

Before the  
 Administrative Hearing Commission  
 State of Missouri



	, IN THE INTEREST OF )	
,	)	
	)	
	)	Case No. 20-0201
vs.	)	
	)	
PARKWAY C-2 SCHOOL DISTRICT AND )	)	
SPECIAL SCHOOL DISTRICT OF )	)	
ST. LOUIS COUNTY, )	)	
	)	
Respondents. )	)	

**DECISION**

We find that the Special School District of St. Louis County (SSD) and the Parkway C-2 School District (Parkway) (collectively the Districts) denied, in part, (Student) a free and appropriate public education (FAPE) because his individualized education plan (IEP) was not implemented in a manner to provide him all of his required service minutes, and Student is entitled to compensatory services. In addition, SDD failed to provide Parent with an independent educational evaluation (IEE). The District shall provide Student going forward with a paraprofessional to assist Student in accessing extracurricular activities. Student was educated in his least restrictive environment (LRE).

**Procedure**

On January 6, 2020, (Parent) filed a due process complaint on behalf of her son, Student, against the Districts. On January 21, 2020, the Districts filed a joint response to

the due process complaint. On April 1-3, 2020, we held a hearing in this matter.<sup>1</sup> Parent appeared and was self-represented, and James Thomeczek with Thomeczek & Brink, LLC, represented the SSD, and Amy Clendennen with Tueth, Keeney, Cooper, Mohan, Jackstadet, represented Parkway. This case became ready for decision on April 13, 2020, when the last briefs were filed.

### **Findings of Fact**

1. At the time of the hearing, Student was a -year-old boy in the ninth grade. He was enrolled in the Parkway School District and received special education and related services through SSD. Student's home school is Central High School, although he was educated at a private separate day facility.

2. Parent has been a SSD employee for years.

3. Originally, Student was determined to be a young child with a developmental delay (YCDD).<sup>2</sup> In kindergarten, he was found eligible for special education services with an educational diagnosis of autism, which remains to this day. Student also had a medical diagnosis of attention deficit hyperactivity disorder, attachment disorder, and light perception in the left eye and ongoing glaucoma treatment, with acuity fluctuation in the right eye.

4. Student's disability affects his involvement and progress in the general education curriculum across all academic areas.

5. Student is universally recognized as likeable, funny, and helpful, and enjoys engaging in conversations, especially with adults. In addition, due to his disability, Student struggles academically and socially. Student's IQ is 40, and he has trouble recognizing

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<sup>1</sup> During this time, the COVID-19 pandemic was occurring. On March 23, 2019, we ordered the hearing conducted via telephone.

<sup>2</sup> The IDEA provides that young children with a developmental delay are entitled to special education and related services. 34 C.F.R. § 300.8(b). In Missouri, the age range for YCDD is three through five years old. The Missouri State Plan for Special Education 2019 (State Plan), Regulation I, p. 5.

consistent letters, numbers, colors, and word identification. He can match two letters in his name. He requires assistance to count to 10.

6. Student learns best with auditory directions and visual supports. He benefits from minimal distractions, one-on-one instruction or in small groups, repetition, positive reinforcement, and social interactions from staff. He requires his educators to use applied behavior analysis principles (ABA), and he has a behavioral intervention plan (BIP).

7. Due to Student's disability, he can become dysregulated to the extent he becomes physically aggressive, causing injury to teachers, staff, and other students, such as using force to hit, kick, bite, slap, pinch, pull out hair, and throw objects and furniture. Student also engages in elopement.

8. Parkway schools have specialized programs for students with autism and intellectual disabilities that are designed to meet students' unique needs and comply with individualized education plans. (IEP). Parkway also offers a functional skills curriculum, designed for students with cognitive disabilities who are not able to access traditional curriculums. For example, a functional skills curriculum for math may include teaching students to count money and develop other life skills involving numbers.

*Student's 7<sup>th</sup> Grade School Year (2017-2018)*

9. According to Student's October 30, 2017 IEP, when Student was years old and in the 7th grade while attending Central Middle School (CMS) and a public separate day facility (Litzsinger) in the Parkway School District, his IEP goals were:

Goal 1 - By the 4th IEP reporting period, while engaged in a structured academic task, [Student] will increase his basic reading skills by sorting and labeling pictures of different common objects into one of two or more categories that represent a larger concept, given no more than 1 prompt, with 80% accuracy across 3 data days.

His baseline was 40, and his target was 80. His baseline data on this goal was: [Student] is able to sort objects into categories by [sic] with approximately 80% accuracy. When using pictures, [Student's] accuracy decreases to approximately 40%.

Goal 2 - By the 4th IEP reporting period, [Student] will demonstrate increased mathematics skills by following a functional direction involving the use of one to one correspondence (i.e. “Get our lunch table 4 forks”) for numbers up to 5, with no more than 1 prompt and 80% independence across 3 consecutive data days.

His baseline was 0, and his target was 80. His baseline data for this goal was: [Student] requires visual and verbal cues to count objects up to 5. He will count objects more than once or skip an object he needed to count. When asked, after he has finished counting, how many he has he often replies with a different number than what he has just counted.

Goal 3 - By the 4th IEP reporting period, [Student] will demonstrate increased social skills by independently completing up to 6 transitions (distance from classroom no more than 50 feet) with a preferred item and adult faded support (6+ feet away) in 4 out of 5 opportunities across 3 consecutive data days.

His baseline was 30, and his target was 80. His baseline data for this goal was: [Student] is transitioning up to 50 feet away to the bathroom and preferred locations with faded adult support in the public separate day setting. [Student] requires a staff in closer proximity when traveling to non-preferred locations or in his newer home school setting. He is still exhibiting elopement behavior, running, and inappropriate vocals during transitions.

Goal 4 - By the 4th IEP reporting period, [Student] will demonstrate increased social behavioral skills by selecting and appropriate coping strategy (break, bike ride, talk about feelings, counting, etc.) during crisis, when provided verbal choices, which will lead to de-escalation in 4 out of 5 opportunities across 3 consecutive data days.

His baseline was 25, and his target was 80. His baseline data for this goal was: [Student] requires verbal choices from adults during crisis behaviors in order [to] de-escalate, and even when provided this support, he may not de-escalate without further intervention.

Goal 5 - By the 4th IEP reporting period, [Student] will demonstrate increased appropriate social behavioral skills by engaging in an academic task or small group instruction (remain in designated work area, interact with materials appropriately, take turns, maintain a quiet voice) with an adult 5-7 feet away for at least 15 minutes, with no more than 2 prompts, across 3 consecutive data days.

His baseline was 25, and his target was 100. His baseline data for this goal was: In the public separate day setting, [Student] is sitting in group with an adult 4-6 feet away and minimal prompting to complete designated tasks. He is raising his hand, making choices, turning pages, and maintaining a quiet voice at the table for 20-30 minute group sessions with approximately 80% independence. In his home school setting, [Student] can remain in group for approximately 7.5 minutes with

an adult 1-3 feet away. He requires prompting to remain [sic] on task and participate appropriately.

Goal 6 - By October 2018, when given up to a start cue for each line segment of a letter and given modifications as needed, [Student] will increase his independence with fine motor skills by copying at least his first name in upper case letters (4/4 letters) from a model with good accuracy for 3 data days.

His baseline was 0, and his target was 4. His baseline data for this goal was: [Student] does not copy his name yet, but is able to TRACE  $\frac{3}{4}$  letters with start cues.

Goal 7 - By October 2018, [Student] will increase his pragmatic language skills by engaging in at least two conversational turns with a peer or adult to appropriately ask a question, comment and respond during a conversation about a non-preferred topic or the topic appropriate to a given activity across at least two settings, given no more than one prompt, on 4 out of 5 opportunities across three data days.

His baseline was 40, and his target was 80. His baseline data for this goal was: [Student] initiates a communicative interaction to talk about preferred topics or play scenarios. He requires models and prompts to contribute to a conversation about a less-preferred topic or a given topic during a structured activity.

Goal 8 - By October 2018, [Student] will increase his semantic language skills to name pictured vocabulary items by providing the category, function and one additional attribute, with 70% accuracy, given one verbal cue and visual supports as needed, across three data days.

His baseline was 20, and his target was 70. His baseline data for this goal was: [Student] has a good expressive vocabulary for spontaneous language and social interactions, but often demonstrates word-finding difficulties to name specific items during structured tasks or conversation. He benefits from phonemic cues or cloze procedures to express specific vocabulary words.

Ex. 19.

10. During the IEP meeting, Parent expressed concerns regarding Student's educational placement; she wanted him to be educated with his non-disabled peers. She wanted Student working on goals that will improve his behavior, social interactions, ability to transition, and academic skills in order to look towards transitioning back to his home school.

## Parties' Mediation Agreement

11. In March 2018, the parties attended a mediation due to Parent filing a due process complaint.<sup>3</sup> Parent and the Districts agreed, in part, to the following in exchange for Parent dismissing her complaint:

- a. The Student will continue with dual enrollment at Litzsinger School and a Parkway Middle School.
- b. Consideration will be given to assigning the Student to a different Parkway Middle School if desired by the Parent, with priority given to South Middle School and Northeast Middle School.
- d. Thirty minutes of the Student's time each day at the Parkway Middle School will be provided in a regular education setting, with non-disabled students, and with special education support.
- e. A new classroom setting will be provided for the Student at Litzsinger with other 6th to 8th grade students with an Autism diagnosis and similar social and verbal skills to the Student.
- f. The Students' IEP team will make revisions to the IEP at the next meeting to the:
  - i. Behavior Intervention Plan
  - ii. Additional academic instruction
  - iii. An assessment and additional education in functional skills
- g. The Districts will provide training for all staff who will be involved in the Student's education at Parkway in the areas of Autism, childhood trauma, and attachment, and with respect to the Student individually.
- h. The Districts will ensure regular and consistent communication between the educational teams at both schools (to provide consistency in the staff's approach to the Student).
- i. Regular meetings will be held to review the Student's progress on a monthly basis.

Ex. UU.

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<sup>3</sup> This Commission does not have authority to enforce an IDEA mediation agreement. 20 U.S.C §1415(2)(F)(iii).

Student's April 30, 2018 IEP

12. According to Student's April 30, 2018 IEP, while Student was still years old and in the 7<sup>th</sup> grade, his IEP goals and base line data remained almost the same.

13. Parent expressed concern that Student lacked inclusive practices/opportunities to learn with non-disabled peers and in general education classes, clubs, and extra-curricular activities with the necessary supports in place. She expressed that there was a disparity in the data between Litzsinger and CMC, which the Districts rely upon to support the position that Student can only learn and make progress at Litzsinger. She argued that Student did not consistently receive adequate direct, explicit academic instruction at CMC, and constant staff changes meant Student was left with less skilled teachers who lacked the fundamental knowledge of how to combine academic and cognitive processing for the purpose of addressing self-regulation and Student's executive functioning needs.

14. The Districts refused Parent's request that Student be educated at his home school full time because they believed Student had a continued need for intensive behavioral support at Litzsinger. The team considered increasing Student's time at his home school, but rejected it due to Student's goal progress and behavioral data.

Student's August 2, 2018 IEP

15. In 7<sup>th</sup> grade, Student attended CMS in the morning and Litzsinger in the afternoon. It was determined that Student was not finding success at CMS, and he was transitioned to Northeast Middle School (NEMS) in his 8<sup>th</sup> grade year.

16. According to Student's August 2, 2018 IEP, when Student was years old and in the 8<sup>th</sup> grade, he demonstrated some progress on his goals, and some of his new goals increased in difficulty slightly. His new IEP goals were:

Goal 1 - By the 4th IEP reporting period, [Student] will demonstrate increased social skills by independently completing up to 6 transitions (distance from classroom no more than 50 feet) with a preferred item and adult faded support (6+

feet away) at 20% above baseline for each short objective across 3 consecutive data days.

