McAllister or others to speak with outside therapy providers.

203. McAllister has heard Parent say that she wants Student to go to Sherwood on more than one occasion.

204. McAllister heard Parent say that she wanted Student to go to a different private school, possibly in May 2018. It has been discussed again in each subsequent IEP meeting since then.

205. The first time McAllister remembers Parent requesting that Student stay at Kentucky Trail was in August 2019.

206. Student needs significant support in every area in terms of his educational programming.

207. McAllister feels she has done everything she possibly can to help Student succeed in his goals.

208. When providing services to Student, if someone walks in the room, he is distracted from what he is doing and McAllister has to restart and refocus Student on what he's doing.

209. When Student covers his ears during her sessions, McAllister tries to engage him, stimulate him, change the activity, stand up and move around, add music and whatever she can to get him to engage, but she has not had success when he is in that particular state.

210. The August 23, 2019 IEP would not provide Student meaningful benefit if implemented at Kentucky Trail because the environment is overstimulating and it is difficult for Student to maintain his attention or even engage or maintain his engagement. Student will not be able to succeed in the Kentucky Trail environment.

211. The August 23, 2019 IEP would provide Student meaningful benefit if implemented at Trails West.

Landes

212. Landes became familiar with Student when she conducted a functional behavior assessment for him.

213. Landes gathered information regarding Student by conducting direct observations of him in a variety of school settings. Landes offered to go to Parent's home to see the full capacity of Student's behaviors, but Parent denied this request. Landes also sat with Hart to review data for the FBA. Landes also contacted Parent for more information.

214. Following the FBA, the District did not develop a behavior plan because behavior plans teach replacement behaviors. Student does not have the developmental or cognitive capacity to be taught a replacement behavior. The District could "only look at some of the environmental stimulus that he is surrounded by in order to better predict when it may or may not happen." Tr. at 649.

215. A health plan was drafted for Student based on the FBA data.

216. Landes attended the August 23, 2019 IEP meeting where Student's health plan was discussed and changes were made to the draft plan at the request of Parent.

217. Landes agreed with the IEP team's conclusion that Trails West was appropriate for Student because she knows and understands the individual needs of Student and the diverse and unique programming needed for him.

218. Landes does not believe Student's August 23, 2019 IEP would provide Student meaningful benefit if implemented at Kentucky Trail. Landes explained, "We only make movements for students in this situation after evaluation processes are concluded and new findings are relevant. And his current functioning, cognitively with his communication and his adaptive skills, are very dependent on an adult assisting him through those." Tr. at 655-56.

Crawford

219. Crawford participated on Student's IEP team to provide insight on assistive technology to look at what type of device could help Student access the curriculum. He looked at augmented communication devices for Student, such as switches and buttons.

220. To conduct an evaluation for Student for his use of assistive technology, Crawford consulted with John Effinger. Effinger observed Student. Trials were conducted where they went into the classroom or Student was removed from the classroom to do observations and attempt to perform tasks with Student.

221. Crawford prepared the assistive technology portion of the evaluation report.

222. Crawford found his evaluation to be very similar to the assistive technology evaluations implemented by Hickman Mills and North Kansas City. Student's gaining behaviors had not changed in a few years.

223. Crawford's evaluation found that Student was not yet ready for assistive technology because he could not use cause and effect or understand the purpose of cause and effect. When Student reached for a preferred object and then the object was hidden, Student would not try to retrieve the object. Student "was not understanding the cause and effect. That if he was enjoying something he liked and it was taken from him, he didn't understand that he could request that item back." Tr. at 667. This is the most basic foundation of developing communication skills.

224. Crawford agreed that Trails West was the appropriate placement for Student because Trails West specializes in students with severe disabilities, and Student has not made progress at three public school settings.

225. Crawford testified that in the areas he looked at for Student with regard to assistive technology, Student's trajectory was "flat." *Id.* at 669.

226. Crawford believes that because the environment at Trails West is different, Student may have a different outcome at Trails West.

227. Crawford does not believe that there is any other assistive technology that would allow Student to achieve a different educational outcome.

McMullen

228. McMullen is the liaison between the District and Trails West. Any District student who goes to Trails West is processed by McMullen.

229. When Student transferred to the District, McMullen and Loree Rogers worked to facilitate Student's transition. Scott Elementary within the District would have been Student's neighborhood school, but due to Student's needs and after meeting with Parent, the decision was made that Kentucky Trail would be Student's best placement in the District.

230. Hickman Mills conducted an evaluation of Student approximately three months prior to his transfer to the District. The services in Student's records from Hickman Mills were significant. At the meeting with Parent, his previous evaluation was reviewed, and McMullen and Rogers talked with Parent about Student's functioning.

231. At Hickman Mills, Student had a one-to-one para, and his cognitive functioning scored in the lowest ranges he could achieve. At the time of the Hickman Mills assessment, Student was 7 years, 4 months old, but his scores reflected an age equivalency of three to six months. His social/emotional scores placed him between age three months and eight months.

232. At Hickman Mills, Student was in a self-contained classroom similar to where he was placed at Kentucky Trail. Hickman Mills was considering referring Student to MSSD before he transferred.

233. Although Student was likely immediately eligible for Trails West based on the information received from Hickman Mills, the District did not immediately send him to Trails West but maintained the same placement he was in at Hickman Mills. The District implemented

a similar IEP as Hickman Mills upon Student's transfer, only modifying the actual minutes for the school week which are slightly different than Hickman Mills.

234. McMullen facilitated a tour with Parent to see Trails West in May 2018. During the tour, Parent and McMullen toured the playground, gymnasium, library, music room, art room, a gross motor room, cafeteria, and nurse's office. Trails West looks like any other school. After the tour of Trails West, Parent told McMullen she did not think Trails West was the place for Student and described the school as "dark." Tr. at 223.

235. McMullen has observed Student in his classroom on several occasions. She has seen him working with his paraprofessional, his occupational therapist, and eating. She has also substituted in Student's classroom for his teacher. McMullen is familiar with Student and all the students in Hart's class because she is a resource in the District to help with students who have cognitive impairments.

236. At Kentucky Trail, when there is a lot of noise, Student will cover his ears and fall on the ground. There are 400 to 500 kids at Kentucky Trail, so that is a lot for him to negotiate in the hallways regarding noise, which is why he does not go to assemblies. It "takes a lot for a student to be able to kind of weed all of that out to be available for learning." *Id.* at 308. At Trails West, there are 40 students. It is a smaller setting, and in McMullen's opinion, he would benefit, and his availability for learning in that smaller, less chaotic environment would be beneficial.

237. At Kentucky Trail, there are 12 students in Student's classroom that are all moving about, going to different activities and coming and going, so there are a lot of transitions going on in the classroom.

238. Of Student's multiple disabilities, McMullen believes his cognitive impairments are the most globally disabling. Student is the least independently functioning student in his program. In McMullen's opinion, Student is the lowest functioning student in the District.

Student does not participate in music or art class and does not participate in class assemblies because they are overstimulating to him.

