

both the hearing dates and the decision date because of the need to obtain information pertinent to this case from third parties and to adequately prepare for hearing. Over the objection of the District, the case was continued with dates to be set during the second prehearing conference scheduled for April 10, 2019. During the second prehearing conference, Parents indicated that they would be asking for leave to file an amended complaint. Following discussions with the parties regarding the continuance, we set the case for June 12-14, 2019, (three days due to the anticipated technology issues regarding Student's hearing aids) with the decision due date of July 31, 2019.¹ The hearing was set at the District and via telepresence for the purpose of Parents' expert witnesses with the exact locations to be determined once experts were scheduled. It was anticipated that the Commissioner would travel to the District and then attend via telepresence for the other witnesses. Parents requested that the hearing be open to the public. Parents also requested that microphones be used at the hearing and that special seating be made to accommodate their need to see the faces of persons in order to lip read. Parents continued to request more time than three days to try the case.

On April 22, 2019, Parents' first amended complaint was filed. On April 23, 2019, Parents requested a continuance of the hearing and decision date. A third prehearing conference was scheduled and then rescheduled due to unavailability of the District. We held a third prehearing conference on April 24, 2019. Parents' request for a continuance was discussed in detail. Parents again requested 5-6 days for hearing. The District opposed Parents' request based upon unavailability of school personnel during the summer and the need to timely proceed with the due process hearing. Further, the District advised it believed the case could be heard in three days. After significant discussion by Parents' counsel, the hearing was rescheduled for

¹ The prehearing order reminded the parties that cumulative or duplicative evidence would not be heard, encouraged the parties to streamline the evidence, and reminded the parties that joint exhibits are preferable. The prehearing order also stated that any exhibit not included in the exhibit lists and not previously exchanged pursuant to the five-day disclosure rule would not be admitted into evidence.

September 4-6 via telepresence or videoconference at both the Kansas City Fletcher Daniels State office building and the U.S. Post Office in Jefferson City. The hearing was scheduled for three days due to the technical nature and extent of third-party witnesses. Based on the size of the telepresence room in Kansas City, the Commissioner told the parties that she would attend in Jefferson City. After specific inquiry by this Commission, Parents' counsel assured us that videoconferencing was necessary for expert and other witnesses and that it would be adequate to accommodate Parents.

On May 7, 2019, a fourth prehearing conference was held. The parties were advised that binders of evidence to be used must be forwarded prior to the hearing and a copy provided to the witnesses at each location.² We requested that the parties file legal briefs regarding Parents' request for a compensatory fund and further, that the parties in their presentation of evidence address the issue of what types of educational services may be needed with regard to compensatory education issues. We once again discussed Parents' need for accommodation, and counsel for Parents represented that Parents' needs would be met.

On August 9, 2019, Parents filed a motion to clarify the complaint with a proposed first amended complaint with clarification. On August 14, the District filed its opposition. On August 15, 2019, we denied Parents' motion.

On August 15, 2019, Parents filed a request for a prehearing conference to resolve concerns about mistreatment of Petitioners' witnesses, procedural disagreements, and confusion about hearing issues, including another request to file a clarified complaint. The District opposed the requests. On August 22, 2019, we entered an order that found we were unable to determine what was being requested regarding mistreatment and procedural disagreements because the issues were not brought before us via an appropriate motion. We overruled Parents' request to file an amended complaint and denied another prehearing conference on the same issues.

² The prehearing order reminded the parties again to streamline their evidence.

On August 30, 2019, the District filed a motion to exclude certain evidence in limine and suggestions in support. The evidence sought to be excluded included evidence that was not part of the five-day disclosure pursuant to the Missouri State Plan, Part B Regulation V, p. 81. There were new exhibits that were not previously disclosed by Parents. On September 3, 2019, we ordered the District to provide a list of all exhibits that were not previously exchanged by 9 a.m. on the first day of hearing.

Beginning on September 4, 2019, we held a hearing. Attorney Samara N. Klein represented Parents. Attorneys Shellie L. Guin, Ryan Fry, and Alexander S. Hall, Guin Mundorf LLC represented the District, with various members of that firm appearing in Kansas City to assist with witness binders. The hearing was not completed in the three days allotted. The Commission allowed the case to continue into September 9 with the expectation that the parties would complete the hearing. The hearing was not completed. We allowed the case to continue into September 10 with the expectation that the parties would complete the hearing. The hearing was not completed. We then allotted September 11, 2019 from 1:00 p.m. to 5 p.m. for the parties to complete their cases and advised both parties that the case would be completed in the time allotted.³ This case became ready for decision on October 15, 2019, when the last briefs were filed.

Following the September 4, 5, 6, 9, 10, and 11 hearing, on September 30, 2019, Parents filed a motion to submit evidence reviewed at hearing and objection to denial of due process. On October 7, 2019, the District filed suggestions in opposition to the motion and objection to denial of due process. On October 15, 2019, Parents filed a response to the suggestions. On October 7,

³ In addition, the evidence included an additional 1.8 hours of an audio recording of an IEP meeting from 3-27-19 (O-2); a videotaped recording of a three-hour IEP meeting from 3-6-2019 (J-2); and the MidWest Ear Institute (MEI) two hour in-service training on Student's hearing aids from 10-31-18 (TT-1) that we separately reviewed following the hearing.

2019, Parents filed affidavits purporting to authenticate the CVs of its witnesses. On October 10, 2019, the District filed a motion to strike the affidavits.

On October 7, 2019, Parents filed a response to the District's continuing objections to evidence based on *Gill vs. Columbia*, 217 F.3d 1027 (8th Cir. 2000). On October 10, 2019, the District filed a reply. On October 15, 2019, Parents filed a reply to the reply.

On October 8, 2019, we ordered that any responses or filings must be filed no later than 8:00 a.m. on Tuesday, October 15, 2019. On October 16, 2019, Parents filed "Petitioners' Objection to Respondent Now Taking Two Different Positions on Eligibility and Fabricating Facts in Clear Contradiction of the Records." Because this document was filed after the deadline set forth in our order, we do not consider it.

Findings of Fact

Category of Disability

1. Student's hearing loss is sensorineural. This means it is related to the inner ear, permanent, and cannot be fixed. The degree of hearing loss is mild to moderate. Mild to moderate designation is based on the decibel level on the audiogram, not the significance of the loss. Dr. Jaime Govenal explained that "this means in an average conversation, without any type of assistive device, he will detect speech but not be able to comprehend it." Additionally, Student has a fluctuating conductive hearing loss secondary to chronic negative pressure, chronic middle ear fluid, ear infections, multiple surgeries, tubes, tube removal that causes conductive hearing loss. Student's educational category of disability was deaf/hard of hearing. Based on the eligibility meeting on November 13, 2018, Student's educational category of disability was changed to specific learning disability in the area of mathematics calculation based on a discrepancy between achievement and intellectual ability.

2. Student has attended school at the District since 1st grade, the 2016-2017 school year.

Parents' Witnesses

3. Sonia Culver is a pediatric speech-language pathologist and the owner of Enrichment Therapy & Learning Center. She works with 18 month to college aged children. Culver received an undergraduate degree at the University of Missouri and her master's degree at the University of Kansas. She has maintained a license to practice in Missouri and Iowa, and has completed 30 hours of continuing education every three-year period.

4. Jaimi Bird is a speech-language pathologist who has 19 years of experience. She has an undergraduate degree in communication and a master's degree in speech-language pathology from the University of Northern Iowa. Bird has worked with children and adults in public school and nursing home settings. She has worked in hospital settings with acute care, inpatient, and outpatient population, and has worked in private practice.

5. Jane Madell (**offer of proof witness**) testified.

6. Shannon Wedemeier is an auditory-oral deaf and hard of hearing teacher for the Olathe School Districts. She has been teach hearing-impaired children for 17 years. She received her bachelor's degree in auditory-oral deaf and hard of hearing education from Fontbonne University in Missouri. She has a master's degree in the same area from the University of San Diego, and a master's degree in education administration from Emporia State University.

7. Stephen Cornelius is the District's basketball coach who coached Student when he was on the team in the 2nd and 3rd grade. Cornelius met Student when he was in the first grade, and his son plays with Student.

8. Parents and Student testified. Both Mother and Father are in the home, and Student has younger sisters. Mother is a hard of hearing individual and has a bilateral moderate severe hearing loss. Mother is a Missouri Certified American Sign Language interpreter and provides hearing advising and consulting services for families in Missouri to the Missouri School

for the Deaf. Father is hard of hearing also, and is very involved with Student and the rest of the family.

9. Jamie Govenal has a Ph.D. in audiology and has been practicing pediatric audiology for 11 years. She works with children who have hearing loss, wear hearing aids, have cochlear implants, and FM technology. She received her doctorate at Washington University School of Medicine. Govenal was employed at Children's Mercy Hospital for five and a half years, and she is currently employed at St. Luke's Hospital Midwest Ear Institute (MEI), where she has worked for the last six years.

10. Megan Lawson is a speech-language pathologist, listening and spoken language specialist. She received her undergraduate degree from the University of Missouri-Columbia. While there, she worked at the Moog School, a school for children with hearing aids and cochlear implants. She received her graduate degree from Fontbonne University in a specialized program focusing on working with children with hearing aids and cochlear implants. She has been working with this population for 15 years. Lawson has worked at St. Joseph Institute for the Deaf in Kansas City. She received her listening and spoken language specialist certificate from the AG Bell Academy. Lawson is currently employed at MEI and works with Govenal.

11. Patricia Stark has a bachelor's and master's degree in speech-language pathology. She has a specialist degree in special education administration and principalship. She is certified in the areas of special education, early childhood special education, and speech-language pathology.

District Witnesses

12. Amy Lane has a bachelor's degree in science in communication disorders and a master's degree in audiology. She is a certified audiologist. She worked at Children's Mercy Hospital for six years as a pediatric audiologist. She currently works at the Multi-District Deaf/Hard of Hearing Program (MDD/HHP), and has for 12 years. She has worked as a clinical

and educational audiologist. A clinical audiologist fits and programs the hearing aids to make speech audible for the child. The educational audiologist looks at how the child is accessing the curriculum and accommodations to help in the classroom.

13. Richard Fletcher is a volunteer with the District's robotics after-school club. Until the end of the last school year, he was employed by the District as the director of technology. Fletcher held that position for approximately four years. His duties involved maintaining and updating the District's computers, servers and network, and managing the budget and supporting students.

14. Kayla Collins has a bachelor's degree in audiology and speech pathology from the University of Northern Colorado. She was a research assistant for an audiologist working on oral habilitation and rehabilitation. She has a master's degree in speech-language pathology. She has a certificate of clinical competence in speech-language pathology. She is certified to work in the Missouri public schools as a speech-language pathologist. Collins is licensed by the Missouri Board of Healing Arts and is a member of the American Speech-Language-Hearing Association. She attends continuing education classes as required. Most of her work has been with public schools, but she has some experience in private practice or in a clinic. Most of her clients have been children, from infants who have just been diagnosed to high school students.

15. Christie Nesbitt has an undergraduate degree in communication sciences and disorders, with an emphasis in deaf education, from Missouri State University. She has a master's degree in deaf studies from the University of Texas at Austin, and has 40 additional graduate hours. She is certified by the State of Missouri in deaf education, ages zero to 21. She works in the District's MDD/HHP, and is currently an educational consultant and process coordinator. Her positions involve evaluating and specifically determining eligibility under IDEA for students with hearing loss.

16. Shanann Chapman has a bachelor of science degree in elementary education with a minor in science, from the University of Central Missouri. She has a teaching certificate to teach elementary school. Chapman worked as a paraprofessional at Park Hills School District for two years and has worked for the District for 21 years. She has received eMINTS⁴ training and training in the use of hearing assistive technology in schools. Student was in Chapman's second grade class.

17. Nancy Gabbert has a bachelor's degree in elementary education from Missouri Western State University and has a master's degree in curriculum and instruction from Baker University. She is eMINTS certified. Gabbert has taught third grade in the District for 17 years. She has worked with students with a variety of disabilities. Student was in Gabbert's third grade class.