His baseline for this goal was 0, and his target was 20. His baseline data for this goal was: ESY [Extended School Year] data reports [Student] is transitioning at 10% above baseline.

Goal 2 - By the 4th IEP reporting period, [Student] will increase his social behavioral skills by selecting an appropriate coping strategy after identifying current emotions, (“I feel upset because . . .”) during crisis, when provided verbal choices, which will lead that 20% above baseline for each short term objective, across 3 consecutive data days.

His base was 5, and his target was 20. His baseline data for this goal was: [Student] can identify his feelings inconsistently and is emerging in his ability to select an appropriate coping strategy.

Goal 3 - By the 4th IEP reporting period, [Student] will demonstrate increased appropriate social behavioral skills by engaging in an academic task or small group instruction (remain in designated work area, interact with materials appropriately, take turns, maintain a quiet voice) with an adult 5-7 feet away for at least 15 minutes, with no more than 2 prompts, at 20% above baseline for all short term objectives across 3 consecutive data days.

His baseline for this goal was 10, and his target was 20. His baseline data for this goal was: ESY data indicates [Student] is at 10% over baseline.

Goal 4 - By the 4th IEP reporting period, [Student] will increase fine motor skills when given a start cue for each line segment of a letter and modification as needed, [Student] will copy his first and last name in upper case letters (7/7 letters) from a model with good accuracy for 3 data days.

His baseline was 4, and his target was 7. His baseline data for this goal was: ESY data indicates [Student] is on 4/7 letters.

Goal 5 - By the 4th IEP reporting period, [Student] will increase his semantic language skills to name pictured items by providing the category, function and one additional attribute, with 75% accuracy, given one verbal cue and visual supports as needed, across three data days.

His baseline was 40, and his target was 75. His baseline data for this goal was: ESY data indicates [Student] is at 40% accuracy.

Goal 6 - By October 2018, [Student] will increase his pragmatic language skills by engaging in at least two conversational turns with a peer or adult to appropriately ask a question, comment and respond during a conversation about a non-preferred topic or the topic appropriate to a given activity across at least two settings, with 80% accuracy, given no more than one prompt, on 4 out of 5 opportunities across three data days.

His baseline was 60, and his target was 80. His baseline data for this goal was: ESY data indicates [Student] is completing with [sic] goal with 80% accuracy given one prompt.

Goal 7 - By the 4th IEP reporting period, [Student] will increase his math calculation skills as evidenced by putting groups of up to 7 items together to create a meaningful function (ex. Counting out materials for others) with one stop cue on 60% of opportunities (EE.8.EE.4)

His baseline was 25, and his target was 60. His baseline data for this goal was: Currently requires one or more cues at 25% accuracy.

Goal 8 - By the 4th IEP reporting period, [Student] will increase his reading skills by following directions that use adjectives (ex. "Give me the blue one" or "Find the hard ball") with 60% accuracy given no more than one cue (EE.RL.8.3/EE.RI.8.4)

His baseline was 15, and his target was 60. His baseline data for this goal was: [Student] is emerging in his ability to identify adjectives. Having his skills is important to reading literacy.

Ex. 25.

17. Parent expressed similar concerns as at the last IEP meeting.

Student's 8<sup>th</sup> Grade Year (2018-2019 School Year)

18. At all relevant times, Tracy Nomenson was the Assistant Principal at NEMS. She has two master's degrees in education, a master's degree in business administration, and a doctorate degree in educational leadership.

19. Nomenson worked with Student's special education team (one special education teacher and two SSD paraprofessionals) before school started to ensure they were ready to educate Student. The team received training in the areas of autism, attachment disorder, trauma-informed care, ABA programing, and training on Student's IEP and BIP, including being able to identify Student's problematic behaviors and what response was required per the BIP to appropriately respond to a crisis. This was done, in part, through role playing.

20. Once school started, Nomenson worked to ensure Student developed relationships with his team and school administrators.

21. At NEMS, Student was educated in the special education classroom, except he was integrated with traditional students for 25 minutes at the beginning of the school day. He attended NEMS in the morning and transitioned to Litzsinger in the afternoon.

22. Student received ABA therapy at NEMS and Litzsinger from trained ABA paraprofessionals in the form of reinforcement, discrete trial,<sup>4</sup> pre-making schedule,<sup>5</sup> non-contingent reinforcement (scheduled breaks in the day to help decrease elopement), functional communication training, and teaching to use various requests instead of engaging in the problem behavior. He was taught in groups and at center time at both locations.

23. Student's NEMS and Litzsinger teams worked together to try to replicate as much as possible Student's program and supports between the two buildings.

24. Despite NEMS training and efforts with Student, his problematic behaviors were significantly more frequent and intense than any other student at NEMS.

25. Student's data showed the Student was too often dysregulated at NEMS and it prevented him from fully working on his academics. Staff commonly used walkie-talkies in order to call for backup when Student became dysregulated and they had to block all entrances to prevent Student's elopement from the building. Staff asked other students to leave the area.

26. Teachers were injured almost daily by Student, which took the form of bruises, sore muscles, pulled hair, and being hit. Twelve NEMS staff members had work restrictions, went to urgent care, or had workers' compensation claims that resulted from Student's actions.

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<sup>4</sup> A discrete trial is traditionally done one on one, but can be done in a group setting by a staff person implementing ABA principles who in:

a fast-paced, repeat drill type of format while . . . reinforcing the student upon correct responses that they're looking for. If a student isn't able to give the correct response, they would do different levels of prompting that are typically written into the ABA program and shape the behavior to be more independent over time.

Tr. at 274.

<sup>5</sup> "Premaking is where you . . . do a preferred task followed by a lesser preferred task, then a preferred task so that you kind of build momentum." Tr. at 251.

27. Nomenson credibly testified:

[W]e did a lot of changes of strategies. . . I really believe that the collective team wanted him to be so successful, that they tried everything they possibly could in order to keep him at Parkway Northeast and be successful. And the data continued to show us that regardless of what we tried with fidelity, it just was not working. And it made us sad because we did not want to lose him, but we -- the data really indicated that what we were doing -- any responses that we made were not being effective.

Tr. at 722.

28. Student's disruptive behavior was documented daily from November 16, 2019 through May 3, 2019,<sup>6</sup> by his team members at NEMS and Litzsinger. The data was correlated into a scatter plot. *See* Ex. XX. Student's disruptive behavior manifested itself at a significantly higher rate and intensity while he was at NEMS than at Litzsinger.

29. A comparison between Student's behavior at NEMS and Litzsinger was also documented in the below chart:

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<sup>6</sup>On March 4, 2019, Student made a transition full time to Litzsinger.

Eric Allen, 5/24/18  
 Average IEP goal progress since 3/12/18

<b>Small Group Data Daily Averages:</b>	<b>Parkway</b>	<b>Litzsigner</b>
Prompts to Transition to Group	2.2 prompts	on average less than one prompt (0.75)
Groups w/ the display of target behaviors for reduction:	<b>42%</b>	15%
Duration of Small Group Engagement:	average of 5.23 minutes	<i>over</i> 15 minutes in duration
Adult Proximity to Eric:	84% of the time adult is 1-3 ft away	85% (independent with no support)
attending to materials appropriately (the absence of property disturbance)	0.2 prompts required to attend to materials	0 prompts required
Prompts needed to take turns with peers (engages in a peer reciprocal interaction with an item):	0 prompts required to take turns w/peer	0 prompts required
<b>Other Goal Data:</b>	<b>Parkway</b>	
By the 4th IEP reporting period, Eric will demonstrate increased social skills by independently completing up to 6 transitions (distance from classroom no more than 50 feet) with a preferred item and adult faded support (6+ feet away) in 4 out of 5 opportunities across 3 consecutive data days.	average of 4.2 minutes to transition between activities/locations (decrease of 3.4 minutes since January progress meeting)	Eric is able to transition to the targeted locations within the building with adult faded support. He is able to <del>independently</del> go to a location and obtain an item with 100% independence. He is currently working on going to a location and completing an action.
By the 4th IEP reporting period, Eric will demonstrate increased social behavioral skills by selecting an appropriate coping strategy (break, bike ride, talk about feelings, counting, etc.) during crisis, when provided verbal choices, which will lead to de-escalation in 4 out of 5 opportunities across 3 consecutive data days.	Eric is using functional communication in the presence of target behaviors 19% of the time (this includes prompted communication - verbal choices)	Eric is able to utilizing functional communication through out the school day e.g. "I want more time, I don't want to do it, let's do something else."

*CBIT Team Working with Student's 8<sup>th</sup> Grade NEMS Team*

30. In January 2019, SSD brought in the Countywide Behavior Intervention Team (CBIT) to work with Student's NEMS team to provide training on how they could better serve Student through the use of non-crisis intervention (NCI).<sup>7</sup>

31. CBIT provides top-tier level of support, and comes in when a student's problematic behavior is increasing despite a functional behavior assessment (FBA) in place and consistent implementation of the current BIP. CBIT works with staff serving students with the most severe problematic behaviors.

32. CBIT is headed by Sara Hinkle, a board certified behavior analyst (BCBA).

33. CBIT's normal process is to review the student's information, observe the student, conduct a functional behavioral assessment or analysis,<sup>8</sup> develop a plan to support the student's team, and then provide intensive training to the staff on the plan by modeling proper techniques to address the problematic behaviors. This process typically takes six to eight weeks.

34. During January – March, 2019, Hinkle observed Student at both NEMS and Litzsinger.

35. When Student exited the bus in the morning at NEMS, he consistently had a tense and hunched-over posture and walked abruptly, and this mannerism continued throughout Student's day despite him being comfortable around the staff. At Litzsinger, Student was more

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<sup>7</sup> The CBIT team was requested in November 2018, but the team was not able to begin services for Student until January 2019.

<sup>8</sup> Hinkle explained the difference between a functional behavioral assessment and an analysis is:

[A] functional behavior assessment . . . relies on observation and you look at what we call the antecedent behavior and consequence. So antecedent is what happens immediately before a behavior occurs; the consequence is what happens immediately following a behavior. And then we analyze the antecedents and the consequences to determine what the function of the problem behavior or the target behavior is.

Tr. at 248-249.

relaxed, his level of independence was higher, and he had less issues with transitions and appeared more confident.

36. Hinkle observed that Student's problematic behaviors improved significantly, both in frequency and duration, while at Litzsinger as opposed to NEMS. For example, Student may hit or pull hair one time at Litzsinger, but engage in such behavior repetitively over a 5-10 minute time span at NEMS. He also engaged in more aggression toward himself and others, and tried to leave the building through elopement more often at NEMS.

37. Because Student began attending Litzsinger full time while CBIT was engaged, the CBIT team stopped because Student's behavior did not warrant its continued services at Litzsinger. In addition, because of the significant difference between Student's behavior at Litzsinger and NEMS, it was Hinkle's opinion that the CBIT team would not have had a significant impact on Student's behavior at NEMS. She agreed that Student should be transferred full time to Litzsinger as his LRE. Nomenson also agreed with the decision.

38. Parent requested that CBIT be allowed to continue with its FBA, which it did. Hinkle conducted the FBA while Student attended full time at Litzsinger.

39. Hinkle opined that a paraprofessional with proper training could implement Student's BIP, but would require a BABC to oversee such services.

*Student's Move to Litzsinger Full time During 8<sup>th</sup> Grade*

40. On March 4, 2019, SSD moved Student to Litzsinger full time. Parent disagreed with this decision and expressed that SSD was using Student's disability to exclude him from FAPE, inclusion, and access to a general education curriculum. Parent requested that Student receive his special education services in his home school with supplementary aid and services in a program designed to meet his needs and not place Student in an already-existing program.

41. All Litzsinger staff have specialized training in NCI, which is not the case at NEMS where only the special education teachers and related staff have such training. This training allows all Litzsinger staff to properly respond when a student elopes.