239. McMullen first attended an IEP meeting for Student in September 2018. At this meeting, placement was discussed, and everyone at the meeting agreed that Kentucky Trail was not the correct placement for Student. At this meeting, Parent stated that she wanted Student to attend Sherwood Autism Center, a school that works with students with autism and communication needs despite the fact that Student has no functional speech. At the end of this meeting, the IEP team addressed some of Parent's concerns and determined more information and data was needed. Also, per Parent's request, the IEP team decided to review wheelchair data, IEP data, and potty-training readiness data. Although the purpose of the meeting was to determine Student's placement, the IEP team tabled that decision to address Parent's concerns because they "wanted to make sure [they] addressed her concerns fully and completely." Tr. at 235.

240. McMullen attended another IEP meeting for Student in October 2018. Per Parent's request, this meeting was facilitated by a facilitator trained by the State of Missouri to work with the team. At this meeting, the IEP team discussed Student's IEP; reviewed data collected; discussed wheelchair use, transportation, toilet training, and Student's special education services and minutes; and talked about placement. The IEP team also added a new goal regarding toilet training. A consensus was reached on the goals and services, and placement was the only area of disagreement.

241. During the October 2018 IEP meeting, Parent stated she wanted Student placed at Sherwood. Parent expressed that Sherwood was "upbeat and energetic" and that the staff at Sherwood told her they were less restrictive than Trails West. *Id.* at 239. According to Missouri's placement continuum, Trails West is considered a public day school and on the continuum is a step less restrictive than a private school such as Sherwood. By recommending

Trails West, the IEP team was proposing to move Student one step down on the placement continuum. By suggesting Sherwood, Parent was suggesting two steps down. McMullen did not believe anyone from the District believed that Sherwood was appropriate for Student.

242. At the end of the October 2018 meeting, the IEP team did not reach a consensus about Student's placement. A notice of action was prepared and sent reflecting the proposed change of placement to MSSD and corresponding updates to the IEP. The notice of action explained the justification for the change of placement and the basis for this action, which included IEP data, evaluation report from Hickman Mills, interview transfer notes, foster parent observations, teacher observations, medical records in regard to wheelchair use, feedback from application for Trails West, interview consideration from a private separate school, sampling data on potty-training and wheelchair use and vomiting behavior. A private separate school was rejected at this meeting because Student requires a functional program to make progress on his IEP goals. The severity of his disability and his delays and the desire to make him as independent as possible, directs that his program needs to focus on specific functional skills.

243. Parent disagreed with the October 15 placement decision and filed a due process complaint. In an effort to resolve the complaint, the District agreed to conduct an evaluation of Student and granted Parent's request for an IEE. McMullen, as part of this evaluation, performed the Vineland Adaptive Behavior Rating Scales. Kelly White, another process coordinator, filled out a scale as well as a teacher. McMullen met with Parent in this process to determine at what level Student is based on his functional needs.

244. For the assessments of communication, daily living and socialization, Student's overall adaptive behavior and motor skills were scored at 20. Anything between 85 and 115 are in the average range. Student received the lowest score McMullen has ever scored a student.

245. Parent also had an IEE done by Karen Jordan, Ph.D. Parent selected Jordan. Jordan's assessments placed Student at an IQ score of 40, and his subtest scores were all zero because he

was unable to respond. He was also given the non-verbal portion of the Stanford-Binet, and his raw scores were zero. On the Reynolds Intelligence Scale, the non-verbal score was 40, and the raw scores were all zero. Jordan's assessment placed Student at a cognitive level of about 6 months, receptive communication at about 3 months, fine motor skills at about 6 months, and gross motor skills at 12 months.

246. Jordan recommended that Student receive intensive special education services, including speech and occupational therapy. She recommended a specialized setting with staff who are experts in working with children who are diagnosed with significant intellectual disabilities, and that Student be in a classroom specifically designed for children with developmental delays and a small student-to-teacher ratio.

247. The District completed the evaluation of Student in March 2019 and reconvened on April 26, 2019, to discuss the findings. It was a long meeting, and all evaluative data was examined. The IEP team reached a consensus as to what level of services Student would be provided, and a new IEP was drafted by the team. The IEP team was about to discuss placement when Parent requested a behavior plan. The team discussed her request and decided to conduct a functional behavior assessment, which is a prerequisite to drafting a behavior plan. A functional behavioral assessment looks at data around identified behaviors to see what behaviors happen before or after an incident to try to figure out why a particular behavior is happening. Landis, the District's behavior interventionist, conducted the FBA.

248. The District scheduled a meeting for May 17, 2019, to consider the FBA data. Even though Parent and her advocates left the meeting, the IEP meeting still went on for hours without them. The behavior of vomiting and sleepiness were incorporated into Student's health plan. The team reviewed the IEP in its entirety at this meeting and discussed placement. After discussion of all options, including a private school like Sherwood or at a different school district that had an appropriate program, the IEP team determined that a public separate school was the

appropriate placement for Student. After examining all placement options, Trails West was determined as the appropriate placement.

249. The IEP team reconvened on August 23, 2019, and made a few revisions to the IEP goals as suggested by Parent. Student's proposed August 23, 2019 IEP is based on Parent's input, Student's current functioning, and is ambitious. The proposed IEP has six goals. The team drafted goals to increase Student's independent play skills, work on real object representation, and increase his functional communication. The August 2019 IEP also has a toileting goal. The August 2019 IEP contains broad goals that Student can use in a variety of settings. Student's services such as occupational therapy, physical therapy, and language therapy are also included in the proposed August IEP at the previous level.

250. Based on the FBA and Parent's input, the IEP team modified Student's health plan, and Parent agreed to the health plan.

251. The August 23, 2019 meeting lasted approximately three and a half hours. The IEP team discussed Parent's request for private school placement and examined the distance from Student's house when discussing placement. Trails West is approximately seven miles from Student's home, while Sherwood is 15 miles from Student's home. The team also discussed their efforts to contact neighboring school districts to see if Student could attend their programs, but this was not an option. After discussion, the IEP team determined Student would attend Trails West as the appropriate placement. The IEP team had made the same decision at least twice before and had even more data and information available to it on August 23, 2019.

252. When McMullen, as part of Student's IEP team, determined that the most appropriate placement for Student was at Trails West, the following factors were important to her: current functioning, delays, minimal progress on IEP goals that the team has been working on for a year and a half, the amount of supports he has currently in place, and there is no progress at Kentucky Trail. "[I]t's concerning, and we want him to get the best educational benefit that he can. We

want him to show progression of skills.” Tr. at 293. When asked if it was likely if Student will show progression of skills if he stays at Kentucky Trail, McMullen said, “no.” *Id.*

253. In McMullen’s experience, when students go to Trails West, due to Trails West’s setup and amount of staff and student support and training, typically after 30 days at Trails West, a student’s paraprofessional is removed. The student will have enough support without a one-on-one para with them at all times. Having a one-on-one para with Student is very restrictive, and at Trails West, although it is one step more restrictive on the continuum, less support for Student will be needed, so he will be more independent in the classroom.

254. At Trails West, Student has the opportunity for an Adaptive PE teacher, art class, music, library time, and a fully accessible playground.

255. At the August 23, 2019 IEP meeting, Parent for the first time indicated she wanted Student to either go to a school called Milestones – a private separate day school – or to stay at Kentucky Trail.