18. Paula Chambers has a bachelor's degree in elementary education with an emphasis in special education from Missouri Western State University and has a master's degree in general education from Baker University. She has a specialist degree in elementary principalship and special education administration through Northwest Missouri State. She is certified to teach elementary, first through sixth grade. She is certified to teach cross-categorical special education, kindergarten through twelfth grade. Chambers has a special education administration certificate, kindergarten through twelfth grade, and has an elementary principal certificate. She has been employed as an in-home implementer, a cross-categorical special education teacher, a resource room teacher, and a process coordinator. In the latter position, she was responsible for overseeing compliance with the Missouri Compliance Standards Indicators to implement the Missouri State Plan. She is currently the District's special education director.

⁴ eMints is a technology-based type of program where teachers can learn different ways to incorporate technology into the classrooms.

Determination of Initial Eligibility

2016-2017 school year (1st grade)

19. Student has had hearing aids since 14 months of age. Parents were actively involved with First Steps and all the speech language pathologists and outside services. Parents, particularly Mother, have worked with Student since he was young, reading 10 books to him per day in preschool and kindergarten and continuing while he was at the District.

20. Hearing aids do not completely and immediately correct hearing loss in the way that eyeglasses correct vision. Student can hear someone speaking to him without his hearing aids. By report of Parents, Student's hearing improved some due to surgery over the summer of 2019. Hearing aids benefit Student's hearing. Student uses a personal FM system that provides assistance in hearing. It is always like the person speaking is right next to Student's ear even if that person is across the room. The personal FM has a consistent signal that addresses both noise and distance. The District installed a Soundfield system in the classroom, and this provides additional assistance by amplifying a person's voice. Student has the ability to hear classmates through his aided hearing.

21. The Phonak Soundfield system was top of the line.

22. MEI evaluated Student on May 11, 2016. The Ling Six Sound Test showed that Student hears across the speech spectrum in a quiet environment, but noise and distractions decrease his ability to detect, discriminate, and understand speech. His Auditory Perception Test for the Hearing Impaired (APT/HI) demonstrated good listening attitude and ability to follow complex directions, particularly with the use of the FM system. The Clinical Evaluation of Language Fundamentals Preschool 2nd Edition (CELF P-2) showed that Student was average on all of the tests and within normal limits when compared to his same age hearing peers, and his age equivalency scores fall near his chronological age. The Goldman Firstoe 2 Test of

Articulation (FTA-2) showed Student to be within normal limits and intelligible, though delayed somewhat. The testing concluded that Student “is within normal limits in using and understanding language when compared to his same-aged hearing peers. Results also indicate that his speech, oral language and listening skills are beyond his listening age.” Ex E-3 at 1350. MEI made multiple recommendations for accommodations to be sure Student was hearing and understanding, and MEI recommended 60 minutes a week with a therapist trained and experienced in therapy with children with hearing aids and auditory oral communication and auditory verbal therapy twice per month. According to Mother, Student had some self-advocacy skills at that time.

23. Student was determined eligible for special education by the District in 1st grade. His educational diagnosis was hearing impaired. Student had an August 10, 2016 evaluation. His evaluation report indicated the use of hearing aids and a personal “FM” speaker system at school. The Goldman Fristoe 2 Test of Articulation was within normal limits for words, but somewhat delayed for conversation. The CELF R-2 standardized language assessment used to identify language deficits had a descriptive rating of average and was all within normal limits. The evaluation concluded that Student met the state criteria for eligibility for having hearing impairment/deafness and needed education services in speech in conversation, self-advocacy, listening in noisy environments, conversation/social skills and voice volume.

24. The August 10, 2016 Individual Education Program (IEP) team, including Parents, determined that Student should be placed in the regular classroom at least 80% of the time. IEP goals included articulation, language, self-advocacy, and reinforcement of understanding. Accommodations included preferential seating, the use of the personal FM system, teacher checking to ensure understanding, and vocabulary sent home for pre-teaching.

25. By the end of the 2016-2017 school year, Student had met two goals and was making progress with the remainder of the goals. On his April 2017 1st grade Stanford

Achievement test, Student was at or above grade level in all areas of testing. Student's grades indicated that he had mostly 3s and 4s (4 is the highest grade) and positive behaviors. He completed 1st grade with a class rank of 2, and an average grade of 3.82. During the 2016-2017 school year, Student made progress toward the goal of articulation of /th/; met the goal of articulation of /r/ and /r/ blends; made progress toward the goal of Language 2-3 step directions; made progress toward the goal of language of increasing vocabulary skills; made progress toward the goal of self-advocacy by asking for clarification or explanation and by seeking assistance.

26. The District provided a Notice of Action (NOA) to Parents on May 17, 2017.

27. The District held an IEP meeting on May 17, 2017, and Parents attended.

Student's IEP goals were slightly revised and the accommodations were the same as the 2016 IEP, with 100 minutes of speech therapy, and Student's placement continued at least 80% in the regular classroom.

28. MEI evaluated Student on May 24, 2017. The Ling Six Sound Test indicated that Student hears across the speech spectrum in a quiet environment, but noise and distractions decrease his ability to detect, discriminate, and understand speech. His Auditory Perception Test for the Hearing Impaired (APT/HI) demonstrated good listening aptitude and ability to follow complex directions, particularly with the use of the Rogers system. The clinical Evaluation of Language Fundamentals 4th edition (CELF 4) showed that Student was average on all of the tests and within normal limits when compared to his same age hearing peers, and his age equivalency scores fall near his chronological age. The Goldman Firstoe 2 Test of Articulation (FTA-2) showed Student to be within normal limits and intelligible 90% of the time, an increase from the previous testing. The testing concluded that Student "is within normal limits in using and understanding language when compared to his same-aged hearing peers. Results also indicate that his speech, oral language and listening skills are beyond his listening age." Ex E-3 at 1350.

It was reported by the school that Student typically used his FM device during most activities. MEI made multiple recommendations for accommodations to be sure Student was hearing and understanding and recommended placement in a mainstream classroom, speech therapy 60 minutes a week, an annual evaluation with his audiologist, and daily sound checks. MEI also made some recommendations for accommodations to be sure that Student was understanding the teacher in the classroom.

2017-2018 School Year (2nd grade)

29. Collins' assessment of Student when she started in the 2017-2018 school year was that he had a mild to moderate sensorineural hearing loss and that his parents had the goal to see him equal or within six months of his peers with improvement in speech and self-advocacy. From her review, she thought Student had progressed and was actually functioning at a much higher level.

30. Collins attended training for Student's Phonak equipment that was from a representative at Phonak from Texas. Regina Knott (the former special education director for the District) was present even though she was no longer employed there. Collins had taken the place of Dana O'Toole (former speech-language pathologist).

31. Collins had each teacher and IEP team member at the District acknowledge that they had read the IEP at the beginning of Student's 2nd grade.

32. When Chambers started with the District, she reviewed Student's IEP and eligibility and had concerns because the IEP appeared to focus on future needs with no academic tests or IQ tests administered. Chambers had limited communications with Parents throughout 2nd grade.

33. Chapman's grading philosophy was that 3 is excellent and 4 is a score that indicates the student can perform with no help from the teacher. Therefore, there are few 4s under grading.

34. Chapman routinely sent vocabulary home on Fridays for Student and Parents to work on for the next week.

35. Chapman raised the issue of Student obtaining more assistance with hearing in the Performing Arts Center (PAC) because Chapman saw behavior that was outside Student's usual character in the PAC that she did not see in the classroom. Once that was adjusted, there were no other issues with Student.

36. Chapman communicated with Parents when Mother dropped off Student, via text messages to her personal phone. Mother communicated with Chapman daily in the morning when she dropped Student off and then in e-mails and texts. Staff routinely reported troubles with Student being able to hear under particular circumstances. Student was reading at a 4th grade reading level in 3rd grade. The IEP of May 2, 2018 included the accommodation that vocabulary be sent home for pre-teaching and FM check in the morning. The IEP did not include tutoring or provision for tele therapy.

37. Chapman did listening checks with Student when Collins was unavailable, only about 10% of the time. Chapman did not have concerns over Student's ability to hear and participate in the classroom except for the isolated circumstances of the announcements over the ceiling speaker. Chapman used the FM system, pass-around microphones that used the Soundfield speaker and Roger system in small groups. Student was always in the top two groups when Chapman broke up groups by skills. Compared to his peers, Student was average in August 2017 in reading, but by April 9, 2018, Student's reading equivalency based on STAR was at the 4th grade level. Student progressed in reading during 2nd grade. Student was good with technology. His writing ability was above average. Chapman continues to use a "how to" video that Student made as an example. Parents did not raise issues with Chapman about Student. Student progressed in all areas: social, reading, peer interaction, math, self-advocacy,

and all other areas. Chapman did not see a need for Student to have additional services when completing second grade. He was doing well both academically and socially.

38. During the 2017-2018 school year, Collins frequently conferred with Student's teachers and parents via e-mail on varying topics, including:

- the use of FM
- checking of connections
- hooking into smart boards
- tracking Student's self-advocacy in class
- concerns about announcements and Student's ability to hear them
- concerns about Student being able to hear during assemblies at the District's Performing Arts Center, contacting the hearing aid manufacturer to make sure that training was appropriate
- making sure substitutes had the information on how to use the system
- updates to Parents on how Student was working on directions with background noise while decorating a Christmas tree
- updates on speech/vocabulary being taught by Collins
- additional resources to use with Student recommended by MEI
- updates on how Collins is addressing listening and speaking sounds with Student,
- instructions for HA⁵ checks to teachers.

At one point, Mother specifically addressed information from the 2018 MEI testing and assistance to provide Student to determine if it was a program issue for the HA. "Also, she mentioned she [was] still concerned with his auditory processing and sounds like this could be an example of that and would not be surprised due to [Student] having had the poor quality hearing aids for 8 months." Ex. A-4 at 1754. In response, Collins indicated that she would follow up on the suggestions and was glad to have the information. Collins followed up and reported that "He was 100% discriminating which word I was saying. Yay!" *Id.* at 1759.

39. During the 2017-2018 school year, Collins charted her morning listening checks with Student. Collins sometimes used a stethoscope to make her checks. Sometimes she would check randomly in the afternoon to make sure Student was still synced to the FM system. The first year, she did listening checks from across the room. She then was advised that listening

⁵HA is "hearing assistive." HAT is "hearing assistive technology."

checks needed to be conducted outside the room, and from then on she did the checks in that manner. Collins also worked with Student on his IEP goals and made quarterly reports. Student was at age and grade level for second grade.

40. At the end of the 2017-2018 school year, Student's language was at his age level, and his listening skills were beyond his hearing age level.

41. Collins often spoke with Mother when she dropped off Student at the door. In 2017-2018, Mother texted Collins and because she sent quite a bit of texts, Collins requested just the use of e-mail. Collins received more communication from Parents than all other students she had combined. There were frequent e-mails pertaining to Student, his hearing checks, information from other resources, and questions.

42. Collins used the same hearing aid protocol both years; however, once Govenal told her to go out of the room for part of the listening check instead of across the room, she then incorporated that into her procedure.

43. Collins noted based on her checks and on observations that Student performed consistently day to day and was successful in and out of the classroom.

44. From the end of the 2017 school year to March 9, 2018, Student met his articulation goal /th/; he met his language goal of following 2 or 3 step directions; he made progress toward his language goal of increasing vocabulary skills; he made progress with self-advocacy by asking for clarification or explanation independently; and he made progress in self-advocacy by seeking assistance.

45. On his April 2018 Stanford Achievement test, Student was overall at a 3.1 grade level with all of the tests at or above grade level. The Student's grades indicated that he made mostly 3s and some 4s with all positive behaviors. He completed 2nd grade with a class rank of 8 and average grade of 3.08.