42. Litzsinger's class sizes are much smaller (six or seven students) than at NEMS. The building is designed to limit access for purposes of elopement and safety. It has fewer students walking between classes and no bells ringing. It has crises intervention areas where staff can debrief (sensory and motor rooms).

43. Litzsinger has both verbal and non-verbal students. Student was placed in the 6th to 8th grade class with a mix of verbal and non-verbal students. The students had a wide range of cognitive functioning, and Student fell in the middle of this range. Student's social skills group consisted of very verbal peers with higher cognition.

44. At all relevant times, Becky Yust was the interim principal at Litzsinger. She is a certified special education teacher and a certified administrator and principal for kindergarten through 8th grade.

45. Around the time Student moved to Litzsinger full time, Yust meet with Dr. Constantino, who was Student's private autism specialist, and they discussed best practices for Student. Litzsinger was implementing Dr. Constantino's recommendations as much as it could.

46. Parent also provided Yust with recommendations made by Aimee Roberson, BSW, BCABAA, LBA, and some of her recommendations were implemented at Litzsinger.

47. While Student attended Litzsinger in 8th grade, his classroom teacher was Stephanie Rieker. Rieker has a master's degree in special education and became a board certified behavior analyst in July 2019. She taught Student at Litzsinger for three years and was his case manager during this time period, which meant she was responsible to ensure Student received his IEP minutes.

48. Rieker recognized that Student required and benefited from ABA therapy, but opined that the therapy did not have to be through discrete trial. At Litzsinger, Student primarily received his instruction from Rieker, except his ABA minutes were delegated to trained paraprofessionals, and later in the year Student rotated amongst three other certified teachers to help with generalizing his skills.<sup>9</sup>

49. At Litzsinger, Student's social instruction (such as teaching Student to sit in his seat, raise his hand, engage appropriately, follow rules, listen to the teacher, and follow directions) was not taught independently (direct instruction), but while he attended his academic minutes and special minutes.

50. Rieker observed improvement in Student once he transitioned to Litzsinger full time. She observed a "dynamic" improvement in Student over the three years she worked with him. Tr. at 406. He built social skills that were replicated in other locations; he was more successful academically in that he was turning pages, answering questions after being read a story, remembering details, and asking insightful questions; and he transitioned without direct support. His problematic behavior decreased, and he began sitting for longer periods of time.

51. Rieker implemented a reading strategy recommended by research presented by Parent regarding the use of picture cards with words.

52. Student struck Rieker in the face, requiring medical attention. This level of aggression was rare for Student while at Litzsinger, and it occurred within the first few days that he started there full time.

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<sup>9</sup> Generalizing is when a student is able to perform a skill throughout the day, and not just one time in a discrete trial setting.

53. During the three years that Rieker taught Student, she issued Student grades. He received As and Bs over the three years. Student's grades were based on the curriculum through SSD for the MAP-alternative.<sup>10</sup>

54. Despite Student's progress at Litzsinger, his weekly class schedule establishes that between March 20, 2019 and the end of the school year June 4, 2019 (11 weeks),<sup>11</sup> Student did not receive in full his special education minutes for social skills and language therapy as required in his January 2019 IEP.<sup>12</sup> Ex. S. Student did not receive:

- a. 20 minutes per week in social skills or a total of 220 minutes; and
- b. 30 minutes per week in language therapy or a total of 330 minutes.

January 2019 IEP

55. In Student's January 9, 2019 IEP that was initiated on March 4, 2019, when Student was 13 years old and in the 8th grade, his IEP goals were:

Goal 1 - By January 2020, when given one start cue per letter and modifications as needed, [Student] will copy his first and last name (9 letters total) from a model with good accuracy.

His baseline was 2, and his target was 9. His baseline data was: Letter I and C are formed without a start cue. Letters E/R/A/L/N require more than one start cue for the letter.

Goal 2 - By January 2020, given only set-up cues, demonstration, and modifications as needed, [Student] will cut at least 4 shapes within 1/4" inch of the cutting line and around corners and curves.

His baseline was 0, and his target was 2. His baseline data was: [Student] requires physical cues in addition to set-up, demonstrations, and modifications in order to cut within 1/4" of the corners when cutting out squares. He often requires physical cues to refrain from cutting the completed shape into smaller and smaller pieces.

Goal 3 - By January 2020, [Student] will demonstrate increased written expression skills by selecting a topic to write about from a field of 3 choices and

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<sup>10</sup> The MAP-A is an alternative assessment for students with the most significant disabilities and cognitive impairments. It requires use of a DML system that is a more hands-on-approach with visuals and materials involved. The MAP is the assessment that the general education students get, with accommodations for students with disabilities.

<sup>11</sup> See Ex. T for date the school year ended.

<sup>12</sup> See January 2019 IEP referenced below.

then selecting pictures about that topic, at least 5 pictures from a field of 10, with 80% accuracy across 3 consecutive data days, as determined by observational charting.

His baseline was 10, and his target was 80. His baseline data was: [Student] has demonstrated the ability to sort some familiar items into categories with visual cues.

Goal 4 - By January 2020, [Student] will demonstrate increased reading comprehensions skills by answering higher order thinking questions (i.e. why questions, how questions, and questions requiring him to make inferences) following the reading of a familiar text, when provided visual cues, with 100% independence across 3 consecutive data days, as determined by observational charting.

His baseline was 15, and his target was 100. His baseline data was: [Student] has demonstrated the ability to answer basic “sh” questions: what, who when, and where. He has difficulty with more abstract questions that require higher order thinking.

Goal 5 - By January 2020, [Student] will demonstrate improved basic reading skills by putting words (on preferred topics with visual cues, for example, a sentence about cooking at a restaurant containing pictures above each word) in the correct order to form a cohesive sentence, with 80% accuracy across 3 consecutive data days, as determined by work sample.

His baseline was 0, and his target was 80. His baseline data was: [Student] is demonstrating basic concepts of print and early literacy skills (turning page, tracking print from left to right, etc.), but has not demonstrated the ability to form written sentences independently.

Goal 6 - By January 2020, [Student] will demonstrate improved mathematics skills by receptively demonstrating understanding of mathematical terminology (more, less, some, or all) when provided a verbal directive such as “Give me ---- (all/some)” or “Which group has ---? (more/less)” with 100% independence across 3 consecutive data days, as determined by observational charting.

His baseline was 0, and his target was 100. His baseline data was: [Student] has not demonstrated understanding of the concept of more or less, unless he has been asked if he wants more of a preferred activity. When asked for some or all, he will always give all of the items.

Goal 7 - By January 2020, [Student] will demonstrate increased social behavioral skills by appropriately requesting to leave the group or area (raising hand, waiting in seat to be called on, providing a reason for leaving) and waiting for permission to be granted before leaving, in 4 out of 5 opportunities across 3 consecutive data days, as determined by observational charting.

His baseline was 15, and his target was 80. His baseline data was: [Student] will stand and leave the group on impulse prior to requesting permission to leave.

With verbal prompting, he is able to return to his seat to ask permission appropriately.

Goal 8 - By January 2020, [Student] will demonstrate increased social behavioral skills by selecting an appropriate coping strategy from a visual strategy board, during instances of frustration that interrupt school activities, in order to regulate himself and return to the previous instructional task, with 100% independence across 3 consecutive data days, as determined by observational charting.

His baseline was 50, and his target was 100. His baseline data was: [Student] is utilizing a zones of regulation binder in order to select appropriate coping strategies approximately 50% of the time.

Goal 9 - By January 2020, when engaged in an activity with peers, or adults, [Student] will follow conversational rules (e.g. personal space, turn-taking, polite manner) to appropriately initiate a communicative exchange by making a comment or asking a question on the topic conversation, given one adult prompt at least 4 times per activity on 4 out of 5 conversation opportunities, as measured by observation across 3 data collection opportunities.

His baseline was 20, and his target was 80. His baseline data was: When initiating conversation with adults or peers, [Student] sometimes needs models and verbal cues to use appropriate and polite language as well as reminders for appropriate personal space. He needs models to initiate conversational exchanges throughout an activity, and to expand his repertoire of comments and questions pertaining to a given topic.

Goal 10 - By January 2020, when engaged in a structured activity, [Student] will increase his pragmatic language skills by responding to an adult or a peer's question and giving relevant information, given one verbal or visual prompt, with 80% accuracy as measured by observation, across 3 data collection opportunities.

His baseline was 20, and his target was 80. His baseline data was: [Student] benefits from verbal cues and prompts to respond appropriately to open-ended questions during conversation. He sometimes responds with comments or questions that are off-topic, or needs repetition and cues for attention to give a response.

Goal 11 - By January 2020, [Student] will increase his receptive language skills by following directions or selecting the correct pictured vocabulary item to show understanding of basic concepts (i.e. spatial, quantitative, qualitative), given verbal cues as needed, with 70% accuracy, as measured through observation across 3 data collection days.

His baseline was 10, and his target was 70. His baseline data was: [Student] demonstrates difficulty with knowledge of basic spatial, quantitative and qualitative concepts. He is able to follow familiar directions to show an understanding of spatial terms in, out, on, and off, but needs modeling for other spatial terms. He can appropriately request more of a needed or desired item or action, but has difficulty differentiating between more and less, some and all. He

needs phonemic cues or models to identify vocabulary based on qualitative concepts.

Ex. 27.

56. Per Student's January 9, 2019 IEP, he was to receive the following minutes per week in special education: 320 in ABA; 450 in reading; 225 in math; 200 in written expression; 435 in social skills; 30 in music therapy; 120 in language arts; and 45 in occupational therapy. He was also to receive in supplementary aids and services 1,505 minutes per week in adult support utilizing ABA.<sup>13</sup>

57. Per Student's January 9, 2019 IEP, he was to receive the following ESY minutes per week in special education and related services: 225 in reading; 115 in math; 130 in written expression; 225 in applied behavior principles; 145 in social skills; 30 in occupational therapy; 60 in language therapy; 30 in music therapy; and 735 in adult support utilizing ABA.

58. At the January 2019 IEP meeting, Parent's expressed concerns including: a) the Districts believed that the only place Student could progress was at Litzsinger; b) Litzsinger staff provoked Student and asked him inappropriate questions;<sup>14</sup> c) focus is on Student's behaviors and not his education; d) Parent's input at IEP meetings is not considered; e) Student's ABA services were inadequate; and f) Student's IEP team indicated that Student required an intensive behavior team methodology by a person with a master's degree in BCBA, and neither of his schools had such a person.

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<sup>13</sup> Student's IEP was amended in February, May and June 2019. Student's January 2019 service minutes during the regular school year did not change in these amended IEP, except for his instruction in social skills changed from 435 minutes in the January 2019 IEP to 410 in his May 2019 IEP. Also, Student's ESY service minutes changed in the amended IEPs, but this was after Student completed Giant Steps' ESY program. In Student's January, May, and June 2019 IEPs, his BIP contained the following language, "According to Student's BIP in place while he attended Giant Steps, he was to receive, in part, "Through discrete programming, [Student] will be taught to give up reinforcing items, coping strategies, and emotional regulation, and all team members will review the BIP monthly." Ex. Z, AA, and 46.

<sup>14</sup> No evidence was introduced providing any details of this listed concern.

59. Student's BIP noted that under the heading Progress Monitoring Goal, the following were reported at Litzsinger and Parkway from November 26, 2018 to December 20, 2018 based on five-minute partial interval data collection and frequent data collection:

Partial Interval Data	<u>Litzsinger</u>	<u>Parkway</u>
Isolated aggression	0%	21%
Continuous aggression	0%	17%
Elopement in room	1%	32%
Elopement out of room	3%	12%
Property disturbance	1%	6%

Frequency data collection	<u>Litzsinger</u>	<u>Parkway</u>
Isolated aggression	0	10
Property disturbance	1	3
Elopement in room	0	12
Elopement out of room	1	6

60. The BIP stated that all staff will be trained on this plan prior to implementation by the educational team, including written instructions, verbal review, modeling, and feedback, and ongoing training and review of plan implementation will be reviewed at regular classroom team meetings. It also stated that fidelity data will be collected on the implementation of this plan by the educational team.