256. At every IEP meeting, the team discussed Student staying at Kentucky Trail and asked themselves whether keeping Student at Kentucky Trail is appropriate, whether he is making gains, and whether he was being successful in his environment with a personal para when he is still not showing the growth the District would like to see. At “every step of the way” the team discussed keeping Student at Kentucky Trail, but never concluded that it was the appropriate placement for him. *Id.* at 294. Parent did not suggest Kentucky Trail as a viable option until the August 23, 2019 meeting at the end of the meeting. There is not one area of Student’s life in which he does not require a pervasive level of support. In McMullen’s experience, there is no other classroom methodology, technique or accommodation that would increase Student’s success at Kentucky Trail.

257. In McMullen’s experience, if Student stays at Kentucky Trail and the August 23, 2019 IEP is attempted to be implemented, Student will not receive meaningful benefit. “I think we

would have the same inconsistent, minimal results...” Tr. at 295. Student needs a different type of setting to make the gains he should be making.

258. Regarding the change of placement, if the IEP team cannot reach a consensus, the LEA makes the final decision. However, at the IEP meeting, the majority of the team except the parent and her invitees agreed with the placement decision.

259. The same IEP goal could have a different outcome depending on the setting. McMullen believes Trails West is more likely to yield a positive educational benefit for Student. Student will have no educational benefit or “de minimis” at best if he stays at Kentucky Trail. Tr. at 307.

Hoots

260. In her role as Director of Special Education, Hoots oversees all programming designed to provide students with disabilities with FAPE for the school district and ensures the District abides by IDEA regulations. Hoots has been responsible for providing FAPE to thousands of children in the last 20 years.

261. Student enrolled in the District on or about February 20, 2018. Through the transfer process, in speaking with Hickman Mills School District, where Student previously attended school, the District learned that Hickman Mills intended to propose a change of placement for Student to Trails West had he stayed in their district. Student had been evaluated at Hickman Mills approximately a month before he enrolled at the District. The District had a copy of Hickman’s draft IEP that served as a foundation for Student’s March 2018 IEP.

262. Hoots has been part of Student’s IEP team since day one. Student has a severe intellectual disability. Student is easily overwhelmed and requires constant “100 percent support from the adults around him.” *Id.* at 19.

263. An FBA was conducted in May 2019 of Student, examining several behaviors, but a behavior intervention plan was not developed. The behaviors of Student were sensory based. An over-sensory stimulating environment led to an increase in the examined behaviors.

264. The District looked at addressing Student's environment as opposed to a behavior plan which is intended to teach replacement behaviors. There are not replacement behaviors to teach Student, rather, it is the responsibility of the adults who work with Student to understand what Student is communicating through his behaviors and adjust his environment accordingly.

265. Student's disability does not mean that he will automatically be placed in a restrictive environment. When looking at programming, factors such as cognition and the level of processing, adaptive skills are examined as the District wants to know how a student is able to function in all environments, including the home and school environment. The District also looks at how much the student can do independently and the intensity of services. Student has a multitude of medical diagnoses.

266. The District looks at all available data before making a change of placement, such as the decision in question. An application for Trails West is not made for every single student who functions at a lower level. Not all District students with low functioning go to Trails West. The District has 750 special education students out of a total enrollment of 4,762. Only seven District students attend Trails West. The difference between the students the District has decided to maintain at the District or apply for Trails West "comes down to their response to the environment, the response to learning, the response to instruction." Tr. at30.

267. Student should not be placed at Trails West solely because he meets eligibility criteria.

268. Student has been in the same type of placement for three years. "He has not progressed in a meaningful way" even with the most intensive programming the District can provide. *Id.* at 31. Based on the data from 2016 to 2019, there are several areas in which Student

has regressed. Student is trending downward in his adaptive skills. The District has made “a lot of changes within his day in order to try and elicit that learning response from him and it’s not working.” Tr. at 31-32. There are very talented educators at the District working with him, a lot of information has been gathered over the last 16 months, four or five IEP meetings have been conducted, and two evaluations have been conducted, but there is nothing else the District can do to help Student learn.

269. Besides being able to walk, Student is the same as when he enrolled in the District. He has made “very minimal progress,” particularly taking into consideration that “we’ve been working on the same goals for... 16 months” and Student’s previous school was also working on these goals. *Id.* at 25. Hoots does not think that “minimal” is the standard for any student. IEP goals are written with the intention of making growth over a year’s time span. *Id.* at 26.

270. Student is currently in a self-contained program at Kentucky Trail with a one-on-one paraprofessional. He is in a classroom with about 12 or 13 students. There is one main teacher in the classroom and a few other paraprofessionals in the room for other students. Due to Student’s intellectual level of functioning, Student is becoming more and more isolated in his classroom because his programming requires a different type of instructional approach than his current classroom peers at Kentucky Trail. “All of the other students are able to participate within small groups within that classroom and work on daily life skills. [Student’s] the only one in that classroom that’s not.” *Id.* at 32-33.

271. Student has had many opportunities to participate and be involved at Kentucky Trail, and used to eat in the cafeteria until it became too difficult for him. In the general education environment, he will drop to the floor and put his hands over his ears. This occurs both in his classroom and when he is outside of his small group setting.

272. The District is currently implementing Student’s March 2018 IEP due to stay-put. This outdated IEP is not as intensive as what Student needs. If the newly drafted August 2019 IEP is

implemented at Kentucky Trail, “we will continue to get the same responses that we have now.” Tr. at 36. Student will achieve a different result at Trails West due to the different environment there due to Student’s low cognition and how much he has to be able to filter in his environment to learn. The greater number of people in the Kentucky Trail environment creates a “mass amount of stimulation” that interferes with his ability to learn. *Id.* If some of Student’s sensory stimulation is reduced and therapies are integrated, Trails West will get a different response from Student, and he can grow at a higher rate than what has been demonstrated at Kentucky Trail.

273. When looking at accessing the general education for a student, the District takes into consideration a student’s ability and the barriers to interacting with typically developing peers. The decision to place Student at Trails West is not just about progress on his IEP goals, it is about the pervasive supports that Student requires in everything he does. Student has not been able to respond to instruction provided in his current placement in a meaningful way.

274. Classroom alterations and supports have been provided to set up Student’s learning environment at Kentucky Trail to try to get him to respond to instruction. These alterations include reducing distractions when he is learning and eating, and setting up instructional time periods specifically for him each moment of his day.

275. Student has exhibited “tantruming and head-banging behaviors” in the past and “extensive biting” of staff. *Id.* at 14. Student’s biting happens on such a regular basis and with such intensity that the staff who work with him, even staff on the bus, wear bite guards on their arms to protect them from the amount of injury that occurs with Student’s biting. Student has unique medical needs and needs PediaSure for sustenance, is incontinent, and vomits frequently. Student is mostly non-verbal. His speech language pathologist has heard him say the word “no,” but was not sure if it was meaningful or just a vocalization. *Id.* at 100.

276. Student has been biting and shown an increase lately. The data shows that the behavior increases due to transitions and he is demonstrating an overwhelmed sensory-based

response. Student's biting has significantly increased from last fall to this fall. Biting is Student's way of telling adults that the environment is too much and overstimulating. To respond to the biting, teaching him replacement behaviors is not an approach to use with Student. To address the biting, the District needs to set him up in an environment to increase his availability to learn. Staff have been injured by the biting. Biting was not the reason placement was transferred to Trails West, but is simply relevant to providing Student a safe environment and is an indicator of Student's stress.