46. MEI evaluated Student on April 6, 2018. The Ling Six Sound Test indicated that Student hears across the speech spectrum in a quiet environment and with some background noise. His Roger system will help as long as wind is not a factor. His Auditory Perception Test for the Hearing Impaired (APT/HI) demonstrated that Student's listening ability was good on a scale of good/fair/poor. Again, the Roger system was recommended for larger group hearing situations. The CELF 4 test showed that Student was average on all of the tests and within normal limits when compared to his same age hearing peers, and his age equivalency scores fell near his chronological age. Student was described as "fast and accurate with his responses" as to sentence structure, completing the word structure subtest with "ease" and confidence, and scored well within normal limits. The GFTA-2 showed Student to be within normal limits and intelligible 95% of the time during conversations and 100% at word level. This is an increase from the 2017 testing. The testing concluded that Student "is within normal limits in using and understanding language when compared to his same-aged hearing peers. Results also indicate that his speech, oral language and listening skills are beyond his listening age. [Student] demonstrated strengths in following complex directions, formulating sentences, word structure, listening in quiet, sentence structure, and speech at the word level." Ex. 4 at 4-13. MEI made multiple recommendations for accommodations to be sure Student was hearing and understanding and recommended placement in a mainstream classroom, speech therapy 60 minutes a week, use of the Roger system monitored, annual auditory/verbal evaluations, continuing with his MEI audiologist, daily sound checks, and encouragement of self-advocacy. MEI also made some recommendations for accommodations to be sure that Student was understanding the teacher in the classroom. Lawson's report also indicated that Student could independently use his hearing aids and engaged in self-advocacy with her.

47. Mother reported to MEI on April 6, 2018 that Student continued to be social at school, interacted well with peers, and that Student did not want to miss out on class time to attend therapy during school.

48. On April 11, 2018, Lawson e-mailed a copy of Student's evaluation from MEI. She specifically mentioned: "He did sooooo well. Several tests improved by quite a bit. There was one test that went down by a few points, but it became much more challenging this year and his score was still well within normal limits. His age-equivalency scores were all improved... I suggested a few things to work on in the recommendations section, but nothing is a dire concern." Ex. A-4 at 1747.

49. The Student's annual IEP team met on May 2, 2018, with Parents in attendance. (Ex P-1) Student's present level of academic achievement and functional performance indicated the following information:

Mrs. Chapman, 2nd grade teacher, and Mrs. Collins, Speech-Language Pathologist (SLP) stated that articulation errors occur infrequently at school, and are consistent with other children his age. Mrs. Chapman and Mrs. Collins stated that he does not often ask for clarification at school, but is progressing at or above grade level in all areas, an indication that he is comprehending sufficiently to learn.

[Student's] speech and language skills are in the average range. Academically, he is at or above grade-level in all areas. ...His functional performance is commensurate with peers.

Ex P-1 at 222. Student was at or above grade level in all areas. His STAR reading test indicated that he was reading at a 4th grade level. His report card indicated he was performing at grade level. His updated testing at MEI with Lawson indicated that Student was "within normal limits in using and understanding language when compared to the same-aged hearing peers." Lawson also indicated that an ongoing concern was to check in with Student throughout the day to be sure he was comprehending directions and especially when there was background noise that interfered with Student's ability to hear. Lawson was aware of the technology provided by the school and was impressed with its willingness to help Student. There was nothing in the

communication to the school from MEI (Governal and Lawson) to indicate any concerns involving data logging or whether Student was hearing at school or syncing with his FM system.

50. Mother expressed concerns in the May 2, 2018 meeting, including Student's hearing aid modes and the impact of background noise particularly during assemblies and windy days. Other concerns were that Student still had articulation errors when at home, he did not ask for clarification about hard words, his speech therapy time should not be reduced, his audiologist suggested proposed 60 minutes of speech therapy, he may need a tutor, he "should not be pushed through," even on small concepts, and Parents were willing to help him progress at home. Mother also addressed that Parents would have Student go to summer school if he would have the teacher that he would have in 3rd grade, although Parents did "not want to pick a teacher for him, but hopes he does not have a strict teacher or one who yells." Ex P-1 at 222.

51. The May 2, 2018 IEP team concluded that there would be an in service for staff regarding the hearing aids, FM system and accommodations and modification. Student had one IEP goal regarding maintenance of intelligible speech. Accommodations included preferential seating, use of the personal FM system at all times, checking for understanding, vocabulary sent home for pre-teaching, and the speech language pathologist at the school (Collins) would perform a hearing aid/FM check each morning. There were no other special education services to be provided. At the May 2018 IEP meeting, Parents did not raise any concerns with the progress of Student. They did not suggest that he needed a deaf educator or that he needed goals in the area of language, social skills or use of technology other than the Lawson report. The accommodations stayed the same; however, the minutes of speech therapy were reduced.

52. Mother wanted to plan and determine when Student should be taken out of class as a result of the change from 100 minutes.

53. The District provided an NOA to Parents on May 2, 2018.

54. Sometime after May 18, 2018, the District was provided a letter from Gornal and Lawson that indicated Student had areas of concern including: recalling sentences, formulating sentences, word classes/word associations, labeling objects and expressive vocabulary, sound errors during connected speech and self-advocacy. Therefore, they recommended that Student receive speech therapy 60 minutes per week. They indicated that “while [Student’s] skills have improved and often were within normal limits for his age, he struggled with higher level language skills.” Ex R-1.

55. In May 2018, Collins reviewed information from Lawson, reviewed Student’s services, and determined that Student was at or above grade level. Collins did not want to dismiss Student from services because she wanted to see how well he retained information over the summer.

56. On May 22, 2018, Parents e-mailed Chambers and asked for another meeting to make changes to Student’s IEP. Parents later e-mailed back on May 23, 2018 that an appointment had been set up with more testing for Student “with a friend of mine in Des Moines on June 7th and report will take 1-2 weeks after that to receive.” Parents still requested a meeting.

Summer of 2018

57. Culver evaluated Student at Parents’ request on June 7, 2018. A Test of Auditory Processing Skills-3 (TAPS-3) was completed. Overall, Student scored within the average range. When subtests were grouped together to determine various indexes, the scores were in the average range. Some subtests were low or very below average, but within normal limits. Student was given the Test of Written Language 4 (TOWL-4). Student scored average in logical sentences and sentence combining and below average in contextual conventions and story composition. Student performed at the 34 percentile with the Woodcock Reading Mastery Test (WRMT-III). The examiner recorded a speech and language sample and assessed Student’s

conversational speech and language skills. Culver concluded that while his overall abilities were scattered and the composite score fell within the normal range: “considering his hearing impairment these scattered skills should not be overlooked as they may be risk factors for *future regression or plateaued abilities academically, especially as academic requirements become more complex*. The scattered skills *may also be an indication that some important foundational skills have not been developed*.” Ex. 4 at 4-19 (emphasis added). Culver recommended a deaf educator to be part of Student’s IEP team, with two 30-minute sessions in speech and language services.

58. The TOWL-4 test cannot be relied upon as an indicator because the test was normed for kids 9-12 and Student was only 8 and a half. Thus, it is only informational and not a diagnostic tool given Student’s age because the test assesses skills that students within that age range are assumed to have been introduced. In the summer of 2018, Student had completed 2nd grade and had not yet started 3rd grade.

59. Culver had been a friend of Mother for 10 years as fellow professionals and chose the testing based on what Mother told her were concerns—auditory processing and expressive writing. In performing the testing, Culver did not use Student’s personal FM system at all, and Student only had his hearing aids. Culver did no classroom observation, nor did she gather any other evaluations or information.

60. In the summer of 2018, Wedemeier started to work with Student at Mother’s request because Mother “noticed that he needed some extra help from a person who teaches children with hearing loss.” Tr. 170. Wedemeier worked with Student on reading goals (inferencing, main ideas), auditory processing goals with memory, vocabulary goals, and multiple meaning goals. She thinks Student needs pre-teaching as an accommodation, not special education. Student’s goal of self advocacy should be in his IEP. She does not agree that he should be eligible based on math disability instead of hearing impairment because everything

comes from the hearing impairment, and he has signs of auditory processing issues. Her opinion was that Student needs special education for someone with a hearing impairment and to be on the caseload of a deaf educator because that type of teacher can pick up a little more than just special education and help with incidental learning in the classroom. To take a child off an IEP in her experience: “If the child has met everything, and I don’t just look at the goals that – or I don’t just look at their grades; so, no. The child has to be doing – has to have met all of their goals and has to be slightly either above or at grade level with their peers. On their goals, are they doing advocacy? can they keep up with the vocabulary? are they able to do inferencing? how is their reading? how is their writing? how – you have to look at the whole child; you can’t just look at bits and pieces.” Tr. at 189-190. She believed Student needs a math goal, a vocabulary goal and a writing goal. Her work with him shows he is making progress. She has not worked in a public school setting in Missouri and does not know Missouri standards. She did not use the Missouri learning standards with regard to writing. She used the 2018 IEP and goals from that and worked with Student on them. She thought he progressed on the goals. She had no knowledge of student at school and had not observed Student in the classroom.

61. Parents e-mailed Chambers on June 29, 2018 and requested a meeting regarding the evaluations that Parents obtained. Chambers e-mailed back on July 2, 2018, that she was not under contract until August 1 and that the members of the IEP team were not under contract until August 20, 2018, and, therefore, a meeting would have to be set up after that date.

62. Mother contacted the school principal Henshaw and provided a copy of the new information from Culver and Wedemeier to her in June 2018.

63. The first time Parents expressed concern to Chambers was in July 2018 when Mother expressed her concern that Student had gaps and was not able to advocate for himself. Mother did not feel that Student was making progress in the classroom. Mother specifically asked for a deaf educator for weekly and quarterly observation.

64. On July 16, 2018, Chambers met with Mother, even though Chambers was not under contract, and Mother expressed her concerns that Student had gaps and was not able to advocate or comprehend. Mother requested that the District contract with a deaf educator for consultations with staff and to observe on a quarterly basis. Mother requested access to internet at school for the purposes of providing Student with tele therapy. Mother also expressed that the District's former special education coordinator promised her that Student's needs would be taken care of and that she was encouraged to bring Student to the District based on its resources that were available. Mother provided contact information for possible deaf educators and for tele therapy.

65. Parents asked to meet with the school principal (Henshaw) in July 2018.

66. After meeting with Chambers, Parents wrote a thank you e-mail on July 26, 2019 that stated: "Thank you from the bottom of our hearts in trying to help [Student] and going above and beyond. Means a lot." Ex. A-4 at 1795. Parents wrote a similar e-mail to Henshaw: "Thank you so much for everything you have and are doing. It means the world to us. ... You are unique and special and we are so blessed to have you. Thank you for going above and beyond..." *Id.* at 1818.

67. Parents requested another meeting with Henshaw, Chambers, and Gabbert to discuss the upcoming school year and whether there would be updates to Student's plan of service. In particular, Parents wanted to bring a deaf educator that worked with Student over the summer.

68. Chambers consulted with the superintendent to be sure state/federal mandates were being followed and found out in the process that the school could either rely upon Wedemeier or contract again with MDD/HHP, which had Deaf/HH consultation and audiologists to perform various services with contracting school districts.

69. The Multi-District Deaf/Hard of Hearing Program (MDD/HHP) is through the Blue Springs School District. It is a co-op that provides audiologists and deaf educators to 28 school districts in the area that contract for services. They provide support to school districts as needed for students in the district, in-house deaf program, and consulting services for students within each student's district. They also work with clinical audiologists in the area in providing educational services. MDD/HHP consults on IEP and Rehabilitation Act of 1973 (§504) matters. The spectrum of services provided to students is from following students who need no special accommodations and are in the regular education program, §504 students who need accommodations and not direct services, and special education students who do need direct services but have an IEP. Students on IEPs may have the educational diagnosis of hearing impaired or may have other educational diagnoses that are not eligible for a hearing impaired, but have a hearing impairment with another educational diagnosis.