April 18, 2019 and May 7, 2019 Progress Information

61. While at Litzsinger, Student's progress was reported as follows for April 18, 2019 and May 7, 2019:

January 2019 Goal 1: By January 2020, when given one start cue per letter and modifications as needed, [Student] will copy his first and last name (9 letters total) from a model with good accuracy,

January 2019 Goal 2: By January 2020, given only set-up cues, demonstration, and modifications as needed, [Student] will cut at least 4 shapes within 1/4" of the cutting line and around comers and curves.

January 2019 Goal 3: By January 2020, [Student] will demonstrate increased written expression skills by selecting a topic to write about from a field of 3 choices and then selecting pictures about that topic, at least 5 pictures from a field

of 10, with 80% accuracy across 3 consecutive data days, as determined by observational charting.

*April 2019 Progress Status:*

- He is able to formulate a sentence in the correct order
- Selects and states the main idea with 90% independence
- Selects and states the support detail with 60% independence
- Formulates the correct sentences with the main idea and supporting details with 50% independence
- 

*May 2019 Progress:*

- He is able to formulate a sentence in the correct order
- Selects and states the main idea with 100% independence
- Selects and states the support detail with 75% independence
- Formulates the correct sentences with the main idea and supporting details with 67% independence

January 2019 Goal 4: By January 2020, [Student] will demonstrate increased reading comprehension skills by answering higher order thinking questions (i.e. why questions, how questions, and questions requiring him to make inferences) following the reading of a familiar text, when provided visual cues, with 100% independence across 3 consecutive data days, as determined by observational charting.

*April 2019 Progress Status:*

- He is able to answer reading comprehension about (What will happen next? and inferencing) for 19/21 opportunities independently

*May 2019 Progress Status:*

- He is able to answer reading comprehension about (What happened?, What will happen next? and inferencing questions) for 19/21 opportunities independently.

January 2019 Goal 5 - By January 2020, [Student] will demonstrate improved basic reading skills by putting words (on preferred topics with visual cues, for example, a sentence about cooking at a restaurant containing pictures above each word) in the correct order to form a cohesive sentence, with 80% accuracy across 3 consecutive data days, as determined by work sample.

*April 2019 Progress Status:*

- After being presented a simple sentence and being asked to "Match" the targeted word he is able to match the word and read the targeted words for 3/8 opportunities independently.

*May 2019 Progress Status:*

- After being presented a simple sentence and being asked to "Match" the targeted word he is able to match the word and read the targeted words for 5/9 opportunities independently.

January 2019 Goal 6: By January 2020, [Student] will demonstrate improved mathematics skills by receptively demonstrating understanding of mathematical terminology (more, less, some, or all) when provided a verbal directive such as, "Give me \_\_\_ (all/some)" or "Which group has \_\_\_? (more/less)" with 80% independence across 3 consecutive data days, as determined by observational charting.

*April 2019 Progress Status:*

- He is able to display the following math concepts
  - ✓ Give me one 56% independent
  - ✓ Give me some 40% independent
  - ✓ Which as more 50% independent
  - ✓ Which has less 25% independent

*May 2018 Progress Status:*

- He is able to display the following math concepts
  - ✓ Give me one 70% independent
  - ✓ Give me some 57% independent
  - ✓ Which has more 67% independent
  - ✓ Which has less 33% independent

January 2019 Goal 7: By January 2020, Student will demonstrate increased social behavioral skills by appropriately requesting to leave the group or area (raising hand, waiting in seat to be called on, providing a reason for leaving) and waiting for permission to be granted before leaving, in 4 out of 5 opportunities across 3 consecutive data days as determined by observational charting.

*April 2019 Progress Status:*

- During 6 opportunities he displayed the following small group skills:
  - ✓ 3/6 opportunities he transitioned to group independently
  - ✓ 4/6 opportunities he did not require or request a break from the small group setting
  - ✓ 2/6 he displayed appropriate replacement break behaviors, (raises hand, remains in seat & waits to be call [sic] upon, provides reason for leaving the group, and returns to group)
  - ✓ Attending to materials appropriately with one or less prompt.
  - ✓ Takes turn with peers (engages in a peer reciprocal interaction with an item) with one or less prompts
  - ✓ Responds to adult/peer by providing relevant information about the small group subject with one or less prompts.

*May 2019 Progress Status:*

- During 6 opportunities he displayed the following small group skills
  - ✓ 3/6 opportunities he transitioned to group independently
  - ✓ 4/6 opportunities he did not require or request a break from the small group setting
  - ✓ 2/2 opportunities he displayed appropriate replacement break behaviors, (raises hand, remains in seat & waits to be call upon, provides reason for leaving the group, and returns to group
  - ✓ Attending to materials appropriately with one or less prompt.
  - ✓ Takes turn with peer (engages in a peer reciprocal interaction with an item) with one or less prompts
  - ✓ Responds to adult/peer by providing relevant information about the small group subject with one or less prompts

January 2019 Goal 8: By January 2020, [Student] will demonstrate increased social behavioral skills by selecting an appropriate coping strategy from a visual strategy board, during instances of frustration that interrupt school activities, in order to regulate himself and return to the previous instructional task, with 100% independence across 3 consecutive data days, as determined by observational charting.

January 2019 Goal 9: By January 2020, when engaged in an activity with peers or adults, [Student] will follow conversational rules (e.g. personal space, turn taking, polite manner) to appropriately initiate a communicative exchange by making a comment or asking a question on the topic of conversation, given one adult prompt, at least 4 times per activity on 4 out of 5 conversation opportunities, as measured by observation, across 3 data collection opportunities.

*April 2019 Progress Status:*

- During 17 opportunities he displayed the following skills during a conversational exchange
  - ✓ 13/17 opportunities appropriate tone of voice during the exchange
  - ✓ 15/17 opportunities appropriate body orientation/ personal space during the exchange
  - ✓ 7/17 opportunities participated in an exchange with a peer/ adult up to 3-4 exchanges

*May 2019 Progress Status:*

- During 17 opportunities he displayed the following skills during a conversational exchange
  - ✓ 13/17 opportunities appropriate tone of voice during the exchange
  - ✓ 15/17 opportunities appropriate body orientation/ personal space during the exchange

- ✓ 7/17 opportunities participated in an exchange with a peer / adult up to 3-4 exchanges

January 2019 Goal 10: By January 2020, when engaged in a structured activity, [Student] will increase his pragmatic language skills by responding to an adult or a peer's question and giving relevant information, given one verbal or visual prompt, with 80% accuracy as measured by observation, across 3 data collection opportunities.

January 2019 Goal 11: By January 2020, [Student] will increase his receptive language skills by following directions or selecting the correct pictured vocabulary item to show understanding of basic concepts (i.e. qualitative, spatial, quantitative), given verbal/visual cues as needed, with 70% accuracy, as measured through observation, across 3 data collection days.

*April 2019 Progress Status:*

- He is able to receptively identify the following concepts independently: big, hard, soft, dry. He is currently working on little, novel colors, novel shapes, and wet.
- He is able to identify the following spatial concepts independently: (receptive) on top and in and (expressive) on, under, and in.

*May 2019 Progress Status:*

- He is able to receptively identify the following concepts independently: big, hard, soft, dry. He is currently working on little, novel colors, novel shapes, and wet.
- He is able to identify the following spatial concepts independently: (receptive) on top, under, in, out and (expressive) on, under, and in.

#### May 7, 2019 IEP – Respondent's Exhibit 46

62. According to Student's May 7, 2019 IEP, when he was 13 years old and in the 8th grade, full time at Litzsinger, his IEP goals remained the same from his January 2019 IEP except the target date changed from January 2020 to May 2020. The following information is provided regarding Student's progress that was not otherwise identified in his May 2019 progress report:

Goal 6 (January 2019 Goal 8)- By May 2020, [Student] will demonstrate increased social behavioral skills by selecting an appropriate coping strategy from a visual strategy board, during instances of frustration that interrupt school activities, in order to regulate himself and return to the previous instructional task, with 100% independence across 3 consecutive data days, as determined by observational charting.

His baseline was 50, and his target was 100. His baseline data was: [Student] is utilizing a zones of regulation binder in order to select appropriate coping strategies approximately 50% of the time. He has recently started using a “words I can use” page for different zones to determine appropriate language for the various emotions he may be feeling.

Goal 7 (January 2019 Goal 9) - By May 2020, when engaged in an activity with peers, or adults, [Student] will follow conversational rules (e.g. personal space, turn-taking, polite manner to appropriately initiate a communicative exchange by making a comment or asking a question on the topic conversation, given one adult prompt at least 4 times per activity on 4 out of 5 conversation opportunities, as measured by observation across 3 data collection opportunities.

His baseline was 40, and his target was 80. His baseline data was: When initiating conversation with adults or peers, [Student] sometimes needs models and verbal cues to use appropriate and polite language as well as reminders for appropriate personal space. He needs cues to initiate conversational exchanges throughout an activity, and to expand his repertoire of comments and questions pertaining to a given topic.

Goal 8 (January 2019 Goal 10) - By May 2020, when engaged in a structured activity, [Student] will increase his pragmatic language skills by responding to an adult or a peer’s question and giving relevant information, given one verbal or visual prompt, with 80% accuracy as measured by observation, across 3 data collection opportunities.

His baseline was 50, and his target was 80. His baseline data was: [Student] benefits from verbal cues and prompts to respond appropriately to open-ended questions during conversation. He sometimes responds with comments or questions that are off-topic, or needs repetition and cues for attention to give an appropriate response.

Goal 9 (January 2019 Goal 11) - By May 2020, [Student] will increase his receptive language skills by following directions or selecting the correct pictured vocabulary item to show understanding of basic concepts (i.e. quantitative, spatial, qualitative), given verbal/visual cues as needed, with 70% accuracy, as measured through observation across 3 data collection days.

His baseline was 10, and his target was 70. His baseline data was: [Student] demonstrates difficulty with knowledge of basic spatial, quantitative and qualitative concepts. He is starting to demonstrate understanding of some qualitative terms as described in the present level. He is able to follow familiar directions to show an understanding of spatial terms in, out, on, and off, but needs modeling for other spatial terms. He can appropriately request more of a needed or desired item or action, but has difficulty differentiating between more and less, some and all.

Goal 10 (January 2019 Goal 1) - By May 2020, when given one start cue per letter and modifications as needed, [Student] will copy his first and last name (9 letters total) from a model with good accuracy.

His baseline was 3, and his target was 9. His baseline data was: [Student] copies r/I/C with one start cue or less for each letter.

Goal 11 (January 2019 Goal 2) - By May 2020, given only set-up cues, demonstration, and modifications as needed, [Student] will cut at least 4 shapes within 1/4" inch of the cutting line and around corners and curves.

His baseline was 0, and his target was 4. His baseline data was: [Student] requires physical cues in addition to set-up, demonstrations, and modifications in order to cut within 1/4" of the corners when cutting out squares. He requires physical cues to refrain from cutting the completed shape into smaller and smaller pieces.

63. At the May 2019 IEP meeting, Parent expressed concerns about: a) Student's inability to read, write and perform mathematics; b) a lack of access to the general education curriculum and inclusive models and that Student should be allowed to receive education in his home school; c) Student's civil rights and privacy rights were violated; d) Litzsinger staff failed to provide accurate documents and provoked Student; e) the Districts failed to bring in an Attachment Specialist to support Student's team; f) she questioned the FBA data, expressed concern about Student's left eye blindness, and the location of his music therapy services; g) asked to start transition planning services earlier than age 16; and h) she requested the following staff and programs: trauma-informed care trained and certified staff, attachment trained and certified staff, one-on-one staff that has an MA in BCBA, small group settings, access to the general education curriculum, and eight hours of extended school year (ESY).