277. Student met his gross motor goal, Goal No. 5 in the March 22, 2018 IEP. Hoots testified, however, that "I don't think that it is related to our direct instruction," but was more due to Student's physical development and maturation. Tr. at 48. Goal No. 6 was considered mastered, as he is no longer using a reverse rolling walker at school.

278. Hart is qualified to teach Student. While there is a degree in special education for severe and profound disabilities, it is a very specialized degree, and Hoots is not sure if in her 20 years in the public school setting she has hired anyone with that type of degree.

279. At Student's first IEP meeting, Hoots stated that other placements would be considered at his next meeting, as there were already concerns that the school might not be able to meet Student's concerns at that placement. Hoots wanted data and to try to implement Student's goals within the school before making a change of placement.

280. At Student's March 2018 IEP meeting, the team discussed that it would be helpful to collaborate with Student's outside therapists or service providers and asked Parent to communicate with the outside providers, but Parent said she had all the documents and she would provide them to the school. The District has never seen those outside records, and Parent never provided consent for the District to communicate with the outside providers.

281. Student's IEP team met again on May 3, 2018, and Trails West was brought up as an option to explore. Student was struggling and was showing scores well below the 18-month

functioning level, which in Hoots' experience has been an indicator of the level of functioning that typically is difficult to meet those needs in District self-contained programs.

282. Regarding MSSD, Hoots testified that "our state has pooled together resources just like we do as a district to bring together expertise and resources." Tr. at 680.

283. If Student is transferred to Trails West, he would still be a District student and the District would be responsible for every evaluation and IEP. McMullen, as liaison for Trails, West would attend IEP meetings for Student.

284. In reviewing all placement options, Hoots spoke to the Lee's Summit School District and Raytown School District to see if they had available programming for Student, as both of these schools have a separate building for their programs.

285. Lee's Summit and Raytown have buildings to serve students similar to the structure of Trails West, but the difference is Trails West is administered by DESE.

286. The District also looked into Sherwood, and he was accepted there, but with the caveat that additional staff would have to be brought on to be able to try to serve him.

287. Hoots explored all kinds of placements and explored Parent's placement preferences.

288. Trails West had a better program for Student than Sherwood because the programming at Sherwood has a heavy focus on language and Student's language difficulties stem from his low cognition. Thus, the focus on programming for Student is developing adaptive and functional skills and integrating in communication.

289. The District has students that attend Sherwood and it is a "great school," but there would also be concern for Student's safety, as there are a lot of "bigger behaviors" occurring at Sherwood. Tr. at 684. Sherwood could not implement Student's IEP. It could not just immediately pick up Student's IEP and implement it, whereas Trails West is already set up to implement his IEP.

290. Even though Student received an eligibility letter for Trails West on August 30, 2018, and the team met in September of 2018, a placement decision was not made at that meeting. After Parent raised concerns at this meeting, the team agreed to gather data and reconvene at a later time.

291. Eight months after Student enrolled, the team reached a placement decision and determined Trails West was the appropriate placement.

292. The change of placement for Student to Trails West was based on Student's current and historical data, his trends of learning over time, the interview with his previous school and implementation of his current IEP and input from Parent, her goals and aspirations for him, and a "large but inclusive team of individuals that really just want what is truly best for [Student]." Tr. at 690.

293. Hoots stated, "it comes down to quality of life...we want [Student] to be an active participating member in his life." *Id.* It is difficult to provide the type of programming he needs in a self-contained program like he has been for three years.

294. Per Hoots, "[l]east restrictive environment does not automatically mean the general education setting. The least restrictive environment means this is the least restrictive place that we can educate this student for independence..." *Id.* at 691.

295. After the District did an evaluation of Student, the results solidified the need for intensive programming for Student. Student has now been evaluated in three different school districts and each evaluation has shown the same result.

296. Regarding keeping Student at Kentucky Trail, Hoots testified, "[i]t's not that we don't want to, because rest assured...our staff absolutely adores this young man, but...it does not allow us to be able to give him what he needs... You have to weigh what are you giving up and what are you gaining." *Id.* at 693-94.

297. Student has had 16 months of instruction in the same placement, but he is not making significant progress. By keeping him at Kentucky Trail “we would be settling. We would be settling for programming that would deny him a true free appropriate public education in order to truly have meaningful benefit and to be able to participate in his life.” Tr. at 694.

298. To assess a student’s growth, the District does not just look at small incremental growth on IEP goals. The District looks at the big, broad scope of what is happening with learning and see how all the pieces fit together. In the big picture in three years, Student has shown regression.

299. One of the big differences between Kentucky Trail and Trails West is the training and expertise at Trails West, “not just of the classroom teacher and the paraprofessionals, but of the entire staff.” *Id.* at 697. Hoover, who would be Student’s teacher at Trails West, has a degree in teaching students with severe and profound disabilities. “She has a totally different type of training and vision and understanding of students with significant – not just significant, but severe disabilities and that descriptor has been outlined in multiple evaluations that we’ve heard even the last two days.” *Id.*

300. Trails West would open up a whole community of peers to Student. Trails West has wraparound services; it helps connect families to resources and provides information on adaptive activities around the community.

301. The August 23, 2019 IEP meeting is the third time the IEP team had made the decision that Trails West was appropriate for Student. That meeting was also the first time Parent requested that Student stay at Kentucky Trail. This is the longest the District has ever worked with a family regarding a change of placement. The team has left meetings on multiple occasions to collect data to address the concerns of Parent.

302. Student staying at Kentucky Trail would not allow him to have his needs met or be able to grow and make gains on his IEP goals based on his historical experience at the school.

303. Following the August 23, 2019 IEP meeting, a Notice of Action (NOA) was sent to Parent setting forth the team's justification for placement at Trails West. The NOA reflects what was discussed regarding programming at Trails West. The NOA outlines the team's conclusion that if the physical and cognitive demands on Student can be reduced in his environment, his ability to be able to be open and available to learn will increase and therefore his independence will increase as well.

304. The NOA details that the evaluation data from 2016-2019 shows that Student regressed in the areas of communication, daily living, socialization, motor and overall adaptive skills. The NOA details Student's progress on IEP goals as "some IEP goal progress." Ex. FFF.

305. The data shows that there has not been an increase in functioning for Student in two years' time when looking at age equivalent behaviors.

306. Student showed a ten point discrepancy for daily living skills from his time at Hickman Mills.

307. Student has had three years in the same placement with the same type of programming, and the District is not getting any other response. His progress has been "so minimal, I don't think that that's enough for [Student]." Tr. at 711.

308. Student could progress at a significant rate if he was taught the same skills with trained professionals in a different environment. "[Y]ou don't ever get a year back. Once that instructional year is gone, it's gone." *Id.* at 712.

309. The first time the team decided to change Student's placement was October 2018 and there have been two subsequent decisions based each time on more data. The data each time shows that Trails West is the appropriate placement. There is no method, technique or accommodation that has not been tried with Student to make him successful.

310. Based on “everything we know,” Student’s August 23, 2019 IEP will not provide Student with meaningful benefit if implemented at Kentucky Trail. Tr. at 716.

311. If Student’s August 23, 2019 IEP is implemented at Trails West, the IEP will provide Student with meaningful benefit because “the expertise, the structure, the basic foundation of what Trails West has been developed around makes it set up to implement exactly what’s on his IEP so that we can see how he responds to the learning that we think he can achieve over a year. I think that with the integrated services that they have, I think that with the . . . community experiences that he can have for generalization, I think that he will learn and achieve those goals that we’ve written over the next year.” *Id.* at 716-17.