70. On August 14, 2018, Chambers, Mother, and Gabbert met to discuss testing of Student from the summer and services that Parents had arranged for on their own. As a result of that meeting, professional development with MDD/HHP was planned. Parents continued to request a deaf educator, and Chambers felt additional evaluation was needed. The District held an informal meeting on August 14, 2018 with Parents, Chambers, and Gabbert to meet the new classroom teacher and to provide an update about new evaluations of Student. Mother updated the testing that was completed during the summer of 2018. Student had a deaf educator work with him over the summer. Mother provided tips on the use of the Phonak FM system and the issue with background noise. Mother discussed starting a reward system for Student, whether it would be useful to have Phonak training, and the use of closed captioning on TV as well as the accommodations for assemblies. Mother requested attending professional development meetings. Chambers wanted to have an update in testing because Student had never been given an IQ test

or academic achievement testing. The District agreed to order a resource called Visualizing/Verbalizing.

71. Mother specifically requested that the District hold off on speech services while an evaluation was being completed. Mother's request was subsequently confirmed in an e-mail to Chambers on August 16, 2018. Because Parents requested that services not be provided, the District had the option to exit Student from the IEP, but chose not to do so. Chambers specifically discussed with Mother that the IEP goals would not be implemented at that time.

72. At the request of Mother, Collins set up a meeting for review of the FM system for Student.

73. On August 20, 2018, Parents requested the third grade supply list and the list of books, levels, and scores from 3rd grade from Gabbert in an e-mail.

2018-2019 School Year (3rd grade)

74. The District contracted with MDD/HHP for the 2018-2019 school year.

75. In August 2018, Lane became involved with Student and the District. She did an in-service to talk about hearing loss and to go through training on the equipment in use at the school. They spoke of things to look for when there are students with hearing loss in a classroom. Lane reviewed the equipment at the school and was impressed that the District provided both the sound field and the FM system. For Student, having both systems provides a safety net in the event the FM system isn't working because both are not necessary with Student's hearing loss.

76. Lane's view was that a listening check should be implemented first thing in the morning and then the rest of the day, and if a student was not responding, the connection could be rechecked or trouble shooting could occur. Generally, routine checks throughout the day are not necessary unless there's a concern that the equipment is not working properly. The FM system brings the sound of the teacher's voice to the student so that it is like she is standing next

to his desk, which helps with the background noise of a classroom. Student should be able to hear others in his classroom because his mixing ratio is set to 50-50, so he should hear classmates through his hearing aids. Lane had no concerns about what the District was doing for Student.

77. Chambers arranged for MDD/HPP and Phonak to meet with staff to update staff on changes with Student's assistive technology.

78. During the 2018-2019 school year, Collins performed the same type of listening checks as the prior year. Collins made arrangements for staff training in August and prepared materials for teachers.

79. On August 20, 2018, the District held a professional development meeting with staff, MDD/HPP personnel, and Mother. Instructional strategies, auditory skills, and communication strategies were all discussed. The FM system and tips were explained to provide all staff with the information necessary to assist Student.

80. It is unusual for Parents to attend school professional development meetings.

81. On August 20, 2018, Collins had the teachers who worked with Student at the District acknowledge that they had read the IEP at the beginning of Student's 3rd grade.

82. On August 23, 2018, the District provided a NOM to Parents for a meeting on September 5, 2018. Mother requested that no meeting be held, with the IEP team conferring instead.

83. On August 23, 2018, Chambers notified MDD/HPP about the RED, and Lane advised that audiological evaluation needed to be added to Student's testing and that MDD/HPP could perform the evaluation free or could summarize the results if done at MEI. Chambers notified Parents that MDD/HPP would be available to give input.

84. On August 22, 2018, Parents e-mailed Collins regarding the HA check, explaining: "I was wrong he needs number 3. One is home, two is noise and that won't sync

with fm. 3 is school and 4 is soccer. I called school and told gabbert. If he's on two it won't work. I'm not for sure how yours work, I have to sync mine to make sure he's hooked up because sometimes it doesn't. Can you please check it, I'm kind of freaking out that he can't hear and isn't saying anything. Please let me know. Sorry, first day jitters. Lol. Thanku." Collins e-mailed back that she performed a check and advised that she would check with Student. Ex. A-4 at 1932.

85. On August 24, 2018, Mother e-mailed Chambers regarding tele therapy scheduling and advised she had corrected the sub on the mute/unmute buttons. Chambers e-mailed back regarding: "We have addressed this situation and please know that no matter how long [Gabbert] is out of the room, the FM system will be used properly." Ex A-4 at 1945. In response, Mother e-mailed: "No worries. I understand. She said miss gabbert went over the fm but it must not have clicked with her. Completely fine." *Id.* Gabbert also responded regarding the timing for tele therapy and that it would be better for Student to miss science and social studies versus reading and writing. Mother replied that the tele therapy would work on a different curriculum of reading/writing and how she hated to have Student miss science and social studies. Gabbert responded to the e-mail on Saturday with the belief that social studies/science time was better for Student than to miss writing, grammar, and spelling. Mother responded to Gabbert: "I'm not trying to be difficult, I just want to be comfortable with our decision. I hate pulling out more than you know because everything is important. If we knew if we had regular deaf education services it would help especially during decisions like this and they could make sure he's not falling behind." *Id.* at 1950. In further response, Gabbert checked with MDD/HPP and both Nesbit and Lane agreed that the best time for pull out would be social studies/science. Chambers also spoke with MDD/HPP and agreed. Mother replied that she had checked with the two who worked with Student over the summer and they told her writing and that she was going to check with the person doing the tele therapy.

86. Mother sent a one page e-mail to Chambers on August 28, 2018:

From: Sent: To: Subject:

[Father's name]@yahoo.com> Tuesday, August 28, 2018 9:54 AM Chambersp@wpsd.net
Good morning!

Good Morning! Just wanted to touch base with you. After looking at schedule again we were wrong. Writing is not an option. 1115 hits during read aloud and lunch. [Father] and I are frustrated that the only option is science and social studies. We both strongly don't want to pull him from there. I did speak with four Deaf educators and two SLP (three of which have or do work with [Student]) and they agreed with writing. [Father] and I discussed our current dilemma at hand which is tele therapy is only available during social studies and science time. We are sticking to the decision to see what tele therapy can do for [Student]'s reading, writing and speech skills. We are now trying to figure out how we can supplement that day of science/ss. He will be there for 15-20 min before being pulled. We have discussed how much we are willing to work with who the school hires to help [Student] s1.1eh as Mdd/hpp but until they start coming regularly we will be willing to supply our own Deaf educator to help with these decisions and starling to keep an eye on [Student] and his wants and needs. We are in talks with the one who helped out this summer. She's available fridays. I told her this could be short term but we are wanting someone to be there for [Student] until Mdd/hpp can provide. I will keep you in the loop but she could start as early as this Friday. Teletherapy could start as early as Monday, September 10th. Please let me know who or what I need to do to get it set up on the technology end and sign release papers. Also if we need to purchase books.

This is not a personal decision but a parent one and I hope it's viewed as such. Again, we are more than willing to work with who the school decides to get WHEN they get someone to service him. However, since we are making decisions for outside services such as the tele therapy we need help in supplementing what he will be missing and until data meeting and new iep is drafted we don't have anything set up. I'm hoping the Deaf Educator can guide us as parents as what we can do to help him or provide for him in the meantime.

One thought I had that I wanted to nm by you until Mdd/hpp gets involved is the start of the school year observations. I completely support them coming to observe classroom, specials, recess and lunch when they are able. I was wondering if Kayla Collins or yourself could at least observe all classes now justbto make sure teachers arc using equipment properly, seating placement, classroom distractions etc. If this is something the school personal or Mdd/hpp can't provide please let us know so we can arrange our Deaf Educator to do so. I'm always in support of frequent observations but just wondering while we're waiting on them if maybe Kayla could take a look around please? She's still continuing daily checks, correct?

Paula, I want to personally thank you for your ongoing assistance in helps with [Student]'s services. I understand your limited to some extent with Mdd/hpp. Until the school can provide and address [Student]'s issues I hope that the school will accept our help and welcome the skills they have to offer for [Student] with open arms. We are just trying to help [Student] the best we can. We believe in a proactive approach and we are trying to honor that and do our part until we can get Mdd/hpp to be a consistent presence at the school.

Thank you, [Mother's name].

Ex. A-4 at 1955. In response, Chambers advised that since the tele therapy was outside the IEP, it would be up to Parents to decide the time, that any volunteers or other deaf educators had to go through background checks in order to work with Student during the school day, and that MDD/HPP needed updated information: “[Student’s] current evaluation report is not sufficient enough to warrant IEP services and that is why we need to enter into a reevaluation and update any testing.” *Id.* at 1959.

87. A Review of Existing Data (RED) is not required to be held via a meeting. It can be done through collaboration amongst the team in writing, over the phone, or through a meeting.

88. An RED was held on August 28, 2018. Assessments were determined to be needed in the area of hearing, communication skills/speech, communication skills/language, social/emotional, general intelligence, academics, and observation. Chambers e-mailed Parents an NOA, an RED, and Parents Bill of Rights. This was followed up with a hard copy.

89. At the RED meeting on August 28, 2018, Collins discussed having a test of narrative language to find out Student’s skill levels, in particular the OWLS; however, Mother wanted less testing. Parents also preferred a non-verbal IQ test be given.

90. On August 30, 2018, Parents wrote Chambers a five-page letter with corrections, additions, and concerns about the RED. Parents also had several questions about the testing and wanted specific information regarding the tests to be administered.

91. On August 31, Chambers responded with revisions to the RED and the offer to meet as a team as scheduled for September 5, 2018.

92. On August 31, 2018, Parents sent Chambers another one page e-mail regarding the setup for tele therapy and the books that were ordered. Parents also advised that Student told her that Collins was doing daily HA and FM checks. Parents continued to question the use of their outside D/HH educator and/or volunteers. Parents expressed they did not understand why

MDD/HPP could not do observations until the testing was completed and asked questions about why the current evaluation was not sufficient enough. Mother later e-mailed back again stating that she really appreciated everything done for Student, that she was just trying to understand the District's policies, and that she really appreciated Chambers, thanking her from the bottom of her heart.

93. Mother wanted tele therapy with Bird to be set up for school during Student's reading and writing time. She asked for input from Student's teacher, Gabbert, about the timing. Gabbert's opinion was that the tele therapy time would be better during social studies/science. Mother disagreed and sought input from multiple other sources. It was clear Mother wanted to determine the timing for tele therapy during the school day.

94. The District agreed to allow the tele therapy that Student was receiving through Parent's arrangements to take place at school. As a result, Parents signed an agreement for non-school related activities on September 10, 2018, and agreed that this was not a violation of FAPE for Student to be missing regular classroom time while he was attending tele therapy by Parent choice and agreed this was not a denial of FAPE that could be pursued in the future. Tele therapy at the school occurred on September 10, October 1, and October 22, 2018.

95. At the hearing, Mother felt that she only had a connection with Gabbert for about a week until tele therapy was arranged and the decision had to be made as to whether Student should miss out on writing or science and social studies. Gabbert chose science and social studies because Student would not be assessed over them or graded. In contrast, Mother's e-mail on August 31, 2018 stated: "I just wanted to let you know that disagreeing with me does not cause hard feelings and I hope it doesn't with you either. Even if we disagree I still think you are the best teacher For [sic] him." Ex. A-4 at 1962.

96. Collins continued to do the HA checks (August 31 e-mail to teacher). Collins checked with the teachers regarding any issues.

97. On September 4, 2018, Collins shared teacher tips from a newsletter from the Multi-District Deaf/Hard of Hearing Program with Student's teachers.

98. The IEP team and Parents met on September 5, 2018 to discuss the RED. Various testing options were discussed. The IEP team agreed on additional testing in the same areas previously determined, with specific tests determined for some areas. Mother shared concerns including obtaining an advocacy book, pre-teaching of vocabulary, after school tutoring, and not liking pull-outs of Student for special education services. Mother wanted contact information for MDD/HPP. Parents and the IEP team agreed that a third party would perform the testing. Parents consented to the testing on September 14, 2018; however, Parents put restrictions or limitations on the evaluations to be conducted. In particular, Parents did not want Collins conducting the language testing and specifically did not want the OWLS (Oral Written Language test) to be administered.