64. At the May 2019 IEP meeting, Parent's request that Student be educated in his home school was denied, and she then requested Student's placement be changed from Litzsinger to a private separate day facility, Giant Steps. Parent became familiar with Giant Steps after reviewing its information and visiting the school. Parent was aware of the difference in Giant Steps' instructional model, including the fact that Giant Steps did not provide direct ABA therapy, such as discrete trial methodology. Instead, Giant Steps' model is to incorporate

ABA therapy into its other academic and social instructions to maximize its students' service minutes within a school day.

65. Giant Steps did not attend the IEP meeting despite being invited by Parent. Giant Steps personnel do not typically attend an IEP meeting before they are contracted to provide services for a student.

66. The Districts believed Student could make progress at either Litzsinger or Giant Steps, and consented to the change in placement to Giant Steps.

67. Parent also requested that SSD allow Student to participate in ESY at Litzsinger from June 3-14, 2019 and participate in ESY at Giant Steps from June 17- July 26, 2019. Parent wanted Student to attend both programs to avoid regression. SSD agreed to allow Student to attend ESY at Giant Steps, but not at Litzsinger because it did not believe a two-week break before the start of Giant Steps' ESY program would "lead to significant regression and inability to recoup" based upon a review of student's data over other breaks. Ex. X.

68. At the May 2019 IEP meeting, the Districts:

- a. Proposed changing Student's behavior intervention plan to address the attention function for [Student's] eloping behavior. The previous function for [Student's] eloping behavior was social negative reinforcement in the form of escape, but new data from the functional behavior assessment in the spring of 2019 suggested that the eloping behavior has a primary function of social positive reinforcement in the form of attention with a secondary function of escape. The team considered not modifying the behavior plan, but rejected due to the data taken on [Student's] eloping behaviors during observations completed on 3/13/19, 3/28/19, 4/2/19, 4/4/19, 4/5/19, 4/10/19, and 4/16/19.
- b. Refused the parent's request of having a Board Certified Behavior Analyst (BCBA) provide [Student] with his direct instruction utilizing ABA and support utilizing ABA throughout his day . . . but rejected this due to there being a Board Certified Behavior Analyst overseeing all of [Student's] instruction and support in ABA.
- c. Refused the parent's request of writing in 1,505 minutes of 1:1 adult support utilizing ABA [because] . . . [Student] does have adult support utilizing ABA written into his IEP.
- d. Proposed a change of placement from public separate day school to a private separate day school. This was due to an increased need for behavioral

supports to address [Student's] goals and minutes. The team considered maintaining his placement, but rejected this due to [Student's] need for a smaller environment to address his behavioral and academic needs. The team also considered a return to his home district, but rejected this due to [Student's] need for a smaller environment with increased supports to best address his IEP goals and objectives

- e. Proposed adding social work under supports from [sic] School personnel. This was due to the need for social work support for classroom staff to address issues around trauma and attachment. Not adding social work under supports from school personnel was considered but rejected due to [Student's] social emotional history and the need for classroom support around attachment and trauma.

#### Summer 2019 – ESY at Giant Steps

69. On May 29, 2019, Giant Steps officially accepted Student into its program.

70. Giant Steps is a private placement school designed to work with children with autism and emotional disorders, and the majority of its program is based on addressing communication, social, and language needs. Giant Steps is approved by the Missouri Department of Elementary and Secondary Education and meets the state definition of a school day. Its services are very different from a traditional Parkway school. It has less than 40 children in the building, and students have a lot of one-on-one support with very small group activities and lessons. Students have multiple opportunities to take breaks. Some of these things can be replicated in a school, but some cannot.

71. The Director of Giant Steps, Danielle Vascolani, is a certified special education teacher with a dual bachelor's degree in elementary education and special education, and a master's degree in educational psychology. In the past, she has also taught as a classroom teacher working with autistic children.

72. Student's Giant Steps team met to plan for Student's arrival. They reviewed Student's IEP, discussed how to set up Student's required services, prepared a visual schedule for Student, discussed and selected the right staff for Student, and discussed FBA strategies.

73. Giant Steps did not inform SSD that it required a change in Student's ESY section of his IEP to implement it, but SSD knew an amendment was necessary to reflect the change in Giant Steps' program.

74. Giant Steps could not fully implement Student's January 2019 IEP ESY requirements.

75. Giant Steps' ESY program focused on building peer relationships, social skills in the community, and following directions to complete activities.

76. Giant Steps tried to implement Student's required ESY minutes as best it could within its designed summer program. It did not attempt to meet all of Student's required minutes, but tried to incorporate the academic concepts throughout the day. For example, Giant Steps had two classes in the morning and then a field trip in the afternoon. A special education teacher taught a science class, and she embedded math and reading concepts into the class.

77. Student's daily log for the summer camp briefly describes his activities, such as trips to the science center, botanical gardens, pool, an obstacle course, with some specific notations for occupational therapy time, counting, music, and art. A summary sheet explains that through the program, Giant Steps worked with Student on speech (listening and following directions and using proper words/tone, and proper interactions with peers), occupational therapy (work on uppercase and lowercase letter recognition, writing his name, identification of feelings and why, choice of calming strategies through visual aids, and identifying when he needs a break and to whom to verbalize it), academics (hands on through several scientific experiments that requires following visual and written instructions to gather proper materials and follow multi-step instructions, discuss chemical reactions and vocabulary), and behavior with a focus on modeling proper behaviors.

78. Giant Steps did not provide Student with direct ABA instruction, but incorporated ABA throughout the day in a variety of ways.

Student's Attendance at Giant Steps during this  
9<sup>th</sup> Grade Year (2019-2020 School Year)

79. Giant Steps could not implement Student's January 2019 IEP special education and related services minutes as written for the regular school year because it was structured toward Student's prior placement. Giant Steps tried to implement the minutes as best it could.

80. Giant Steps asked if Parent would wait to amend Student's IEP until it could perform a FBA. Parent agreed to this.

81. At the beginning of the school year, Giant Steps had trouble establishing a baseline of Student's abilities due to his refusal, problematic behaviors, lack of focus, and constant scripting about being a sheriff and who is in control.<sup>15</sup> Initially, his teachers focused outside of some of the IEP goals to build a rapport and get a clear picture of what exactly he could do.

82. On October 9, 2019, Parent expressed concerned to Giant Steps that: a) Student was being required "to fit into an already existing program instead of the services being adapted to meet his unique need;" b) Student's only goal is not to improve his social skills; c) she has not been able to obtain data on what Student can do since returning to Giant Steps from summer break, and it appears Student has regressed; d) Student needs to make up the direct instructional minutes he did not receive during ESY; and e) Student's IEP meeting has been prolonged too long. Ex. DDD.

83. The IEP team began meeting in November to revise Student's IEP for implementation at Giant Steps. Scheduling issues resulted in the need for numerous meetings. Parent needed to meet after 3:00 p.m. and other members were typically available until 4:00 p.m.

84. A new IEP was never implemented while Student was at Giant Steps.

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<sup>15</sup> Student testified at the hearing that his desire is to become a police officer.

85. During the IEP meetings, Giant Steps and the Districts wanted to move all of Student's IEP minutes under one umbrella, which was functional academics, instead of stating specific minutes per subject matter. Parent did not agree to this.

86. A correction was made to Student's IEP on November 14, 2019. SSD agreed to 60 hours of compensatory services over the remainder of the 2019-2020 school year to focus on reading and math goals to be provided by SSD's Homebound Department at the local library. SSD agreed to this after reviewing Student's documentation regarding his present level of performance on his goals versus his baseline from his May 2019 IEP. SSD determined there were areas in which Student made minimal progress resulting from his change of placement from public to a private separate day facility. The District also agreed to provide opportunities for Student to engage in extracurricular activities at Central High School, his new home school.

87. Parent disagrees that the local library was a proper location for Student to receive his compensatory services, as it lacks confidentiality and it was unfamiliar to Student as a place to receive his special education.

88. Student's BIP was not revised to include Giant Steps' FBA information. Giant Steps prepared a BIP, but it was never incorporated into Student's IEP. According to Student's BIP in place while he attended Giant Steps, he was to receive, in part, "Through discrete programming, [Student] will be taught to give up reinforcing items, coping strategies, and emotional regulation, and all team members will review the BIP monthly." Ex. Z.

89. Giant Steps did not formally review Student's BIP monthly, but did hold case reviews to discuss Student. Parent was not included in the case reviews.

90. Student's behavior improved as he acclimated to Giant Steps. Student had "quite a bit of aggression towards staff" but it became infrequent, "[h]e went from having several episodes in a month to . . . by February and January, only maybe one or two per month, which was an amazing improvement for him." Tr. at 569.

91. As Student acclimated to Giant Steps, he was capable of sitting more regularly and following teacher direction without being aggressive, and Giant Steps could provide Student his required academic instructions. Student began to make progress on his goals.

92. According to Student's December 2019 progress report (Ex. MM) from Giant Steps that was based on Student's January 2019 IEP, student could:

Goal 1 progress status:

Decrease in percentage due to data including both first and last name

69% (up from 68% in November 2019)

[Student] has worked on uppercase and lowercase letter recognition through the use of various medias. [Student] has practiced writing his name using the Handwriting without Tears curriculum. Copying first name from model without starting dot on  $\frac{3}{4}$  inch lines: correct letter formation for 2/4 letters (letters E and c) and poor line adherence. Copying first name from model with starting dot on  $\frac{3}{4}$  inch lines: correct letter formation 4/4 letters and fair line adherence after demonstration from therapist, highlighted spaces, and hand over hand assist to guide to starting dot. Copying last name from model with starting dot on  $\frac{3}{4}$  inch line: correct letter formation for 3/5 letters and fair line adherence after demonstration from therapist, highlighted spaces, and hand over hand assist to guide to starting dot. [Student] has used the slant board (places his writing surface in his line of vision and promotes and extended write position) and writes using a thin highlighter, which has improved his handwriting legibility. With verbal promotes, [Student] is able to set-up pencil using a tripod grasp independently.

Goal 2 progress status:

0% (same as November 2019)

[Student] can set-up his scissors correctly in "thumb up" position with minimal to no prompting. He stabilizes his paper with his non-dominant hand although he has moderate difficulty orienting the paper in the correct direction and staying on the cutting line.

- Circle: veered  $\frac{1}{2}$  inch with highlighted border and maximum cues for use of assisting hand and visually attending to shape
- Triangle:  $\frac{1}{2}$  inch with highlighted border and maximum cues for use of assisting hand and visually attending to shape
- Square:  $\frac{1}{4}$  inch with highlighted boarder and maximum cues for use of assisting hand and visually attending to shape.

### Goal 3 progress status:

Up a few percentage points from November 2019)

Selecting at least 3 pictures from a field of 5 49% and NA for selecting at least 4 pictures from a field of 8 - [Student] has made some growth with selecting appropriate pictures that relate to topic. After the pictures are chosen, [Student] will use Talk to Text on the google drive. From there, he will generate a sentence verbally into the microphone and may need a verbal sentence starter to begin and prompts to stay on task. After he completes the sentence verbally he will press play and listen to the sentence to make sure it makes sense. Then, the teacher reviews the sentence adding pictures for [Student's] consideration.

### Goal 4 progress status:

Answering How Questions 46% and answering Why questions 38%: Through materials of interest, [Student] was given short reading passages, photos, and puzzles sentences to answer HOW and WHY questions to further his higher order thinking skills. The reading passages of interest were both read aloud by his teacher or Talk to Text on google. All materials, photos, and reading passages were comprised of fiction and non-fiction information. Typically, [Student] would answer using a bingo stamper, highlighting, and/or verbal stating the answer.