312. Student is currently in the most restrictive environment the District can provide.

313. Minimal benefit is not enough for Student or any student.

VI. Trails West

314. Trails West and other MSSD schools are public separate schools. A public separate school is a placement just below inside the regular class less than 40% of the time. As a public separate school, Trails West is still under the same educational standards for the state of Missouri.

315. Trails West is approximately seven miles from Student’s home and has around 40 students currently enrolled.

316. Trails West looks like a regular school. It is a one-story building. It doesn’t seem cavernous or large. It has a front office, classrooms in the front two hallways, a multi-purpose room in the middle (for adaptive PE and lunch), a home living area, an art room, and some other rooms. Classrooms 1-10 have bathrooms for student use and there is a playground.

317. When you walk in the building at Trails West, there is a big display that says “Welcome to Trails West” and “Trails West Tigers,” and there are bulletin boards up and down all hallways. Seasonal decorations are often in the windows of the secretary’s office. *Id.* at 602.

318. The environment at Trails West is similar to other schools operated by DESE. There were 4-5 students in a classroom with a teacher and 1 or 2 paras. They did circle time and individual time. Therapies were integrated into the classroom setting (which facilitated carryover of skills more than pulling out into a one-on-one setting). It was a quieter environment. They also had Christmas parties, prom, family chili suppers, adaptive PE with a lot of adaptive equipment for students, took field trips off campus, and went swimming.

319. A minority of students are confined to wheelchairs at Trails West, not all students are medically fragile, many students are highly active, and many students do vocational skills to help them prepare for programs after they turn 21 so they could go into the supported workforce. There was a focus on transitioning out of the educational environment into a real life experience.

320. Hoover's classroom is very active; there are 5 students from 3rd grade to 7th grade, herself and two teacher assistants. Hoover is in the classroom setting where Student would go if he attended Trails West. She has other students that are nonverbal or generally cannot communicate, students that are on the severe level in terms of their disabilities or cognitive abilities. She does not currently have any students that have difficulty or need assistance with walking.

321. Daily classroom activities include daily living (self-care), an all group activity talking about who is there that day, leaving the classroom to go to an obstacle course room to practice motor skills, walking around to say good morning to the cook and thank her for fixing lunch, going back to the classroom to do center groups and individuals one-on-one teaching, social stories, lunch time, story time, ABC time with phonics, and a kinetic energy activity.

322. Trails West has a home-school coordinator who works directly with families. Trails West has all-school parties and all-school activities, and parents are always invited to attend.

323. Trails West follows Missouri learning standards and IEP team decisions on what each individual student will be learning.

324. Hoover has been trained in positive behavior management skills.

325. At Trails West, therapists usually come into the classroom to provide students services rather than pulling the student out of the classroom for such services.

326. When Parent toured Trails West, she saw a classroom with children strapped in wheelchairs and two paras. There was no teacher in the classroom initially. Parent found Trails West to be gigantic and dark. “I could hear my voice echo when we were in there.” Tr. at 414. Parent saw the playground and described it as “dirty.” *Id.*

327. Parent went back to the classroom she had seen earlier, and the teacher was again not there. The children were still strapped in wheelchairs, and the paras were interacting with each other.

328. In order to be admitted to Trails West, the referring school must provide a justification and identify how a student would meet criteria and why it is the appropriate location for services. To meet standards for admission, a student must have an IQ score of four standard deviations below the mean, so a score of 40 or below. The student must also have adaptive scores of 40 or below. Just because a student is eligible to attend MSSD, it is still the IEP team’s decision if that is the appropriate placement for the student.

329. There are more restrictive placements than MSSD schools, including homebound education.

330. McMullen and Rodgers wrote Student’s application for Trails West. The application was completed on July 1, 2018, after Student had attended the District for approximately five months.

Conclusions of Law

This Commission has jurisdiction over this case. Section 162.961.⁷ The burden of proof is on the party seeking relief, in this case Parent. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005).

⁷ Statutory references are to RSMo 2016 unless otherwise noted.

Parent must prove that the IEP and placement proposed by the District is not reasonably calculated to provide Student with FAPE. Parent must prove her case by a preponderance of the evidence. *Tate v. Dept. of Social Services*, 18 S.W.3d 3, 8 (Mo. App., E.D. 2000). A preponderance of the evidence is “evidence which as a whole shows the fact to be proved [is] more probable than not.” *State Bd. of Nursing v. Berry*, 32 S.W.3d 638, 642 (Mo. App. W.D., 2000).

I. Credibility

We must judge the credibility of witnesses, as well as the weight and value of the evidence. *Faenger v. Petty*, 441 S.W.3d 199, 204 (Mo. App. W.D., 2014). We have the discretion to believe all, part, or none of the testimony of any witness. *Dorman v. State Bd. of Registration for the Healing Arts*, 62 S.W.3d 446, 455 (Mo. App. W.D., 2001). Our Findings of Fact reflect our credibility determination.

II. Objections Taken With the Case

A. Blanck

The District argues that Blanck provided no relevant or probative testimony. As its primary support, the District cites *Gill v. Columbia Sch. Dist.*, 1999 WL 33486649 (W.D. Mo. 1999) (hereinafter *Gill I*) That decision was affirmed in *Gill v. Columbia Sch. Dist.*, 217 F.3d 1027 (8th Cir. 2000) (hereinafter *Gill II*). In the underlying facts of *Gill*, the parents attempted to call two expert witnesses at the due process hearing that they had hired after the IEP meeting at issue. The hearing panel excluded their testimony because “it was not relevant to the appropriateness of the IEP because it had not been brought up at that meeting.” *Gill II* at 1033. The parents offered the testimony as an offer of proof. The hearing panel found for the district, and the parents appealed. One of the issues was the decision to exclude the expert witnesses’ testimony.

In *Gill I*, the court refused to admit evidence of a student's progress in a home-based instruction after the parents rejected the student's IEP and sought compensation for the in-home education. The court determined that the issue in the case was whether the IEP was appropriate as of the date the IEP occurred. Accordingly, "[a]bsent some indication that the evidence was presented to defendants in an effort to get a revised IEP," only evidence from before the IEP meeting should be admitted. *Gill I* at 20.

Gill II summarized the pertinent finding of *Gill I* as "[the IEP] could not be judged in hindsight]," *Gill II* at 1034, but made no substantive finding regarding the appropriateness of admitting evidence gathered after a challenged IEP. The *Gill II* court affirmed the District Court's decision and found no justification to open the record to admit the witnesses' testimony.

In *K.C. v. Bd. of Educ. for Montgomery County Pub. Sch.*, 2007 WL 1521054 (D. Md., May 22, 2007), the IEP meetings at issue were held on April 27, 2004 and July 16, 2005. On August 9, 2006, the administrative law judge for the due process hearing found for the district. The parents appealed and sought to supplement the administrative record with evidence of student's academic performance after the IEP in question was held. The *K.C.* court found that:

Plaintiff's additional evidence concerns KC's subsequent progress, after the IEPs were offered, in a different program, and are not relevant to whether KC would have received an educational benefit from the IEPs that Defendants offered.