99. It is the District's responsibility to evaluate Student.

100. When Parents place limitations on their consent, the District is not required at that point to proceed with an evaluation; however, the District did so with Student to try to obtain more information.

101. After the September 5, 2018 meeting, Mother e-mailed Gabbert and Chambers with her thanks for supporting Student. Mother also e-mailed Chambers regarding her concerns that the RED report included that Student did not advocate for himself with the FM to sub and teacher at the beginning of the year, that she observed at track day last May that Student wasn't understanding until Chapman went over to help him, and that Student had not heard his name on the intercom the prior year and that this supported a lack of advocacy. Chambers replied that she would add the concerns and also advised about the status of testing.

102. On September 24, 2018, Collins discovered that Student's hearing aids did not automatically sync to the FM and e-mailed Parents asking if they had permission to contact Student's audiologist directly. In response, Mother wrote:

Thank you for the update. Yes, I signed the hipaa form for paula if you need to contact audiology that is fine. Whatever helps [Student]. Thank you for being proactive about this as I've been concerned. [Student] doesn't report well for fm at soccer so I have to do the quiet word check to verify. The issue (I think) when the fm is on it sounds exactly the same. It's so natural. So for [Student] he doesn't understand why he can hear the teacher/coach so well when they are so far away because their voice is equal to surroundings so it sounds natural in the fact it sounds like people are right next to him. Therefore hard for him to report because of how natural it all is. Also, when people ask him, "can u hear me?" He says yes even if he's hearing from hearing aids because he can't seem to tell the difference. I just notice how much when Lisa did demo at school. That's why for me, the word/direction/phrase test seems to help. For me, doing the quiet test away from his hearing aid field is how I truly know. Also, I know they said that when you turn fm on it's suppose to automatically sync if he's in right program but in my experience with him and our fm that is not the case. I have to sync it and sometimes it doesn't want to sync. I've had problems lately with it syncing but I usually have him change his batteries(if ha batteries are not strong enough we have problems) and that seems to help. ldk if paula relayed to you but the one day we had tele therapy Richard and I had a heck of a Time getting it to sync and it was in the right ear.

Thank you for addressing this and reassuring me that you are working on it.

[Mother]

Ex. A-4 at 1998. Collins continued to trouble shoot the issue by calling the manufacturer and by checking the FM with the stethoscope checks more often. Collins always found that Student was connected to the FM.

103. On September 26, 2018, Collins e-mailed staff a reminder to use closed captioning for videos for Student.

104. On September 26, 2018, the problems with Student's HA was again addressed between Mother and Chambers:

Thanku for everything. I do appreciate it. I did speak with [Student]'s Audiologist and she said she would be willing to help and will probably reach out. I told her to contact you if she does and then after she speaks with you she could also speak with Kayla. Fm systems are very difficult and are constantly a puzzle. She even mentioned how she deals with them all the time and still has difficulties troubleshooting. She is very knowledgeable. I'm just trying to help and she knows [Student] personally as well. I'm fine with Mdd/hpp as well. Jamie is just another resource who was offering to reach out to solve the problem as well. Didn't want you to get hit blindsided if she calls but she has a lot more valuable info regarding fm and checks. Im just offering our resource to you guys to help out.

I'm just trying to figure this out for [Student]. Not trying to overstep, my only thought is [Student]. Thank you for letting me know and keeping me updated.
[Mother]

Chambers wrote:

Yes, we have notified all staff of the difficulties that we have been experiencing. Kayla has also been checking his hearing aids and FM system multiple times throughout the day. I believe she checked him 3 times today because she was so concerned. To ease your mind, she goes out into the hallway and whispers a direction to him inside of the classroom and he was doing fine with that today, So the good news is...if there is a problem, he is not doing without either the FM or hearing aids for a long period of time. On another note, I did hear back from Amy at MDD/HHP about doing a training and she could only do the 28th during the afternoon this week. That won't work since we dismiss at 1:15. She is looking at her calendar to see what else she has available within the next week. Kayla had trouble reaching Lisa with Phonak, but finally got ahold of another representative who was able to give her suggestions today. I am requesting that Kayla ask Phonak for a full training again when she calls back tomorrow. I¹ lease know that we are doing everything that we can to correct this in a timely manner. Thanks, Paula Chambers Director of Special Services West Platte R-IJph. 816- 354-7703

Mother wrote:

On Wed, Sep 26, 2018 at 8:57 AM [Father's name]<@yahoo.com>

wrote:
Good

morning! I was just touching base to see where we are on assuring [Student]'s medical equipment is being use effectively al school throughout the entire day. I know you were out of the school Monday so I waited til today. I know Kayla has contacted Lisa and waiting back. I know she had difficulties with the left aid syncing to fm yesterday. I gave her permission to discuss with our audiologist. What ever helps [Student] and resolves this issue quickly. You are allowed as well. You mentioned speaking with Mdd/hpp, but neve l· received an update on staff training. Also they are trained with

,lh equipment. [Student] notified me that besides Kayla's morning checks and stethoscope checks that there has not been any quick checks amongst classroom nor special teachers.

We used our Roger fm pen on sat, Sunday, Monday evening without any issues other than [Student] repmtng incorrectly. As I explained to Kayla the ftn sounds very natural to a hearing aid wearer. Sounds just like a hearing aid. It is hard for him to determined just from speaking into the fm with his hearing aids the difference. When Lisa came and did a demo you could hear the way [Student] hears and it was obvious to everyone. It's a very natural sound that is difficult to determine what is hearing aids and what is ftn. He seems to only be able to tell me when I move away from his hearing aids and can repeat what I whispered. It is vely common for teachers to do quick tests with ftn throughout the day. [Student] has two buttons on his HA that he can accide:ntly push program button instead of volume button. Also passing fm to special teachers, buttons can be accidently pushed.

I know the school views me as mom. As a parent and part of the team I'm expressing my experience and knowledge as a lifelong hearing aid wearer and as someone who professionally deals with hearing aid, fm and cochlear implants.

This is [Student]'s lifeline. His technology is the most important service we can provide to [Student] inside and out of the school. I'm just trying to resolve and assure all people that have direct access to [Student] have awareness and proper training on the equipment.

Thank you.

Ex. A-4 at 2002-03.

105. Gabbert sent home vocabulary from books, newsletters, and notes in Student's daily planner. Gabbert generally wrote lesson plans on Thursdays, so she generally sent home vocabulary on Fridays.

106. Gabbert also provided morning tutoring for Student on Tuesday mornings; however, Student failed to be on time. Gabbert provided the tutoring at the request of Parents and because she wanted to see Student succeed.

107. Gabbert routinely sent vocabulary and upcoming work to Parents. Mother asked for vocabulary on October 17, 2018 in an e-mail. Gabbert told Mother that there was no vocabulary and that the concepts were historical events in Missouri for social students. Mother asked for more specificity and received Gabbert's comment back:

There is no vocabulary that goes with these concepts as they are specifically just historical events that occurred in Missouri. The

best suggestion that I can give would be to check with the library for books about this concepts [sic]. Again keep in mind that we have NO set curriculum for Social Studies due to the changing standards from the state of Missouri. Please understand that we are doing our very best to follow the accommodations of [Student's] IEP. I do ask however that you please keep in mind that we, all three third grade teachers, do have other students, families, and personal lives, not to mention requirements from the school that we must keep us with as well. I do not want to be rude but I feel like we are being held to an extremely high standard of getting this information to you and that is unrealistic at times. We are not perfect, nor will we try to be. Thank you for your understanding.

Ex. 10 at 572. Parents forwarded the e-mail to the principal.

108. Gabbert's assessment of Student's third grade performance initially was that Student was within the normal range of where a 3rd grader should be performing both academically and socially.

109. Gabbert interacted with Mother as she dropped Student off. Gabbert declined providing her personal cell phone number to Parents and preferred to communicate by school e-mail or by the student's assignment notebook that the students take back and forth from school.

110. Gabbert received training multiple times from MDD/HHP, Collins, and MEI.

111. Gabbert arranged for the right cords for the social studies and science room so that Student could have everything set up for his FM system. Gabbert also made sure that the FM system went to the specials (social studies and science) teachers. She also worked with Student to be sure the iPod app worked and that he had it with him to check.

112. Gabbert did not feel that Student's hearing impairment affected his classroom education at all. Gabbert witnessed Student self-advocating with battery changes, repeating questions, and telling her when he did not understand. Gabbert experienced Student's advocacy skills improving throughout the year.

113. Gabbert attempted to assist with announcements by obtaining e-mails or by having students repeat the information.

114. Gabbert had one emergency situation where she forgot to mute her FM to deal with a peanut allergy for another student at the Halloween party so Student heard her instead of the parent providing game instructions. This was upsetting for Student.

115. In Gabbert's class, Student performed at 4th grade level in STAR reading and in the 3rd grade 8th month level in STAR math. The Accelerated Reader tests showed consistent 90-100%, indicating Student was comprehending what he read.

116. Gabbert had some limited times when Student appeared to daydream or to turn a marker and washrag for a dry erase board into a "Captain Underpants" character from a book that happened during a week. Gabbert redirected, but did inform Parents of what she saw. Gabbert did not think this was a hearing related incident.

117. Gabbert disagreed with Wedemeier on Student's writing ability because Student was "spot on for what my expectations for my third grade class were." Tr. at 1479. Gabbert used the Missouri standards on writing and the Missouri Learning standards for the benchmarks set for the state for students in grades K-5. The writing samples illustrate that Student was writing at a 3rd grade level according to the Missouri Learning Standards.

118. Gabbert witnessed incidental learning, good speech articulation and intelligibility, and adequate progress from Student during 3rd grade. He learned new vocabulary with the other students. Student played well with his peers at recess, including four square.

119. Gabbert tutored Student once a week on Tuesday mornings from 7:20 to 7:45 a.m. She was asked by the principal and Parents to perform this task.

120. Gabbert documented when she would check if Student's Roger was connected to his hearing aids.

121. During 2017 and up through September 20, 2018, Student had routine visits with MEI to address programming and adjustment of hearing aids, obtaining new hearing aids, adjustments for wind during soccer practice, program updates, and general checks.

122. On October 3, 2018, MDD/HPP met with District staff and Mother to go over how to check the hearing aid system and FM system. Lane reviewed the monitoring notebook of Collins and thought that Collins was performing the listening checks.

123. On October 8, 2018, Collins e-mailed staff and reminded them to let her know if there were any concerns about syncing Student's FM system and hearing aids.

124. On October 12, 2018, Student's teachers for specials received training on Student's hearing aid checks and FM system.

125. Chambers and Parents met on October 17, 2018 so Parents could express their concerns. They discussed the sufficiency of the vocabulary being sent home.

126. Cornelius testified about basketball from 2nd to 3rd grade. Student would sit outside of the group when he worked with the group. He used the wireless FM system. Mother would notice before he would. Cornelius had to prompt Student to get confirmation that he was understanding. Student could follow directions, but if it was more intricate, like a play, then Cornelius would have to coax a reaction.

127. Nesbitt typically sees special education students who range from students several years behind in academics and language to students who just need a consultation. MDD/HHP used a rubric to determine Student's qualifications for services. Nesbitt determined Student was in the range that would be a consult, which was included under the District's contract with MDD/HHP. Student did not require a deaf educator. Student had a documented hearing loss, but did not have an adverse educational impact. In general, Student was learning in the school environment in a manner commensurate with his peers. Therefore, the least restrictive environment (LRE) for Student would be the classroom. Nesbitt observed in the class on October 3, 2018, and reviewed scores on Student's evaluations and did not see the need for Student to have special education services. Nesbitt thought a verbal IQ test would be important for Student to test his language, listening, and speaking skills.