### Goal 5 progress status:

(Student decreased from November 2019)

Putting words in the correct order to form a cohesive sentence, with visual strips to match picture with words to words with 80% accuracy – Student at 40%

Putting words in the correct order to form a cohesive sentence, matching a word card to a visual strip with words in the correct order: Student at 33%

Throughout this quarter [Student] has been utilizing a variety of materials to form cohesive sentences. Through the use of the smartboard, picture word puzzles, interactive books, and hands-on activities. Our main focus this quarter has been the use of simple phrases such as I see, I can and I want to generate a sentence by matching picture with words to words to form a sentence. These phrases were paired with environmental print, and animals, holiday . . . [.]

### Goal 6 progress status:

(Student increased from November 2019)

Providing a verbal directive such as “Give me (all/some) with 80% independence – Student at 50%

Providing a verbal directive such as, Which group has (more/less) with 80% independence – Student at 33%

[Student] appears to understand the word ALL. When given opportunities like put all the pencils away, or pick up all paper clips on the table he is successful. However, when asked to give some of the items, he will give all the items. Nevertheless, some is still quite challenging for [Student]. Due to [Student's] inability to identify and associate 1-1 correspondence to numbers, we find it very difficult for [Student] to understand more or less. 33% is derived from Teacher assistance throughout the whole activity.

Goal 7 progress status:

(Student increased from November 2019)

Request to leave the group or area and waiting for permission to be granted with a visual cue – 1 verbal prompt – Student at 27%

Requesting to leave the group or area and waiting for permission to be granted with no more than 1 verbal prompt – Student at 0%

[Student] still needs to be verbally or visually directed by his teacher to leave the group and wait for permission. He is definitely much more compliant and will follow teacher requests. All prompts are teacher initiated.

Goal 8 progress status:

(Student decreased from November 2019)

When frustrated select appropriate coping strategies from a visual board with no more than 2 prompts – Student at 20%

When frustrated select appropriate coping strategies from a visual board with no more than 1 prompt from adult – Student at NA

20% of the time [Student] needs no more than 2 prompts to select the visual coping skill he needs. 80% of the time [Student] needs 3 or more prompts to select appropriate copying strategy.

Goal 9 progress status:<sup>16</sup>

(Student increased from November 2019)

Increases attention = Student at 87%

Increase participation – Student at 60%

Increase positive peer interactions – Student at 70%

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<sup>16</sup> This goal was not specifically documented but appears under the goal that Student will participate in Social Skills classes with minimal prompts.

This quarter in Social Skills we have been focusing on problem solving skills, finding solutions to a given situation, greetings and goodbyes, appropriate touch, body language, eye contact, sharing, taking turns, and continued with personal space, and perspective talking. [Student] had been much more willing to participate in group activities and had been able to stay regulated when difficult situations arise. We still have a ways to go on appropriateness of interactions but he has been willing to work through more difficult activities.

Goal 10 progress status:

(No information reported for November 2019)

42% - In this reporting period, [Student] has worked on identifying and practicing a variety of ways to continue a conversation, including questions or comments. With adults cueing to decrease distracting behaviors, [Student] is able to identify if a response is on target and, if not, provide an alternate response if needed.

Goal 11 progress status (based on November 2019 progress report):

(Student increased from November 2019)

20% This quarter, [Student] has practiced his receptive language skills across environments, including in the school and community. It has been observed that [Student's] participation increases when engaged in hands-on or vocation related tasks. He benefits from reminders to make sure he is listening in order to decrease distractions and visuals for requesting help when needed to promote self-advocacy.

93. In February 2020, Giant Steps terminated Student from the program effective March 31, 2020.<sup>17</sup>

Student's IEE at Mariam Learning Center

94. In approximately June 2019, Parent requested an IEE, and SSD consented.

95. Parent selected Mariam Learning Center (Mariam) from a list of approved contractors supplied by SSD.

96. Mariam conducted a psycho-educational evaluation for Student, which it did on June 5-6, 2019. The evaluators and authors of the evaluation were Denise Eckelkamp, M.Ed, a

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<sup>17</sup> At the time of the hearing, the Districts were trying to secure Student placement in another private separate day facility.

certified school psychological examiner, and Joan K. Leetch, M.A., CCC-SLP, a speech and language pathologist.

97. Eckelkamp previously worked as a substitute psychological examiner for SSD, and she accessed SSD's records regarding Student unbeknownst to SSD or Parent on June 11, 2019, while evaluating Student.

98. Parent later learned of Eckelkamp's access of the information and brought it to SSD's attention. SSD offered that Parent could have Student re-evaluated in the areas in which Eckelkamp conducted the evaluation and SSD would reimburse her the cost to have the tests redone.

99. Parent desires to know the true measure of Student's ability.

#### Extracurricular Activities

100. Parent made several inquiries as to how Student could participate in extracurricular activities at his home school. She sought direction from SSD about a paraprofessional for Student's extracurricular activities without much success.

101. SSD stated that it was searching for paraprofessionals to support Student, but was having difficulties finding anyone.

102. Student did begin participating in wrestling and track at his home school, and Parent hired a sitter to assist Student in getting to the activity and properly dressing in his wrestling onesie.

#### Student's Vision

103. On October 2, 2019, a review of existing data was held and it was determined that Student did not meet criteria for a categorical disability in the area vision because it was not adversely impacting his educational day.

### Transition Planning

104. Parent has made repeated request for the Districts to begin transition planning for Student. This has not occurred.<sup>18</sup>

### Parkway Disciplinary Data

105. SSD documented in a Special Education in the Partner Districts 2018-2019 Report:

Suspension rates for students with disabilities continue to increase, and rates of out-of-school suspensions (OSS) for students with disabilities are higher in St. Louis County than they are state wide. Rates of suspension in those counties remain very high . . . [.] County wide, students with disabilities are 2.7 times more likely to receive a suspension exceeding 10 days than were nondisabled students each of the last two years. African-American students with disabilities receive long-term (10+ days) suspensions at a higher rate than both nondisabled peers and white students with disabilities . . . [.]<sup>19</sup>

### Lack of General Education Teacher at Student's IEP

106. On October 14, 2019, Parent requested a general education teacher attend Student's IEP.

### **Conclusions of Law**

The Administrative Hearing Commission has jurisdiction over this case. Section 162.961. The burden of proof is on the party seeking relief, in this case the Parent. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). 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).

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*

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<sup>18</sup>Beginning not later than a student's IEP in effect when the student turns 16 years old, or younger if deemed appropriate by an IEP team, post-secondary goals need to be added to the student's IEP based on an age appropriate transition assessment related to training, education, employment, and when appropriate, independent living, transition services. State Plan, Regulation IV T. 48.

<sup>19</sup> Student received suspensions in the past, but the specifics were not introduced into evidence.

*Registration for the Healing Arts*, 62 S.W.3d 446, 455 (Mo. App. W.D., 2001). When there is a direct conflict in the testimony, we must make a choice between the conflicting testimonies. *Harrington v. Smarr*, 844 S.W.2d 16, 19 (Mo. App. W.D. 1992). Our findings of fact reflect our credibility determinations.

### IDEA Summary Information

Under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400, et seq., all children with disabilities are entitled to a free appropriate public education (FAPE) designed to meet their unique needs and to prepare them for further education, employment, and independent living. 20 U.S.C. § 1400(d)(1)(A) and 34 C.F.R. §300.1(a). The Missouri State Plan for Special Education (August 2017) (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 pertaining to the education of disabled students that are provided in conformity with the Student’s IEP. State Plan, Regulation I, § G, page 6-7.

The primary vehicle for carrying out the IDEA’s goals is the IEP. 20 U.S.C. § 1414(d). “An IEP is a written statement that ‘sets out the child’s present educational performance, establishes annual and short-term objectives for improvements in that performance, and describes the specially designed instruction and services that will enable the child to meet those objectives.’” *A.H. by and through D’Avis v. Independence School District*, 466 S.W.3d 17, n.6 (Mo. App. W.D. 2015), quoting *Honig v. Doe*, 484 U.S. 305, 311 (1988), see also 20 U.S.C. § 1414(d)(1)(A). The IEP is not required to maximize the educational benefit to the child, or to provide each and every service and accommodation that could conceivably be of some educational benefit. *Board of Education of Hendrick Hudson Central School District, Westchester County, et al. v. Rowley*, 458 U.S. 176, 207 (1982). “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.” *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S.Ct. 988, 999 (2017). If a student’s disability prevents him from grade-level advancement, then the student’s “educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom . . . every child should have the chance to meet challenging objectives.” *Id.* at 1000. 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 the child’s parents. *Id.* at 999, citing *Rowley*, 458 U.S. at 207-209.

The 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.” *Andrew*, 137 U.S. 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).

The procedural details set forth in IDEA “. . . emphasize collaboration among parents and educators and require careful consideration of the child’s individual circumstances.” *Andrew*, 137 S.Ct. at 994, citing §1414. However, not every procedural violation amounts to a denial of FAPE. “[A] hearing officer may find that a child did not received a FAPE only if the procedural inadequacies – (i) impeded the child’s right to a FAPE; (ii) significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provisions of

FAPE to the student; or (iii) or caused a deprivation of educational benefits. 34 C.F.R.

§300.513(a)(2).

### Parent's Due Process Complaint

In her due process complaint (and as further defined in her pre-hearing conference statement), Parent identified the following issues in dispute and requested the following resolution:

**Issue 1** – Whether the Districts failed to implement Student's January 1, 2019 IEP, and did they deny FAPE by not providing the services?

**Proposed Resolution:** Order the Districts to provide Student services and order them to provide Parent with an updated schedule that includes how the services/minutes will be delivered to Student, the location of the services, room number, and service provider. Order Student to receive ongoing direct instruction/teaching from a professional with a MA BCBA, and order compensatory services in all areas that Student was deprived between March 4, 2019 and May 23, 2019 (while at Litzsinger).

**Issue 2:** Whether the Districts failed to implement Student's IEP during the 2018-2019 school year (8<sup>th</sup> grade at Litzsinger) from March 4, 2018 to May 23, 2019, and failed to provide FAPE in LRE and educate Student in an environment with similarly situated peers (age/grade/social and verbal skills?) Student's placement was changed based on his behavioral data in one setting (NEMS). His behavior is a part of his disability, he often uses his behavior to communicate due to his limited verbal and vocabulary related to his educational and medical diagnoses of Autism. A request was made for Parkway to include Student with his non disabled peers as he tolerates with key component from the program at Litzsinger.

**Proposed Resolution:** Order the Districts to provide individualized programming in home school instead of requiring a student to fit into already existing special education program/time/schedule by including option for inclusion based on Student's current needs. Order team to create a fade plan from more restrictive to least restrictive setting to ensure both terms are working to receive Student in home school with ongoing trainings and team meeting noting the Student's progress each month. Order school team to reconvene within 10 days to change Student's placement to home school for the amount of time that will benefit him and allow access to general education curriculum.

**Issue 3:** Whether Student was denied LRE during his May 2019 IEP (Parent requested inclusion) despite his level of service to separate private placement. Parent requested inclusion into home school for a portion of Student's school day. Parent requested the team to consider Student's behavioral data from March 2019

through May 2019; however, his consideration for inclusion was denied. It was requested again during the mediation meeting in June 2019 without proper notice.

Proposed Resolution: An order for the Districts to include Student in his home school with provisions of services under IDEA for services, related services, goals, accommodations, BIP, etc. to his maximum extent. Order for Student's team to meet monthly to ensure he is making the necessary progress to meet the fade plan in place, necessary training and ongoing collaboration between home school and private separate school setting to ensure Student's success.