Id. at 4. The Court denied parents' motion to supplement the administrative record and request for additional discovery.

The two cases cited above refute the argument that the only limitation on the admission of evidence is found in 34 CFR § 300.512:

(b) *Additional disclosure of information.*

(1) At least five business days prior to a hearing conducted pursuant to § 300.511(a), each party must disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing.

(2) A hearing officer may bar any party that fails to comply with paragraph (b)(1) of this section from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

Clearly, other objections, such as relevance, are cognizable at the hearing. In *Doe v. Richmond Con. Sch. Dist.*, 67 IDELR 264 (D. Mass. 2016), the Court stated, “Compliance with the Five Day Rule does not guarantee that a particular piece of evidence is relevant to a particular issue.” The *Doe* court also agreed that expert testimony about conditions subsequent to the IEP would not be relevant, stating:

The Hearing Officer did not find the evidence was improperly offered, but rather that it was irrelevant to the question of whether the IEP was reasonably calculated to provide FAPE. The adequacy of the IEP must be examined based on what was known to the school district when the IEP was promulgated.

We allow Blanck’s testimony because it is not about information that was unavailable to the IEP team, but constitutes expert testimony about the general concept of LRE. But due to the District’s objections to his testimony, some of which we have noted in our Findings of Fact, we did not give his testimony much weight, nor do we find his testimony to be particularly helpful in our analysis of LRE .

B. Owens

The District objected to the testimony of Owens because she has never been a part of the IEP team and has never presented this information to the IEP team. The District argues that her testimony is not relevant to our decision. We disagree and allow the testimony.

III. IDEA and LRE

Under the IDEA, all children with disabilities are entitled to FAPE designed to meet their unique needs. 20 U.S.C. §1400(d)(1)(A) and 34 C.F.R. §300.1(a). Missouri’s State Plan for Special Education (2019) (State Plan) generally defines FAPE as regular and specialized special education and related services provided at public expense, under public supervision and direction

without charge to the parents that meet the educational standards of the state educational agency and are provided in conformity with the student’s IEP. *State Plan*, Regulation I, G at 6. The IDEA does not prescribe any substantive standard regarding the level of education a disabled child should be accorded. *Board of Education of Hendrick Hudson Central School District, Westchester County, et al. v. Rowley*, 458 U.S. 176 (1982). It does require the school district to “provide a disabled child with such special education and related services in conformity with the [child’s] individual education program.” *Endrew v. Douglas County School District RE-1*, 137 S. Ct. 988, 994 (2017).

Accordingly, it is well established that the IEP is ‘the centerpiece of the statute’s education delivery system for disabled children.’” *Id.*, quoting *Honig v. Doe*, 484 U.S. 305, 311 (1988). An IEP is a specialized course of instruction developed for each disabled Student, taking into account the “unique needs” of a particular child. *Id.*, citing *Rowley*, 458 U.S. at 181. The IEP is not required to maximize the educational benefit to the child, but must be “reasonable” and “not ideal.” *Rowley*, 458 U.S. at 199 and *Endrew*, 137 S. Ct. at 999.

The IDEA states that, to the maximum extent appropriate, children with disabilities must be educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment should occur “only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 20 U.S.C. § 1412 (a)(5)(A). This concept, known as the “least restrictive environment” (LRE), is the vehicle through which Congress sought to bring children with disabilities into the mainstream of the public school system. *See Mark and Ruth A. v. Grant Wood Area Education Agency*, 795 F.2d 52, 54 (8th Cir. 1986); *Rowley*, 458 U.S. at 189.

The concept of educating students in the LRE reflects a “strong preference” that disabled children attend regular classes with non-disabled children. *T.F. v. Special Sch. Dist. of St. Louis*

Cnty., 449 F.3d 816, 820 (8th Cir. 2006). But the mainstreaming preference of the IDEA is not absolute; 20 U.S.C. § 1412(a)(5)(A) “calls for educating children with disabilities together with children who are not disabled ‘[t]o the maximum extent appropriate.’” *C.B. ex rel. B.B. v. Special School Dist. No. 1*, 636 F.3d 981, 991 (8th Cir. 2011).

Children such as Student must have an IEP that provides an educational program “appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom.” *Endrew*, 137 S. Ct. at 1000. “To meet its substantive obligations under the IDEA” an IEP must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew*, 137 S.C. at 999. This is not a bright-line rule and it “requires a prospective judgment by school officials” that is a “fact-intensive exercise” incorporating information from both school officials and input from the child’s parents. *Id.*, citing *Rowley*, 458 U.S. at 207.

However, an absence of the court providing a “bright-line rule” is not “an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review” and such deference is “based on the application of expertise and the exercise of judgment by school authorities” and “[a] reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decision that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.” *Endrew*, 137 S. Ct. at 1001-1002, citing, in part, *Rowley*, 458 U.S., at 206. Nevertheless, this does not negate a hearing officer’s duty to weigh the credibility of the witnesses and consider the impact of the testimony of expert witnesses. *Bd. of Educ. of Montgomery County v. S.G.*, 2006 WL 544529 (D. Md. Mar. 6, 2006).

Educational authorities must identify and evaluate disabled children, develop an IEP for each one, and review every IEP at least once a year. §§1414(a)-(c), (d)(2) and (4). They must also re-evaluate a Student every three years. 20 U.S.C. §1414(a)(2)(B)(ii); 34 C.F.R.

§300.303(b)(2). Each IEP must include an assessment of the child’s current educational performance, articulate measurable educational goals, and specify the nature of the special services that the school will provide. §1414(d)(1)(A).

The primary mechanism for delivering a FAPE is the development of a detailed instruction plan, IEP, for each child classified as disabled. 20 U.S.C. Section 1401(18). An IEP consists of, inter alia, a specific statement of a student's present abilities, goals for improvement, services designed to meet those goals, and a timetable for reaching the goals via the services. *Id.* Section(s) 1401(a)(20). The creation of an administrative structure capable of producing IEPs is a requisite to receiving IDEA funds. *Id.* Section 1414(a)(5). To the extent possible, however, a school must “mainstream” disabled Students – that is, instruct them in a regular, not special, education setting. *Id.*; 1412(5).

34 CFR. §300.114(2) states:

Each public agency must ensure that –

(i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and

(ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Concerning placement decisions, 34 CFR § 300.116 states:

In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that –

(a) The placement decision --

(1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and

(2) Is made in conformity with the LRE provisions of this subpart, including §§ 300.114 through 300.118;

(b) The child's placement –

(1) Is determined at least annually;

(2) Is based on the child's IEP; and

(3) Is as close as possible to the child's home;

(c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled;

(d) In selecting the LRE consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and

(e) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.

The issue in this case is whether Student's August 23, 20219 IEP is reasonably calculated to enable him to make appropriate progress in his LRE, which Parent argues is Kentucky Trails and the District argues is Trails West. The following cases instruct us what to consider when determining the LRE.

In *Greenwood v. Wissakickon School District*, 50 IDELR 280, 571 F. Supp.2d 654 (E.D. Pa. 2008), the Court noted a conflict between the IDEA's goal of mainstreaming and its requirement to provide an IEP meeting the student's special needs. In this case, the parent wanted her daughter placed in full-time regular education rather than full-time placement in life skills classes operated by the Montgomery County Intermediate Unit. The Court stated:

Placing a student in the least restrictive, popular known as mainstreaming, requires a school district to provide the appropriate supplementary aids and services for inclusion in a regular classroom to the greatest extent possible. Mainstreaming does not require inclusion in a regular classroom if doing so would jeopardize a student's ability to achieve a meaningful educational benefit. Thus, inclusion is not appropriate when the nature or severity of a student's disability precludes an education benefit from inclusion with non-disabled students[.]