128. During the fall of 2018, Collins did not provide speech services from the IEP goals to Student because Mother requested that Student not have services. The gap in services was from May 2018 to November 2018, and even with the gap, Student had no regression and had highly intelligible articulation. This confirmed Collins' opinion that Student was ready for dismissal from speech services. Student again met all of his goals on his existing IEP. Collins' opinion was that Student was progressing and his skills were at or higher than his peers.

129. On October 17, 2018, Parents requested a meeting and met with Chambers to discuss their concerns over lack of professional development training being scheduled for staff; behaviors of staff in instituting hearing aid checks and FM system checks, particularly Gabbert; Mother's request to have cell phone numbers for teachers; Parents' unhappiness with tutoring by Gabbert; lack of vocabulary being sent home timely and for specials; a loss of trust with Collins and Gabbert; and the District staff failed to understand that "deaf brains are different." Ex. NN-1.

130. Govenal e-mailed Chambers on October 19, 2018 regarding providing specific training for Student's system. Ex. A-4 at 2070.

131. On October 22, 2018, Mother e-mailed Chambers with concerns about the consent for testing and wanting to know specific tests that would be given. Mother also had questions about the in-service training that was in the process of being scheduled for Student's equipment. Finally, Mother shared an incident where a specials teacher forgot to turn on the FM equipment and how she used it as a teachable moment for Student to better self-advocate. Chambers replied with concerns from MDD/HHP about the need for a general intelligence test that was not non-verbal. Chambers also provided eligibility dates for meetings in November.

132. On October 25, 2018, Chambers e-mailed Mother and included the unofficial test results from the evaluations. She noted Parents gave consent to testing generally, by signing the NOA, and this was not for specific tests. Chambers confirmed the protocols being used by the

District since November 2017 for hearing aid checks and FM checks. Chambers again asked for eligibility meeting dates.

133. Chambers coordinated with Govenal via October 26, 2018 e-mails in the setting up of a training session for teachers and others who work with Student to troubleshoot his hearing aids and FM system including providing a checklist and information on how the system worked.

134. Even after the default programming changes had been made, Collins' hearing check on October 12, 2018 revealed that she had to manually change the program in order to get the hearing aids synced to the FM. Collins had also observed Student adjust the program himself.

135. On October 30 and November 5, 2018, the District sent Parents an NOM for November 5 and 13 respectively. The District also sent e-mails on October 22 and November 5 and 7 and hand delivered a copy on November 8, 2018. Parents did not confirm any meeting. Mother agreed to waive her timeline for notice of meeting for the November 5, 2018 meeting.

136. On November 1, 2018, the District conducted hearing aid and FM training for its staff. The training was facilitated by Govenal and Lawson from MEI. Govenal trained the staff that hearing aids are never programmed perfectly due to fluctuations in middle ear pathology that is ever changing. It is usually harder for Student later in the day because Student gets tired following all of the conversations and from listening and processing. Therefore, at the end of the day, this can appear like daydreaming or inattention. As an example for troubleshooting, Govenal also stated: "So last one, I know this has come up, I know [Student] is a daydreamer – *he daydreams in our sessions too*, so you know during classroom activity he appears to be daydreaming and not completing activity, so what could be going on?" Staff correctly pointed out that it could be auditory fatigue, equipment issues, tiredness from listening all day, and could

be simply daydreaming. Governal also told staff during training that they “have a great protocol in place” and the “protocols are really well written.”

137. Mother had communicated with the superintendent twice and to the administration (including the school board) regarding having training for staff. Finally, Mother said Chambers did not allow her to be at the November 1, 2018 in-service training because she did not ask for prior written notification to be inside the in-service, which was being required by legal counsel. Based upon an exhibit that appeared to be staff notes from the presentation, Mother concluded that the in-service was being held to appease and not to focus on learning how to use the equipment.⁶

138. On November 8, 2018, Father e-mailed Chambers advising that an attorney⁷ had been hired and that the District should communicate directly with the attorney. The District’s attorney sent a copy of the current IEP and a draft of the evaluation report to Parents’ attorney.

139. Before the November 13, 2018 eligibility meeting, Collins determined that in her personal opinion, Student was not eligible for special education.

140. An evaluation must be completed within 60 days after consent from Parents is obtained. The last day to hold the eligibility meeting was November 13, 2018.

141. The purposes of an eligibility meeting are to consider whether eligibility should continue, be modified, or be terminated or if the educational diagnosis has changed.

142. On November 13, 2018, the District held an approximately 10-15 minute eligibility meeting via telephone. Parents and their attorney attended. The IEP team discussed that eligibility for Student was in the area of specific learning disability in mathematical calculations.

⁶ Mother based this on Petitioner’s Exhibit 14, which was not offered into evidence. Routinely with most of Parents’ witnesses on direct, counsel asked questions about an exhibit that was not admitted at that time or later. The District failed to object to the testimony.

⁷ The attorney was not the attorney involved in this case.

143. Parents had input into the November 13, 2018 change in eligibility by hiring their attorney and having her participate in discussions and review of the evaluation report with the District's attorney. It is not unreasonable for the District to rely on Parents' attorney as to representations and agreements. Since Parents had specifically asked the District to communicate directly with the attorney and the attorney represented Parents, the District and its attorney reasonably relied on the representations of counsel.

144. Chambers had concerns that Student no longer qualified for hearing impairment and that he barely qualified for math calculation based on his progress in the classroom. She agreed to qualify Student in math calculation, which Student barely met, in order to address the accommodations that Student needed in the classroom and to provide additional time to develop an IEP and meet Parents' concerns.

145. Nesbitt thought that Wedemeier's assessments of Student's skills in writing was really just typical for 3rd grade students generally because 3rd grade is really where students learn to write and develop skills on the basic elements of writing. Nesbitt's opinion was that the supplemental services provided by Parents certainly assisted Student, but Student consistently achieved both before and after those services. Therefore, those services did not produce progression.

146. Nesbitt found that Student's math calculation skills were atypical for students with hearing loss. His strengths were language and reading. Nesbitt explained that hearing loss does not discriminate, and, therefore, because Student was not experiencing problems across the board with all other areas, a deficit in math alone indicated to her that Student's math calculation was not caused by his hearing loss.

147. Chambers saw nothing in the evaluation report to be considered at the December 6, 2018 IEP meeting that would qualify Student for special education services under the category of hearing impairment.

148. On November 13, 2018, the District sent Parents an NOA that stated: “The district proposes to change [Student’s] eligibility for special services to Specific Learning Disability in the area of Math Calculation from Hard of Hearing/Deafness.” Ex. XX-1. At the same time, the District sent Parents a NOM for December 6, 2018 to review/revise the IEP.

149. On November 14, 2018, Parents’ attorney shared with the District’s attorney that Parents had significant concerns over changing Student’s eligibility. On November 21, 2018, the District’s attorney sent Parents’ attorney a letter outlining the initial agreement with Parents’ attorney regarding the eligibility change and the substantial decline in the relationship between Parents and the District including the contact by the Student’s clinical providers directly with MDDHPP and what was perceived by the District as threatening legal action.

150. On November 19, 2018, Student’s MEI provider Megan Lawson, speech language pathologist, wrote a letter advocating services for Student that stated: “While he has made good progress in the past, and some standardized tests demonstrate he is performing within normal limits in many areas, he is still behind in areas where he should be catching up.” For the first time, Lawson stated Student needed a “deaf educator.” The recommendations outlined more specific goals than previously provided. Lawson stated “[Student] is extremely capable, but may need more help than a child without hearing loss, even if he ‘looks’ like he is doing well.” Ex. E-3 at 1377.

151. On November 20, 2018, Student’s MEI provider, audiologist Jamie Govenal, wrote a letter also advocating services for Student in regard to how Student’s hearing loss impacts him academically. She opined that Student had decoding and auditory/working memory deficits. Govenal specifically listed math facts, math word problems, new math concepts and inferencing could be issues as a result. Because Student will always have hearing loss, Govenal concluded that his diagnosis of being hearing impaired should never change and should be

acknowledged on the IEP. She provided recommendations on how to make sure his equipment was working at school.

152. Between the April 2018 report from Lawson and the November 20, 2018 letter from Lawson, Lawson did not conduct any other evaluation of Student. Based on the April 2018 evaluation, Student would not have qualified for deaf/hard of hearing.

153. It is out of Governal's scope to diagnose a math disability. Governal did not have significant enough concerns about Student's hearing aids to run a data logging report before September 2018. The hearing aids control what program Student is in.

154. The District held an IEP meeting to discuss the evaluation and potential changes to the IEP on December 6, 2018. Parents attended with their attorney.⁸ The District's attorney also attended. The meeting ran from 10:00 a.m. until almost 1:00 p.m. Chambers took notes and provided the notes to Parents via an e-mail on December 14, 2018, with the information that the request for an IEE was premature because the District had not completed its evaluation. Parents corrected the notes and provided them back to the District. Wedemeier felt that part of the minutes reflected what she witnessed and part did not coincide – enough to make a change to the minutes. She was not specific about what did not coincide. The IEP team concluded that additional evaluations were needed.

155. Stark testified based on her professional training, opinion, and from research that she believed gaps that Student had on testing would get wider as he got older. She identified “modest” discrepancies in scores that related to hearing in her opinion.

156. The District uses the discrepancy model so it looks for a discrepancy between performance or achievement and IQ. The only academic area that Student qualified for and met the required discrepancy for eligibility was mathematics.

⁸ Parents' attorney was the attorney involved in this case.

157. A school district has 30 days after an eligibility determination to complete an IEP.

158. On September 10, 2018, Jaimi Bird, M.A. CCC-SLP (speech language pathologist) provided goals for Student's tele therapy, and quarterly progress on these goals were reported on December 10, 2018. Student met Quarterly Goal 2 to improve verbal expression and language organization, met Goal 3 to identify and name nouns, verbs and adjectives; met most of his word association task goals; and continued to work on his improvement of written language Goal 5.

159. In December 2018, some of the areas indicated by Parents as areas where Student was behind were actually areas that were still being introduced or would be introduced in the spring of 3rd grade, such as inferencing, figurative language, etc. Therefore, if outside services found Student to be insufficient in those areas, it was not really a measure of Student's abilities.

160. At the December 6, 2018 IEP meeting, Parents and the District agreed that additional testing needed to take place. Lane participated in the IEP meeting, and there was not any progress on the completion of the IEP because of the additional testing that was needed. Parents requested eligibility to be changed, but it was not changed during that meeting. Mother did not feel that there was parent participation because she thought she was not heard. The team did not formulate a new IEP and became bogged down in eligibility, not the evaluation.

161. Parents actively participated in all IEP meetings except the March 27, 2019 IEP meeting.

162. On December 13, 2018, the District sent Parents an NOA with a RED. The action to be taken was a re-evaluation with assessment in communication skills/language, using the Oral and Written Language 2nd Edition (OWLS 2); general intelligence using the Wechsler Intelligence Scale for Children; and academic using the Wechsler Individual Achievement Test. A consent for Parents' signatures was included.

163. On December 14, 2018, Gabbert e-mailed Mother regarding clarification on vocabulary pre-teaching and that it was being discussed in class, and that Student was also working with her in the tutoring sessions on the upcoming vocabulary. She stated: “[Student] has done well with all the words and has given some great examples of ways to show what those words mean.” In response, Mother e-mailed that she expected to receive vocabulary in advance because it was Student’s IEP goal, and further: “I would expect [Student] to receive the same education as all the other children regardless whether you assess or not. If the school’s goal is to only ‘expose’ the kids in the classroom to vocabulary I hope the school would also recognize that [Student] is Hearing Impaired unlike all the other children in his class. Therefore, the need for an IEP and such accommodations are needed to assure [Student] is getting the same appropriate education as the other children while at school in ALL classrooms.” Ex. A-4 at 2162.

164. On January 9, 2019 in e-mails between Lawson and Mother, Mother expressed her frustration with not hearing from Resound regarding information and reports that were requested.