**Issue 4:** Whether the Districts (failed to ensure services could be provided/implemented at the private separate school location) outlined in his May 2019 IEP for ESY and during the regular school year. Parent requested Giant Steps' attendance at Student's May 2019 IEP meeting, the team failed to follow up on whether services could be implemented as outlined in his IEP held without Giant Steps representation, even after the IEP was revised in June 2019. Parent requested an IEP meeting in August 2019 (to address minutes and services Student did not receive during ESY and during the current school year). Giant Steps asked that the IEP meeting be scheduled after the FBA was complete, which was accepted by Parent. When the meeting was scheduled, the Districts informed Parent she needed to coordinate the IEP with the Districts and not Giant Steps (Parent was of the impression Giant Steps was going to follow the process it was given when it accepted Student as a student to schedule the IEP meeting). Needless to say, the IEP meeting was scheduled months later. Scheduling the meeting posed IDEA violations as the team initially wanted to schedule the IEP meeting without a regular education teacher and component district representative. When parent brought it to the attention of the team, a request for a new dates was made by the Districts, since Parent "requested a different administrator". Parent advised the team she wanted to ensure all required participants were present at the meeting from Student's home school and she was not requesting a different administrator, but the required staff to ensure consideration was being made for Student for all components of his IEP. During subsequent meetings, General Education Teacher and Components District Representation participation in Student's continuation IEP was not disclosed until the meeting started (although team was aware prior to the meeting).

Proposed Resolution: Order the Districts to invite required participants and representatives for each continuum of service to the IEP meeting to ensure all levels of service are represented, especially when services are written to be implemented at a different location. Order Districts to notify Parent when IEP team member is not going to be present at the meeting prior to the meeting in writing along with written report for their area as well as present excusal form prior to the meeting. Order Districts to inform Parent of their options to have child's home school representatives present at Student's IEP despite Student's level of service. Order the Districts to provide compensatory services for direct services that Student did not receive during ESY 2019 from June 17, 2019, through July 26, 2019 and compensatory services for minutes Student did not receive during the 2019- 2020 school year at Giant Steps.

**Issue 5:** Did the Districts deny Student FAPE during June 3, 2019 - June 14, 2019, when the request was made for ESY at Litzinger School as outlined in his IEP?

**Proposed Resolution:** Order the Districts to provide compensatory services for Student to recoup minutes from June 3 - June 14, 2019.

**Issue 6:** Whether the Districts denied Student provisions outlined in his IEP for participation in extracurricular activities. As of January 24, 2020, a district provided adult support is not in place.

**Proposed Resolution:** Order the Districts to provide adult support so Student can participate in extracurricular activities to his fullest extent. Order team to reimburse for the hours Student's personal care attendant has spent supporting him in extracurricular activities at school until the Districts can secure someone retroactive from October 2019 - present.

**Issue 7:** Whether the Districts violated the IEE provisions under IDEA. The Districts are required to consider the results; however are not obligated to adopt the findings. See, e.g., *T.S. v. Board of Educ. of the Town of Ridgefield*, 20 IDELR 889 (2d Cir. 1993); *G.D. v. Westmoreland Sch. Dist.*, 17 IDELR 751 (1st Cir. 1991); *R.Z.C. v. North Shore Sch. Dist.*, 73 IDELR 139 (9th Cir. 2018, unpublished); *Garvey Sch. Dist.*, 110 LRP 44204 (SEA CA 07/19/10); and *Clark County Sch. Dist.*, 117 LRP 13610 (SEA 03/08/17).

**Proposed Resolution 7:** Order the Districts to reimburse Parent for the IEE during the 2020-2021 school year which will be conducted by an agency independent of the Districts' influence. Order the Districts to amend Student's educational record containing information from IEE completed in June 2019 to include a statement about the findings, such as: the IEE is not valid/reliable since the evaluators did not complete the assessments, scores are not valid since they are not independent of the Districts' influence and should not be used for determining additional diagnosis, programming or services. Order the Districts to require IEE approved agencies to provide a disclosure that they will not use employees affiliated with Special School District to evaluate students referred by Districts and if they do, they will notify parents and referring school district in writing prior to the commencement of the assessment. Order Districts to deactivate staff access to student records when they are not working on Districts' behalf during the summer months.

**Issue 8:** Did the Districts deny Student's provisions under IDEA as outlined in his IEP by failing to provide Applied Behavior Principle (ABP) services as well as services determined by the team in his Behavior Intervention Plan as written on 5/8/2019, continued on 5/8/2019, by failing to provide discrete programming to decrease inappropriate behaviors in the school setting?

**Proposed Resolution:** Order the Districts to reconvene an IEP within 10 days with required participants from both placements, especially the child's home district representatives to the IEP meeting. Order the Districts to provide Student with compensatory services so that he may recoup the services he was denied during

ESY and during the 2019 - 2020 school year. Order the Districts to schedule monthly meetings with the CBIT team to ensure research based practices are in place to ensure Student has opportunities to decrease inappropriate behaviors and increase appropriate behaviors along with the amount of time in the learning environment with peers. Order the Districts to provide instruction in Applied Behavior Principles by a M.A. BCBA due to the intensity of need and to ensure fidelity of implementation.

**Issue 9:** Whether the Districts violated Student's rights by failing to provide or create the opportunity for him to have access to ABP instruction (discrete programming), academic instruction (for science, and social studies) and music therapy along with the accommodations outlined in the said subjects and a grade to show what Petitioner's child has learned in each subject, how he will earn credit toward high school graduation and transition services toward his post-secondary goals.

**Proposed Resolution 9:** Order the Districts to provide Student ABP. This should include general education teacher participation, component district representatives and representatives from both levels of service. Order the Districts to provide Student with compensatory services for the services he was denied during ESY and the 2018- 2019 school year. Order the Districts to provide Student with compensatory services for ABA/ABP services to be provided to him by an approved agency (M.A. BCBA).

**Issue 10:** Did the Districts violate provisions under IDEA by not considering his monthly data for a lesser restrictive setting during the 2019 - 2020 school year and denying Student an educational benefit based on disability/race? Student's IEP outlines provisions for a monthly review of data that has not happened since the March 2019 school year. It was agreed upon in June 2018 that Student's team will meet monthly with Parent to review progress on goals.

**Proposed Resolution:** Order the Districts to follow the IEP as written. Order Districts to plan the monthly meetings at the start of school to ensure team members can make the necessary arrangements to be present.

**Issue 11:** Whether the Districts violated Student's rights under IDEA by failing to conduct a re-evaluation for transition, adaptive behavior and language assessment as requested during the 2019 - 2020 school year and failing to complete a Review of Existing Data meeting.

**Proposed Resolution 11:** Order the Districts to conduct an RED meeting for the purpose of gathering additional information for a transition evaluation for the purpose of determining post secondary goals/outcomes for Student. Order the Districts to conduct an RED meeting especially when both parties do not agree with conferring, despite the provision where it indicates the team MAY confer. Student has two school years to gather input from and would like to do it all at one time instead of a conferral process.

We address each of Parent's issues below.

Issues 1, 4, 5, 8 and 9

Parent alleges that the Districts failed to implement Student's January 1, 2019 IEP by not providing him with all of the service minutes, thereby denying him FAPE. Student's January 1, 2010 IEP was implemented on March 4, 2019, when Student transferred full time to Litzsinger. The IEP was later amended in May and June 2019, but the only relevant change was that Student's social skills minutes went from 435 minutes in his January 2019 IEP to 410 minutes in his May 2019 IEP. Also, his ESY minutes changed, but this is not relevant to our discussion because the May 2019 IEP was implemented after Student completed Giant Steps' ESY program. Therefore, at the time Student attended Giant Steps' ESY program, his social skills service minutes were 435 per week.

*Litzsinger*

We recognize that Litzsinger was Student's LRE, which we discuss in more detail below. Student found success at Litzsinger and his problematic behaviors substantially reduced. Moreover, his progress during this time period is documented and supports such a conclusion. Student was taught by trained staff in an environment conducive to his needs. The fact that his main special education teacher, Rieker, may not have been with Student at all times is not the standard set forth in Student's IEP. Student was capable of being educated by other special education staff, and it was important to attempt to generalize Student's skills.

While we do not agree with all of Parent's arguments and the amount of compensatory service she requests, we do find that Student was not provided his full service minutes per his January 1, 2109 IEP while he attended Litzsinger. When examining Student's January 2019 IEP service minutes against Student's class schedule, Ex. S, it is clear that the schedule limited Student's social skills and language therapy minutes. Between March 20, 2019 and June 4, 2019, Student did not receive social skills education for a total of 220 minutes, and 330 minutes

in language therapy. Student is entitled to receive from the Districts compensatory services for those lost minutes.

### *Giant Steps*

Student's January IEP service minutes were still in place at all relevant times while Student was educated at Giant Steps, both ESY and during the regular school year. Parent argues that Student did not receive his full ESY service minutes while attending Giant Steps' summer program, and his regular IEP service minutes once he attended Giant Steps for the regular school year. Parent argues that the Districts did not properly ensure that Student's ESY minutes could be implemented by Giant Steps, the Districts improperly delayed the IEP meeting after the regular school year began, and other procedural violations occurred. Parent seeks compensatory services and changes to how the Districts schedule and provide notice to Parent regarding IEP meetings.

The Districts denied Parent's request that Student receive ESY services at Litzsinger. His IEP was designed to fit the Litzsinger model, not Giant Steps. SSD recognized that Student's IEP would need to be amended to fit Giant Steps' program. Giant Steps' personnel testified that they tried to implement Student's IEP as written because they were unable to come to an agreement with Parent on an IEP amendment for the summer. Nevertheless, they recognized that they did not implement Student's ESY services fully. Nevertheless, Giant Steps did become familiar with Student's IEP and BIP, and they determined the right staff for Student and discussed FBA strategies. Its ESY program focused on peer relationships, social skills and following direction, but also worked with Student on his academic needs as documented by testimony and Student's daily log. Student's IEP does not state that his service minutes must occur through direct teaching. The IEP does not prevent Student from being taught by embedding his special education and related services throughout the day. In addition, this BIP does not required direct ABA instruction, but it does state that "Through discrete programming,

[Student] will be taught to give up reinforcing items, coping strategies, and emotional regulations, and all team members will receive and review the BIP monthly.” Exs. Z, AA, and 46.

After the ESY program, Student attended Giant Steps full time between August 2019 and March 31, 2020. An IEP correction was made to Student’s IEP in November 2019, in which SSD agreed to 60 hours of compensatory services over the remainder of the 2019-2020 school year to focus on reading and math goals to be provided by SSD Homebound Department. This 60 hours determination was based upon a review of Student’s documentation regarding his present level of performance of his goals versus his base line from the May 2019 IEP, and determination that Student made minimal progress in the areas of reading and math after his placement was changed to a private separate day facility. According to the hearing testimony, the 60 hours of compensatory service was to occur at the local library. It is unclear if Student received any of these hours. We know that Parent objected to Student receiving the hours at the local library.

Per the District’s own analysis and Student’s data, Student regressed in the areas of reading and math. In addition, according to Student’s progress report from Giant Steps in December, he was still regressing in his social skills. Therefore, by the District’s own rationale for providing Student with 60 hours of compensatory services in reading and math (four weeks of ESY and August –November 2019 regular school year), Student should also receive compensatory services for December. According to Student’s December 2019 progress report from Giant Steps, he still showed regression in behavioral skills and reading. We do not have sufficient evidence to determine Student’s progress or regression on his goals for January through March 2020.

Therefore, using a pro-rata method (12 hours per month) we award Student an additional 12 hours in compensatory services in reading for December 2019. With regard to Student’s

regression in his behavior skills, we attribute some of it to his need to transition to a new school. However, in December 2019, he was still showing regression and his BIP required that he receive discrete programming to give up reinforcing items, coping strategies, and emotional regulation programming. Accordingly, we award 36 hours of compensatory services in behavior skills with at least 10 hours in discrete programming per his January – June 2019 IEPs. To the extent Student did not receive his 60 hours of compensatory service addressed in his November 2019 IEP, we extend those beyond the requirement that he receive them during the 2019-2020 school year. Furthermore, all compensatory services shall occur at a location in which Student is familiar with receiving educational instruction to avoid him having to adapt to another learning environment because the evidence establishes that it takes Student significant time to acclimate.