(Citations omitted.) The Court looked at the student’s severe cognitive disabilities and communication difficulties.

In *P. through Mr. and Mrs. P. v. Newington Board of Education*, 51 IDELR 2, 546 F.3d 111 (2nd Cir. 2008), the Court stated:

[W]hether a student has been placed in the “least restrictive environment” requires a flexible, fact-specific analysis, considering whether, with the aid of appropriate supplemental aids and services, education in the regular classroom may be achieved, and, if not, whether the school has included the student in regular classes, programs and activities to the maximum extent appropriate.

The Court found that the school district was mainstreaming the student to the maximum extent appropriate. Considering the student’s unique circumstances, which included a need for pull-out services, the Court found that the additional mainstreaming requested by the parents was not appropriate. The Court noted that the presumption in favor of full mainstreaming as the LRE must be balanced with the importance of providing an appropriate education “tailored to each student’s particular needs.”

In *Solorio v. Clovis Unified School District* 74 IDELR 2, 748 F. App’x 146 (9th Cir. 2019), the Court affirmed a district court’s decision that, although the student’s parents wanted a full-time general education placement, the proposed placement of special education classes for academic subjects was the LRE. The student was not receiving benefit from even substantially modified work assignments in the regular classroom, and her frustration over this was impairing her social interaction with her peers.

In *Michael P. v. Indian River County School Board*, 37 IDELR 186, 48 F. App’x 326 (11th Cir. 2002), the parent agreed with the IEP team’s goals and objectives for her son, but objected to the decision to place him in a school that was limited to special education students. The Court looked at the student’s cognitive level (functioning in most skill areas at the level of a three year-old). The Court found that the separate school was better suited than parent’s choice –

a special education classroom at a district middle school – to meet the student’s need to learn daily activities. The Court noted that the lack of necessary equipment, such as bathroom facilities, an individual dressing stall, a sink and dishwasher, in the district’s classroom would severely limit implementing an important component, life skills, in the student’s IEP.

In *Boston Public Schools*, 114 LRP 28221 (June 13, 2014), a district cited recent evaluations recommending highly individualized instruction for a teenager with autism to show that he needed more restrictive placement than the full inclusion sought by his parents. Although the student had made academic and behavioral progress, it was clear that he was in need of further development and his parents did not meet their burden of showing that his needs could be met in a full inclusion placement.

In *Moon Area School District*, 114 LRP 27276 (May 20, 2014), a district provided evidence that student was making progress in the more restrictive private placement. Testimony that a district-based placement would not allow the student to progress and would not be appropriate for the student, resulted in a finding that the private placement was student’s LRE.

In the case before us, with regard to placement decisions, Blanck described “implicit bias” as an unseen and “unnoticed by the person who does it” bias on the basis of race that African Americans face. Tr. at 144. He opined that it could be a factor in this case. Hoots testified that she did not believe the placement decision was based on any bias. This latter is consistent with the testimony of everyone who works with Student. They gave credible testimony that they cared about Student and were working to help him. Their testimony that they believed that the Trails West placement was in his best interest was also credible and sincere.

Parent argues that we should only consider that Student has made progress on several of his goals. But, due to such factors as stay-put during the pendency of this appeal, he and his teachers are working with a March 2018 IEP. As the testimony below illustrates, Student’s progress is inconsistent. Landes testified:

Q: --do you think that [the last IEP that was drafted in August] would be – provide [Student] meaningful benefit if it was implemented at Kentucky Trail?

A: I do not.

Q: Why is that?

A: I think he deserves the opportunity to be served through the least restrictive environment through our continuum of service placement. We only make movements for students in this situation after evaluation processes are concluded and new findings are relevant. And his current functioning, cognitively with his communication and his adaptive skills, are very dependent on an adult assisting him through those.

And at this time he accesses, I'm going to say, no general education time, per his current IEP, and he's in a general education school building, and that can be a somewhat isolating way to educate someone, any individual in any capacity. And when that becomes the long-term need of the student, that oftentimes lends us to look at the next placement on the continuum.

So in this case for [Student] being less than 40 percent in Kentucky Trail in our most suitable program we offer here, that next place on the continuum would be the separate day school, Trails West.

Tr. at 655-56.

McMullen testified:

Q: And the team decided that Trails West was the appropriate placement?

A: Correct.

Q: What factors were important to you when you made this decision?

A: When I look at [Student], I look at his global delays, the amount of support and the pervasive supports that he needs. He requires somebody with him at all times. I looked at his goals that he's had since March of 2018, and, typically, we would expect goals to be mastered in a year's time. That's our hope. And his progress has been inconsistent at best, and he has met one out of six goals. One discontinued, but . . . The amount of progress he's making in the setting that he's in is not – it's not really an education benefit to him.

Id. at 268-69.

Hoots testified:

Q: There's been discussion during this hearing about regression?

A: Yes.

Q: What do you mean by "regression"?

A: Well, what I mean is, even if you look at this notice of action, the very last section, it really does explain it. But in a nutshell, when you look at things like his Vineland scores, in 2016 he went from . . . a 49 to a 39.

And then from – with the teacher, he had in 2016 a 28 and he went to a 20. When we look at the overall functioning, he was, in motor, at the ten-month age of functioning and he dropped to six months. He went from, in communication, from six months to three months.

And a lot of this is based off of the independent educational evaluation that was done as well. It's not just evaluations that we've done here in Belton. It's also looking at . . . the actual number of communication behaviors that he exhibited, he had eight behaviors that he was exhibiting on the communication matrix in 2016. In 2019 he had six.

A: For – so those are the major ones. It's not – when you're talking about such small incremental growth on IEP goals, you have to look at the big, broad scope of what's happening with learning, too. You have to have this big, broad vision and see how all these pieces fit together.

And then you also have to look at what's happening with those individual instructional goals that have outlined. And what we – what we found is in the big picture in three years he has shown regression in the big picture. Those small, incremental growth indicators have not impacted him, to me, and what I would want for my own son. And I don't feel that when we have an option of looking at a program that has the potential, even, to stimulate that growth, why would we not do that?

Tr. at 695-96.

In addition, determining the LRE involves consideration of prior placements that showed the student was not making progress towards IEP goals and any benefit to student from interaction with non-disabled students. *Hudson v. Bloomfield Hills Public Schools*, 23 IDELR

613, 910 F. Supp. 1291 (E.D. Mich. 1995). The District's IEP team considered and discussed each of these things on several occasions.

The District's witnesses testified about Student's minimal progress working on a two-year-old IEP. The District even argued that accepting such de minimus progress and not trying to change something might constitute a denial of FAPE. In addition, Hart described Student's interaction with his non-disabled peers as very limited:

Q (by Commissioner McIntosh): Before you start, can you tell me the extent of [Student's] interaction with his peers during the day?

A: With peers within my classroom setting?

Q: Well, what are you aware of or what do you have knowledge of?