165. On January 16, 2019, Chambers e-mailed Parents that she still needed parental consent for testing and a NOM for January 30, 2019 for the purposes of review of the IEP. Parents asked that the meeting be rescheduled. The District made an attempt to reschedule. The District provided Parents with information regarding obtaining an evaluation on their own if they desired.

166. On January 16, 2019, there was not a completion of the District evaluation that would have entitled Parents to an IEE. The District agreed in the interests of moving forward to allow Parents to obtain an IEE.

167. On January 24, 2019, Chambers e-mailed Parents with clarification that the purpose of the January 30, 2019 meeting was to review the IEP and make whatever changes were needed as a result of the evaluations and the change in eligibility. Chambers continued to

request permission to test. Chambers included an NOA Refused since Parents had not given consent to further evaluation. The District further offered to pay for an IEE for Parents to obtain evaluations on their own so long as they complied with District policy for IEEs.

168. The District scheduled another IEP meeting to review/revise the IEP for February 5, 2019, and sent Parents a NOM on January 25, 2019.

169. Chambers continued to send dates to Parents that would work in February for an IEP meeting.

170. Chambers e-mailed Parents on January 29, 2019 regarding picking up a copy of Student's educational file, which was 685 pages. Chambers also provided NOAs, meeting minutes, and professional development videos (which were provided). Chambers sent an additional e-mail that clarified the NOA sent after the November 13, 2018 eligibility meeting. When Parents believed documents were omitted from the educational file, Chambers immediately responded.

171. On January 31, 2019, the District e-mailed a response to Parents' request to tape record IEP meetings for Student for the purpose of ensuring people were telling the truth and to accommodate a hearing impairment of Parents. The District agreed to record and provide audio/visual recording of future IEP meetings with access for Parents.

172. Student continued to have routine visits and equipment checks at MEI from February 4, 2019-July 31, 2019.

173. On February 4, 2019, Parents filed a Child Complaint with the Department of Elementary and Secondary Education.

174. On February 5, 2019, the District scheduled another IEP meeting to review/revise the IEP for February 8, 2019 and sent Parents a NOM on the same date. Parents waived the notification and indicated that they would attend. Parents were unable to attend due to illness.

175. On February 10, 2019, the District scheduled another IEP meeting to review/revise the IEP for February 20, 2019. The District provided the option of having a facilitated IEP meeting. Chambers e-mailed Parents on February 10, 2019 to provide alternatives to meeting in person because the District had been trying to conduct an IEP meeting for Student since November 2018. Parents signed the facilitated request and asked for the meeting to be recorded for their accommodation, stated that they would not waive pending child complaints, and would have counsel present. The meeting was rescheduled to March 6, 2019, and the District sent a NOM to Parents on February 22, 2019. The District shared the agenda for the meeting with Parents. A draft of the prior IEP was shared with the telephone participants.

176. Parents communicated via e-mails with Dr. Jordan from February 6, 2019-February 19, 2019 regarding the appointments. On February 25 and 28, 2019, Jordan e-mailed Parents regarding the report and payments. Jordan e-mailed clarifications on February 28, 2019 to Parents: “And while I appreciated the background information you gave, I had no intention of calling all the people you listed on the release, other than Samara for clarification of the case. In your time frame of trying to get this done so quickly, I simply do not have time.” Jordan also clarified that if consent was withdrawn to send a copy of the report to the school, then Parents would be fully responsible for the payment of the IEE. Jordan allowed Parents to review the report and make edits before it was sent to the school, but not as to the substance of the report. Jordan shared a draft of the report with Parents on March 1, 2019. Mother provided remarks and edits to Jordan who incorporated some of the edits in her report. The District received Jordan’s report on March 4, 2019.

177. On February 14 and 22 2019, Jordan engaged in the IEE. Jordan administered a clinical interview with Mother, a clinical interview with Student, a WISC-V with selected subtests, a Test of Nonverbal Intelligence (TONI 4), OWLS II, and a CELF-5. On Mother’s clinical interview, Jordan noted that Student had red flags in 2nd grade about reading, writing

and math. Mother reported that Student initially had a hearing-impaired designation, but now only has one speech goal and that it was inadequate. Mother expressed concern about Student self-advocating. She noted that Student receives tele therapy and was working privately with an auditory oral deaf educator. Mother reported that Student struggles with reading, his word memory is low, and his reading vocabulary is weak. He has problems with solving word problems and basic math facts. He struggles with social language and does not understand jokes/humor. She told Jordan that he is “not learning the way things are now.” Mother reported that Student was easily frustrated, had slow processing, and that his teacher has expressed concern that he is daydreaming in class. On the Student clinical interview, Jordan noted: “[Student] appeared to hear and respond to all orally presented information. On a few occasions, he asked for repetition of a question or statement. There were two incidents in which [Student] appeared to mis-hear what the examiner said, with both instances involving the examiner saying nonsense words loud and asking [Student] to repeat those words. The unfamiliarity of these nonsense words appeared to make them more difficult for him to decipher.” Jordan also noted that Student lacked enthusiasm, appeared tearful when presented with certain tasks, and mentioned that his mother was buying him a particular toy as a reward for cooperating with testing. Other behaviors included fiddling with books, papers, and his pencil, and being fidgety. On the WISC-5, Student scored:

Verbal Comprehension	Average
Visual Spatial	Very High
Fluid Reasoning	Average
Working Memory	Average
Processing Speed	Average
FULL SCALE IQ	Average

On the subtest scores, Student had all scores between 8 and 12 or average, except for Fluid Reasoning, Figure Weights, which was a score of 7. On the non-verbal index, Student scored 111 or the high average range and above 77% of children his age. On the TONI -4, Student performed at the 91st percentile in the very high range of non-verbal cognitive ability. On the OWLS II, Student was average in written expression and average in reading comprehension. Jordan also administered the Illinois Test of Psycholinguistic Abilities (ITPA-3) to assess various aspects of language. Student performed in the average range on each subtest except syntactic sentences that included nonsense sentences, which was below average and sight decoding, which was above average. On the CELF-5 Metalinguistic, in the subtests Student scored low in making inferences, average in conversation skills and figurative language, and below average in figurative language. This gave him a total metalinguistic index of low average, a meta-pragmatics index of average, and a meta semantics index of low average. Jordan concluded in her report: “[Student] continues to demonstrate need for special education services as a child with a hearing impairment.” G-2 at 628. Jordan provided recommendations including working with a deaf educator, working with a speech/language therapist, continued use of FM system, preferential seating, academic support, social and pragmatic language skills interventions and strategies, self-advocacy, strategies to improve his reading comprehension, writing strategies, use of keyboarding to assist with writing, and building resiliency. Jordan also recommended monitoring Student’s academic progress if there were future concerns.

178. On March 3, 2019, Collins e-mailed staff regarding what Student’s survey revealed about his hearing and reinforced with staff ways to help Student.

179. DESE obtained a facilitator of the IEP meeting. On March 4, 2019, the DESE facilitator e-mailed Chambers following discussions with Mother. Mother was concerned with the eligibility determination and the child complaint. The facilitator stated: “[Mother] sent me 13 e-mails this weekend with attachments of many documents. One in particular, I would like to

ask you about is the NOA that talks about more testing being done-mom refusing. Mom told me they had more testing done and that was to be covered this Wednesday, so I was just wanting to see what that entailed.” The facilitator shared her caution that she had written in an e-mail to Mother that she could only facilitate IEP meetings and not eligibility meetings. On March 4, 2019, the facilitator stated in an e-mail to Mother that she could not facilitate eligibility meetings, which was on the agenda. Ultimately, the facilitator cancelled the facilitated IEP meeting.

180. On March 5, 2019 Mother requested to change the agenda to have the IEE first, which Chambers rejected since the purpose of the meeting was to complete the IEP.

181. On March 6, 2019, Chambers sent MEI an IEP draft. Chambers provided the IEP team a draft IEP as the discussions progressed during the meeting. Parents specifically objected, stating that they needed accommodations because it was extremely difficult to read and generate thoughts and follow the conversations of the team without review of the draft prior to any meeting. This was the first time that Parents requested this accommodation.

182. On March 6, 2019, the IEP team met, including Parents. The video recording of the IEP meeting illustrated the difficulties Parents and the District faced in constructing an appropriate IEP for Student after there had been a determination as to a change in eligibility category. Parents complained that they never participated in a meeting discussion to determine a change in eligibility and never understood that the educational diagnosis for the IEP was changing from deaf/hard of hearing; however, Parents were represented by counsel at that November meeting and counsel had agreed on Parents’ behalf as to the eligibility change. Ms. Klein represented Parents at the March 6, 2019 meeting. The additional concern of Parents was the failure to understand that the IEP had to be completed in a timely manner, and that the IEE would be reviewed after completion of the IEP. Parents voiced their thoughts that they did not agree that Student was doing a great job in reading and writing. Parents felt the District was not

taking into account new content, Student's reliance on visual skills instead of listening comprehension, and that the team simply failed to understand Student's hearing loss and how it would affect his future. Parents were concerned that the research supports that the "gap gets worse without intervention," and Parents wanted early intervention with a deaf educator being involved. The District pointed out that Parents had asked that there be no speech therapy while Student was being evaluated and so Student had no therapy for the first quarter of fall 2018. Parents were also concerned with Student's conversations with peers. They believed that Student was not interacting, whereas the classroom/recess teacher's assessment was that the Student "does fantastic in conversations with peers" and participated during snowy days in Connect 4 tournaments. The IEP meeting ran for about three hours, and the IEP was not completed. At the end of the meeting, another IEP meeting was supposed to be scheduled to complete the IEP and review the IEE.

183. It was clear from the IEP meeting that Parents want to dictate how the District carries out the IEP goals, including when and if pull outs from the general education classroom occur, what studies are missed during pull outs, and that Parents are proactive toward possible future failure by Student.

184. Chambers used an IEP draft for the meeting and provided team members with a section at a time. Mother testified that she felt like it was a one-sided conversation and that being given the IEP one page at a time, she felt like she could not participate. However, Mother spoke up several times at the meeting and Parents and their "team" actively participated at least half the time. When Mother complained that she could not read and participate, she was given time to read the IEP pages that were under discussion.

185. On March 8, 2019, the District sent Parents a NOM for March 27, 2019 to review/revise the IEP. Chambers e-mailed Parents a copy of the former IEP as a draft. On March 22, 2019, Parents filed their due process IDEA complaint. Parents e-mailed Chambers on

March 25, 2019, that they did not wish to attend the scheduled meeting on March 27, 2019, and to proceed without them because Student was on “stay put.” Ex. L-2.

186. The IEP team held a meeting on March 27, 2019 without parents. The meeting was audio taped. The team completed reviewing the IEP and set goals and accommodations. The IEP team then reviewed the IEE and added accommodations/modifications suggested by Jordan. Differences between how Student was doing at school and the testing was discussed. The classroom teacher noted that Student’s progress in the Star test showed he was currently reading at a 4.8 level. The classroom teacher also noted that for 3rd grade, Student was writing well. The team unanimously agreed that there should be no change in eligibility based on the IEE by Jordan. The team unanimously agreed that the IEP goals should not change based on Jordan’s report. The team specifically discussed the accommodations/modifications suggested and determined that they would adopt all of them except for a deaf educator. The team noted that Jordan wrote that Student “may” benefit from a deaf educator, but the IEP team felt that there was no data to support the recommendation. The IEP team recommended goals were for in-classroom 100% with services provided there during regular classroom time for math goals. The District issued an NOA on April 3, 2019. The District refused to add deaf education services as requested by parents. The District adopted additional services (accommodations) because consent was not needed. The District rejected deaf education services because there was no data to support difficulty with auditory discrimination skills, and a deaf educator is not required to monitor the use of assistive technology. Further, Student was performing at or above grade level in the classroom. A second NOA was given for the refusal to change in eligibility category from specific learning disability in the area of math calculation to hearing impairment/deafness based upon the re-evaluation in August 2018 and the IEE in February 2019. Chambers e-mailed Parents a copy of the IEP, NOAs, and an audio recording of the meeting as well as handwritten notes.