Parent makes several arguments regarding errors or inconsistency in the evidence. In part, she makes these arguments to question the credibility of Litzsinger and Giant Steps staff. We recognize that errors and inconsistency exist, but we find the weight of the evidence supports our above findings. We deny Parent's other resolution requests associated with these issues, except SSD shall provide Parent a written explanation as to how Student's special education and related service minutes will be delivered to him as provided in the current IEP.

#### Issues 2, 3 and 10

Parent raised in these issues the same request for compensatory services addressed above, so we will not address it again here. In addition, she asserts that Student was denied his LRE because his placement was inappropriately changed to Litzsinger full time on March 4, 2019, and later to Giant Steps. Parent argues that Student's changes in placement were done, in part, because the Districts did not properly consider Student's monthly data and did not hold monthly review data meetings since the March 2019 school year.

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 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). However, 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).

Litzsinger and Giant Steps are more restrictive environments than NEMS by definition, since they are separate day schools for special education. Federal regulation 34 CFR 300.115 refers to a “continuum” of alternative placements. By way of example, it lists “instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions.” Therefore, we must consider whether mainstreaming cannot be achieved satisfactorily. *Pachl v. Seagren*, 453 F.3d 1064, 1068 (8th Cir. 2006).

The United States courts of appeals have developed different tests to determine the appropriateness of mainstream education under the IDEA. One such test, applied by the Fourth, Sixth, and Eighth Circuits, was first articulated in *Roncker on Behalf of Roncker v. Walter*, 700 F.2d 1058 (6th Cir. 1983). *See Pachl v. Seagren*, 453 F.3d 1064, 1068 (8th Cir. 2006) (endorsing Roncker test); *DeVries By DeBlaay v. Fairfax Cty. Sch. Bd.*, 882 F.2d 876, 878 (4th Cir. 1989). Under this test, mainstreaming can be achieved satisfactorily unless: 1) the child

would not benefit from mainstreaming, 2) any marginal benefits received from mainstreaming are far outweighed by the benefits gained from the services that could not feasibly be provided in the non-segregated setting, or 3) “when the handicapped child is a disruptive force in a non-segregated setting.” *Pachl v. Seagren*, 453 F.3d at 168 (quoting *Roncker On Behalf of Roncker v. Walter*). A student’s behavior is a significant consideration for educational placement. *See P. ex rel. Mr. & Mrs. P. v. Newington Bd. of Ed.*, 546 F.3d 111, 120 (2d Cir. 2008) (considering “possible negative effects of the inclusion of the child on the education of the other students in the class”).

Before changing a student’s placement for behavioral issues, the local enforcement agency must determine if those behaviors reach the level of a “disruptive force.” *Gefre v. Leola Sch. Dist.* 44-2, No. CIV 06-1047, 2009 WL 3147645, at \*6 (D.S.D. Sept. 25, 2009). Striking students and staff members is sufficient to constitute a disruptive force. *Parrish v. Bentonville Sch. Dist., No. 5:15-CV-05083*, 2017 WL 1086198, at \*2 (W.D. Ark. Mar. 22, 2017).

In *Clark ex rel. J.J. v. Special School Dist. of St. Louis County*, 2012 WL 592423 (Mo. App. W.D. 2012), the student's behaviors included: poor listening skills, being disrespectful to adults, running away from adults, physical aggression, throwing objects, knocking over furniture, climbing on furniture, and kicking objects and people. The student was placed in Litzsinger. Due to further behavior issues, parents and the school agreed to homebound services at the public library. The student did better, benefitting from the 1:1 teacher/student and the seclusion from other distractions (including other peers). The school recommended that the student return to Litzsinger. The parent requested a due process hearing and argued that the school's actions in transferring the student from a general education setting to a public day school did not provide FAPE to the student because the latter was not his LRE.

The Court stated:

Firstly, the IDEA's preference for "mainstreaming" is not absolute. The IDEA clearly indicates that although the "least restrictive environment" is encouraged,

special classes, separate schooling or "other removal of children with disabilities from the regular educational environment is proper "when the nature or severity of the disability of a child is such that education in regular classes is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."

*Id.* (Citations omitted.) The Court noted that all of the educators and a unanimous hearing panel found that a change of placement to Litzsinger was necessary in order to provide the student with FAPE, and agreed with this determination.

In the present case, Student was not benefiting from being mainstreamed as supported by the frequency and intensity of his problematic behaviors. He received marginal benefits from NEMS and this was far outweighed by the benefits he gained at Litzsinger. In addition, Student was a disruptive force at NEMS.

We do not find that Student was denied service minutes while attending NEMS. NEMS staff was properly trained, implemented Student's IEP and BIP as best they could, worked with Student's Litzsinger team to try to replicate the success Student was having at Litzsinger, and implemented Student's ABA therapy the same as the Litzsinger staff. Litzsinger was the best placement for Student given its unique attributes, small class size, less noise and hallway transitions, secured building and NCI training of the entire staff. Hinkle opined that, given all of the evidence, the CBIT team would not have had a significant impact on Student's behavior in NEMS. She agreed that Student's LRE was Litzsinger, as did Nomenson.

Parent argues, in part, that Student's LRE would be his home school if the staff was properly trained. She argues that Rieker was training to become a BCBA and this, in part, allowed Student to be more successful at Litzsinger. However, Parent also argues that Rieker was not always providing Student instruction throughout the day. Parent also argues that the CBIT team should have been allowed to finish training the NEMS staff, and the NEMS paraprofessionals were less skilled. Parent places a lot of weight on the ability of the CBIT team, but CBIT's own director, Hinkle, testified to the limited success the CBIT team could have

achieved at NEMS compared to what Litzsinger offered Student. Furthermore, we do not find that the NEMS paraprofessionals were less skilled or the entire NEMS team was unable to properly implement Student's IEP. Student's behavior drove the decision to change his placement to Litzsinger full time, and the evidence supports the Districts' decision. The Districts present a "sound educational policy" for their decision to move Student to Litzsinger that is "a cogent and responsive explanation for their decision." *Andrew*, 137 U.S. at 1001-1002. We find that Litzsinger was Student's LRE.

With regard to Giant Steps, Parent consented to Student's placement. She argues that she only consented to Giant Steps because the Districts denied her request for Student to be educated, at least part time, in his home school, and she wanted to ensure her colleagues were not responsible for hindering her son's educational rights. Nevertheless, Parent requested and consented to Giant Steps, and we have not found that the Districts violated LRE. Accordingly, because we did not find that Districts violated LRE when they placed Student at Litzsinger full time, we do not find they violated Student's rights under the IDEA when they consented to Parent's request for Student to be placed at Giant Steps. This is not to say that the District did not have an obligation to ensure Student's IEP was implemented at Giant Steps, as discussed above.

We deny Parent's resolution requests associated with this issue.

#### Issue 6

Parent argues that the Districts denied Student the right to participate in extracurricular activities as outlined in his IEP. Parent seeks an order requiring the Districts to provide adult support for Student so he can participate in such activities and to reimburse her for the cost of having a private personal care attendant provide such services this past school year.

Parent did not introduce any cost information for the private personal care attendant; therefore, we cannot award her reimbursement costs. Nevertheless, going forward, the Districts

need to secure a personal care attendant for Student to participate in his extracurricular school activities or reimburse Parent for the reasonable cost of a private personal care attendant that supplies such services.

### Issue 7

Parent alleges that SSD violated the IEE provision of the IDEA by failing to grant her request for a new an IEE. Federal regulation 34 CFR § 300.502 states:

(a) *General.* (1) The parents of a child with a disability have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section.

(2) Each public agency must provide to parents, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained, and the agency criteria applicable for independent educational evaluations as set forth in paragraph (e) of this section.

(3) For the purposes of this subpart—

**(i) Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question; and**

**(ii) Public expense** means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent, consistent with § 300.103.

(b) *Parent right to evaluation at public expense.*

**(1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in paragraphs (b)(2) through (4) of this section.**

**(2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either—**

**(i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or**

**(ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.**

(3) If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

(4) If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the

parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation.

(5) A parent is entitled to only one independent educational evaluation at public expense each time the public agency conducts an evaluation with which the parent disagrees.

(Emphasis added.)

Parent argues that the evaluation was not “independent” because unbeknown to the parties, an evaluator at Mariam was a current or former SSD employee who accessed Student’s records through SSD’s computer system while evaluating Student.

In *Board of Educ. of County of Nicholas v. H.A.*, 2011 WL 864829 (S.D. W. Va. Feb. 1, 2011), the district challenged the decision of a hearing officer (HO Lane) who found that it had not followed a previous hearing officer’s (HO Gerl) decision requiring an IEE. The district claimed it had complied, but the parent argued that the evaluation was not a fair evaluation because the doctor (Dr. Krieg) performing it had an undisclosed relationship with school personnel, and thus was not independent from the district.

Parent is entitled to an independent evaluation. She did not receive this due to the fact that one of the evaluators who conducted some of the test and co-authored the report, including the recommendations, accessed SSD information without permission. The evidence does not state to what extent the evaluator used the SSD information to reach her conclusions. Nevertheless, it calls into question the independence of the IEE.

The Districts informed Parent that she could have Student re-tested on the assessment conduct by this Mariam evaluator. However, the entire report is brought into question. The Districts shall pay the reasonable costs of another IEE and remove the Mariam evaluation from Student’s records. We deny all other of Parent’s requests for resolution of this issue.

## Issue 11

Parent argues that the Districts violated Student's civil rights by failing to conduct a re-evaluation for transition services, adaptive behavior and language assessment as she requested during the 2019-2020 school year and failed to complete a RED meeting.

Per the State Plan, the Districts are not required to begin transition planning until Student is 16 years of age, unless the IEP deems it appropriate. The evidence does not support that transition services are required for Student at this time. We deny Parent's other assertions in this issue and her request for resolution. We do not find evidence to support them or that any procedural violation impeded Student's right to FAPE, significantly impeded Parent's opportunity to participate in the decision-making process regarding the provisions of FAPE for Student, or caused a deprivation of educational benefit.

Also, to the extent Parent makes a claim of race discrimination, such a claim is outside our authority to consider.

### Request for Attorney Fees

No attorney has entered his or her appearance on behalf of Parent. Moreover, this Commission is without statutory authority to award attorney fees.

### Delivery of Compensatory Services

As discussed in detail above, and summarized here, Student is awarded the following compensatory services:

- a. 220 minutes in social skills;
- b. 330 minutes in language therapy;
- c. 36 hours in behavior skills with at least 10 hours in discrete programming per his January – June 2019 IEPs; and
- d. To the extent Student did not receive his 60 hours of compensatory services addressed in his November 2019 IEP, we extend the time frame to receive those beyond the requirement that he receive them during the 2019-2020 school year.

All compensatory services shall occur at a location in which Student is familiar with receiving educational instruction. Further, an IEP meeting shall be scheduled by the parties as soon as possible to review/revise Student's IEP to cover the compensatory services discussed above. Such services shall be administered to Student in a manner reasonably directed by SSD, and during the summer of 2020, if possible. However, the services are to be provided on a schedule mutually agreeable to the parties. The parties may mutually agree to extend the completion of the delivery of the compensatory services after the start of the 2020-2021 school year if required in the best interest of the Student or due to COVID-19.

### **Summary**

The Districts shall provide to Student compensatory services as directed above, and provide Student going forward with a paraprofessional to assist Student in accessing extracurricular activities. SSD shall pay for Parent to obtain another IEE and remove any reference to the Mariam evaluation from Student's records. Student was educated in his least restrictive environment (LRE).

SO ORDERED on April 16, 2020.

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RENEE T. SLUSHER  
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.