A: [Student] is – receives services, 100 percent special education. So he is in my classroom setting for the majority of his day, other than recess and transitions in the hallway. So he really doesn't initiate interaction with peers.

We have occasions when peers will, you know, attempt to engage him and he will smile sometimes and he can respond and he'll clap or imitate a little bit of – he makes great eye contact. So he is seeing them and he does smile at them when they initiate with them.

Q: So the primary communication peer-to-peer is in the special education classroom?

A: Yes.

Q: Does he have any interaction in the hallways with nondisabled peers or at recess?

A: He's at recess with nondisabled peers. There's really no interaction with them. They're playing around him, he's playing around them. He may swing next to a peer with assistance, but he's not actively interacting with peers.

Q: Do the non disabled peers in his class know him?

A: In the school? Because he doesn't attend classes with nondisabled peers.

Q: Oh, Okay.

A: But, yes, yeah, they know him.

Q: And does he have the same kind of interaction as far as the eye contact with those peers?

A: At recess, he's very focused on his activities and things that he wants to do. He's not acknowledging or looking for that contact really at recess, that I've noticed.

Q: And what kinds of activities does he engage in at recess?

A: We got to get him off the asphalt because he likes the feeling of that warm asphalt. Once we get to the playground, he likes to swing. That's his preferred activity. He can climb with assistance and will go down the slide with assistance, but his preferred activity is to swing.

Tr. 119-21. At Kentucky Trails, Student is in the most restrictive environment the District offers. He is the least independently functioning student in his program and in the District. Student receives all services in the special education setting, and he is in that setting for all of the school day except recess and transitions in the hallway. Even in those settings, he does not initiate contact with others. Student does not participate in assemblies, music or art class because these are overstimulating for him. He does not eat in the cafeteria because the experience led to an increase in his vomiting. In the separate classroom, Student "is becoming more and more isolated because his programming requires a completely different type of instructional approach than all the rest of the students in the class." *Id.* at 33. Trying to involve Student in group activities in the classroom results in overstimulation and "hooting or vocalizing" instead of doing what the group is doing. *Id.* at 510.

Student is receiving little benefit at Kentucky Trails from the very limited contact with non-disabled peers. The placement criteria of 34 CFR § 300.116 is best met by Trails West.

IV. MSSD/Trails West

MSSD was established by state law to serve students with severe disabilities referred to the State Board of Education by local school districts that do not operate such programs themselves and that are not part of a special school district. *State Plan, Regulation XVI* at 148. Local school districts may refer severely disabled students to MSSD. If they do, Regulation XVI

sets forth a lengthy process for justifying the placement of a child in MSSD. If a school district wishes to place a student in a state school, it shall:

(1) The public agency must establish the existence of a severe or profound intellectual disability. Students with severe disabilities generally have significant cognitive deficits as evidenced by method a or b described below:

a. The student obtains scores falling four (4) or more standard deviations below the mean using a standardized measure of cognitive functioning. The evaluation report also includes scores from a normative referenced standardized measure of adaptive behavior that yields a composite score that falls four (4) or more standard deviations below the mean, or

b. The student is not able to respond to any standardized measure of cognitive ability due to a combination of sensory and/or motor impairments, but evaluation information indicates significant deficits in cognitive ability and adaptive behavior skills as evidenced by a description of the student's need for pervasive levels of supports across all life areas, as defined by the American Association on Intellectual and Developmental Disabilities (AAIDD) classification system. The evaluation report also includes scores from a normative referenced standardized measure of adaptive behavior that yields a composite score that falls four (4) or more standard deviations below the mean.

Only assessment results from comprehensive evaluations less than three (3) years old and consistent with the procedures in Regulation III will be considered during the MSSD eligibility process.

(2) The public agency shall provide justification of why the public agency is not the least restrictive environment for the student.

Students who educationally benefit from special education and related services that can be provided by the public agency are not considered eligible for services through MSSD. In general, students with disabilities such as cognitive deficits falling two (2) to three (3) standard deviations below the mean, Speech or Language Impairments, Hearing Impairment/Deaf, Visual Impairment/Blind, Learning Disabilities, Emotional Disturbance, Other Health Impairment, Traumatic Brain Injury, or Orthopedic Impairment can receive an appropriate education when served by public agencies.

Id. at 148-49.

There was negative testimony from Parent about Trails West based on her tour of the school, and we have addressed her concerns in our Findings of Fact. Parent testified:

Q: And do you recall anything that was shared to you about the daily schedule?

A: No. I just remember the circle time because that's what – I was – as Princess said, I was traumatized by this. When I left I was crying because I thought this was the only option for my child. And – I'm sorry.

And it was made to me that it was the only option for my child, and – I forgot your question. I'm sorry.

Q: That's okay. Separate therapy room, what is that about?

A: They had some – some home living area that had a bed and a TV and a kitchen, and that was for, I guess – thank you – people, you know, that are learning living skills.

They had a gym. They had a therapist working in the hallway with another child, but that was the only child I saw in the hallway the entire time I was there. There was absolutely no movement in that building whatsoever, and it was depressing to me.

Tr. at 415. But there was also positive testimony from the District's witness, and we have included that in our Findings of Fact. We need not decide that one witness was not credible to make these findings.

There was testimony that placement at Trails West will benefit Student because he will not have as many of the distractions that cause him to lose focus such that the teacher must start over with whatever he was doing. He will not be pulled out of the classroom for services. Trails West could immediately pick up Student's IEP and implement it, where other placement options could not. The one-on-one para will probably be removed from Student's IEP because of Trails West's amount of staff and student support. The one-on-one para was described as "very restrictive" and without one, Student will actually have more independence in the classroom. *Id.* at 288-89.

The District argues that the August 23, 2019 IEP is ambitious and best implemented at Trails West, his LRE. We agree that the evidence supports this decision.

Summary

The District did not deny FAPE to Student because his IEP is reasonably calculated to enable him to make progress appropriate in light of his circumstances and his LRE is Trails West.

Therefore, the August 23, 2019 IEP is hereby adopted with the placement of Student to be at Trails West. The District and Parent are ordered to implement the IEP goals immediately and to transition the transfer of Student to Trails West as soon as practicable.

SO ORDERED on January 31, 2020.

AUDREY HANSON MCINTOSH
Commissioner

Appeal Procedure

Please take notice that this is a final decision of the Administrative Hearing Commission and you have a right to request review of this decision. Per §162.962, when a review of this decision is sought, either party may appeal as follows:

- (1) The court shall hear the case without a jury and shall:
 - (a) Receive the records of the administrative proceedings;
 - (b) Hear additional evidence at the request of a party; and
 - (c) Grant the relief that the court determines to be appropriate, basing its decision on the preponderance of the evidence;
- (2) Appeals may be taken from the judgment of the court as in other civil cases;
- (3) Judicial review of the administrative hearing commission's decision may be instituted by filing a petition in a state or federal court of competent jurisdiction. Appeals to state court shall be filed within forty-five days after the receipt of the notice of the agency's final decision;

- (4) Except when provided otherwise within this chapter or Part 300 of Title 34 of the Code of Federal Regulations, the provisions of chapter 536 are applicable to special education due process hearings and appeal of same;
- (5) When a commissioner renders a final decision, such decision shall not be amended or modified by the commissioner or administrative hearing commission.

The right to appeal is also addressed in 34 C.F.R. §300.516.