187. The March 27, 2019 IEP provided more supports and accommodations for Student addressing his hearing loss than the prior IEP. The March 27 IEP was not able to be implemented. Parents filed a due process complaint. Collins continued to serve Student with the same goals from the May 2018 IEP.

188. From February to the end of March, 2019, Gabbert and Collins worked with the Coterie and MDD/HPP so that accommodations could be made for Student to be able to hear the musical and participate in the class field trip.

189. From March 25 to April 2, 2019, Chambers and Jordan e-mailed regarding the IEE. Chambers stated: “Thank you for providing a detailed invoice and for taking time out of your day to discuss the evaluation. I appreciate you sharing your observations about [Student’s] attitude toward his mother and you during the testing. It’s always helpful to know when a student is not happy about being there. Also, *thank you for letting me know that the recommendations you listed first were from information provided by [Student’s] mother and from your interview with her and the others are the standard recommendations you typically include.* That is good information for the team to have in developing [Student’s] IEP. Like I said in our conversation, we typically don’t see recommendations like that on evaluation reports so I appreciate your clarification. (Emphasis added). Ex. A-4 at 2364-2365.

190. DESE found the District was not out of compliance on 9/9 child complaint allegations and issued its decision on April 5, 2019.

191. Sometime prior to April 12, 2019, Parents revoked their consent for MEI to share reports with MDD/HPP.

192. Student met the IEP goal from the 5/2/2018 IEP of maintaining intelligible speech in all academic settings, self-correcting errors, and increasing volume when asked with 80% accuracy over three data days on 3/26/2019 and continued through the end of the school with no

errors in therapy session, no errors of articulation reported, and with Student's self-correction of reading "pitcher" instead of "picture." Ex. T-2.

193. In reference to the discontinuance of the IEP goal regarding "will increase vocabulary skills by achieving at least 80 percent accuracy," Wedemeier disagreed with discontinuing any vocabulary goal for a student that is hearing impaired like Student. Ex. O-3 at 1627. Wedemeier also believed it was necessary for a teacher or SLP to have special certifications or training with deaf/hard of hearing students.

194. Student's 3rd grade May 2019 STAR reading report indicated Student was reading above grade level. He finished 3rd grade with an average of 3.07 and class rank of 7, with mostly 3's and 4's.

195. Lane does not typically see kids with hearing loss also being diagnosed with auditory processing disorder. When there's hearing loss, there is not a clear signal to the brain, so it is hard to say if the hearing loss is causing the difficulties or if there is a brain processing disorder. Lane stated that you program for what is happening with a student now, not for potential future regression.

196. Lane heard from several teachers that Student self-advocates.

197. Based upon MDD/HHP's analysis of Student, Lane's opinion is that Student falls within the spectrum of students who could be best served by a § 504 plan.

198. The least restrictive environment for Student is the regular classroom.

Compensatory Education and Resolution

199. Parents hired Enrichment Therapies and a deaf educator. They bought all of Student's equipment, including hearing aids, the FM system in 1st grade and another FM Roger pen.⁹ Father testified the total bill for Enrichment was almost \$2,000. Parents paid Wedemeier

⁹ Father testified about the costs without objection by the District, based upon Exhibit 13, which from testimony consisted of receipts and periods of service, but Parents failed to admit Exhibit 13 into evidence.

about \$1,300. Parents paid MEI about \$9,500 and about \$12,000 including the Roger pen. Parents requested that the school provide a deaf educator and one-on-one and enrichment therapy. Father believed a fund set up for therapy would be good. Student had ½ -1 hour per week tele therapy; he worked with the deaf educator two hours per week during summer and one hour per week during school year; mother provided Student with pre-teaching about two hours per week. Father estimated that for the entire 3rd grade, there was not pre-teaching going on by District.

200. Father testified that Student's advocacy skills have not increased since 2nd grade and that he was withdrawn from classmates at sporting events and birthday parties. Father agreed Student should be in 4th grade, but feared he may fall behind.

201. Mother requested an auditory verbal or auditory oral deaf educator. Mother disagreed with the math learning disability and believed Student's educational diagnosis should be hearing impaired.

202. Mother testified that Parents' goal for Student is for early intervention and to fill any gaps that form without having Student fail first. Based on the resistance from the District about the vocabulary and Mother's feeling that it was not consistent or in advance, Mother wanted a deaf educator to be able to work with Student to teach.

Use of Assistive Technology

203. Student was very consistent in wearing his hearing aids.

204. In 2016-2017, Student had Oticon hearing aids. In the summer of 2017, Student switched to Phonak hearing aids. In September 2017, Student was in a replacement set of Phonak hearing aids. In November 2017, Student switched to ReSound hearing aids where he had an immediate improvement, but there were still some concerns. With FM sync, most school districts do not want the hearing aids to automatically jump because they want the student's report. In Student's case, Govenal could not figure out how to turn that feature off, and the

ReSound hearing aid would not work that way. It was not known at the time Govenal programmed it that when the FM synced, the hearing aids jumped to the soccer program. From November 2017 through April 2018, Govenal did not run a data logging. There were no concerns that he was not hearing at school, and there was a test that indicated he was hearing 98% with his hearing aids alone.

205. The Phonak Soundfield system was top of the line.

206. For the 2017-2018 school year, Student's hearing aids were set up to be in home mode unless changed, and for the FM mode, they were set to default to soccer program unless changed by Student. Student had control over his buttons, and he was moving himself out of the right program.

207. In 1st grade, Student had a hearing aid system that had an FM. However, it was not programmable, it simply linked to the FM. Between 1st grade and 2nd grade, Student got new hearing aids, and the District purchased the Roger touchscreen. The District had training from the hearing aid company over the summer. Govenal programmed the hearing aids to automatically go into home mode. The school had a mode. Every school day, Student went to Collins, and she checked each hearing aid and synced them to the FM mode for school. The School also had purchased a pass around mic; however, training in the fall of 2018 at the District advised to use the FM system like a microphone for the teacher, that it could be laid down on the table in groups for a 360 effect, and that it could be used like an interview mic and point it to the speaker.

208. Govenal programs the hearing aids. To assist the District, Govenal changed the default program to school mode so that when they are on, it automatically goes into school mode.

209. Collins routinely performed the hearing checks in 2nd and 3rd grade for Student and set the FM system. As the system was used during the day, the teachers were trained to do quick checks to make sure it was working. Collins and Chapman went to Mother with concerns

about Student being able to hear the intercom, with background noise, and in the performing arts center.

210. In May 2018 at the time of the IEP, Collins had no information about data logging.

211. On September 21, 2018, MEI downloaded information from Student's hearing aid system and found that there was an average use time per day of five hours since November 8, 2017 and that most use reflected the "home" setting. The loud environment, school and FM and Sports and FM settings were very low. Student was supposed to manually move to his school program. Home averaged 78%; school averaged 6%; soccer averaged 6%. Govenal forwarded the report to MDD/HHP. Govenal changed Student's hearing aids to default to the school program in FM .

212. On the day Govenal ran data logging, her notes indicated that Mother reports he is hearing well and using the Roger at school. No concerns were expressed about Student not being able to hear.

213. Student tested at 97% in quiet and background noise at 93 % in October 2018. Govenal recommended that Student use an app on his iPod in order to track what program he was syncing with. Govenal shared that information with MDD/HPP Amy Lane.

214. Therefore, for the 2018-2019 school year, Student's hearing aids were switched to have the default FM program go to school so that once FM was attached, it would jump into the school program. Govenal encouraged Student not to push the buttons on his hearing aids so that he didn't accidentally get into the wrong program.

215. Mother had several conversations with Chambers about data logging and had discussed the information with Collins, who in turn spoke with Govenal. The percentages between home and school mode need to be comparable. The home mode does not sync with the FM, and the only FM modes are school and sports. Mother observed the red light on the FM

system, indicating it was not syncing. Mother concluded that District personnel were misusing the FM system and that they were not doing daily checks.

216. Lane from MDD/HHP reviewed the data logging report, and even though it reflected low hours per day, Lane explained that Student had 93% word understanding with background noise, which would mean that Student could hear 93% of words with his hearing aids alone in low noise.

217. Govenal's opinion was that all children with hearing loss should be followed. By saying "followed," she means that intervention services are geared toward their hearing loss. Govenal did not have any certifications through the Missouri Department of Elementary and Secondary Education and was not qualified to diagnose any specific learning disability. She believed Student should have services that monitor his progress. The type of specialist would include a deaf educator, an auditory verbal therapist, or somebody with experience with children with hearing loss. Govenal recommended monitoring or intervention services with Student at some allowance of minutes weekly as determined by the IEP team. Govenal agreed that MDD/HPP could provide the deaf coordination or education to Student.

218. Mother noticed in field trips in 2nd grade and track and field day in 2nd grade that Student struggled to hear. Mother specifically noticed that in 3rd grade, the teacher was wearing the FM and there was a person speaking about how to do a math problem who was not wearing it. In 3rd grade, Mother noticed substitute teachers did not wear the FM correctly, so she sent an e-mail to Chambers with the issue that substitutes needed training. At Christmas, Mother noticed Student did not know the directions for a game because the teacher had the FM system on and not the parent describing the game. Mother attributed these instances to the teachers not growing up with a hearing impairment and/or being in the field of deaf education. Mother believes that this is exactly why an auditory verbal deaf educator could assist Student and the District.

219. Data logging takes a total hour and a total day and divides. It does not take into account less than total hours. Also, if the battery dies, the minutes actually never count.

220. On February 1, 2019, Govenal pulled the data log and the hearing aids logged four hours per day since September 20, 2018.

221. Gabbert routinely checked Student's hearing aids and the FM system during the school day.

222. Fletcher installed splitters or dongles to make it easy for Student to go from classroom to classroom. The District's intercom system was too old to provide assistive technology for Student, so the only solution was to e-mail announcements as well as having the announcements over the intercom. With the PAC, there was a splitter installed for the laptop so that Student's transmitter could be plugged into that at the same time. Fletcher made sure that the technology was set up for tele therapy when Student had it during school time. Fletcher also provided assistance in setting up the app on Student's iPod.

223. Collins routinely checked Student's hearing aids and the FM system for each school day.

224. Govenal provided her opinion during training on November 1, 2018, that Student's problems in 2017 on the use of the equipment was likely due to the equipment jumping in the wrong program and Student failed to recognize that he was in his soccer program a lot by accident. Ex. TT ¹⁰. Govenal said:

I think a lot of the confusion from last year with him being maybe in the wrong program was on the hearing aid and the understanding of how it was working because it works differently than his old hearing aid and so I actually think he was in his soccer program a lot by accident and I'll explain the differences between his programs and he was also in his home program a lot not necessarily because anyone...it was just jumping in the wrong program and then I don't think [Student] was the best reporter at first in his listening checks and he's getting better with that and so

¹⁰ This was the video recording of the MEI training.

lessons learned now we're in a new place so our goal is just to move forward and you know hopefully everyone's more comfortable including [Student].

225. Chambers conducted a review of Student's Phonak/Roger touchscreen mic usage based upon total school time from August 16, 2017 to May 22, 2019 and Student's absences. Chambers concluded that the time tracked by the Roger was about equal to the total school hours. The District's analysis was that the FM system was being used appropriately by the school.

226. The District used the assistive technology in the manner in which it was intended and kept documentation to indicate that the protocols for syncing the FM and troubleshooting Student's hearing aids regularly occurred at the beginning of the school day and as needed during the school day. Student was not the best reporter of recognizing what FM mode his hearing aids were in, but he continued to improve. Student and the District were assisted by the Phonak system and the iPod in detecting the correct program.

Conclusions of Law

We have authority to hear this case. Section 162.961.¹¹ The burden of proof is on the party seeking relief, in this case Parents. *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). Parents must prove their case by a preponderance of the evidence. *Tate v. Dept. of Social Services*, 18 S.W.3d 3, 8 (Mo. App., E.D. 2000).

I. Credibility

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

¹¹ Statutory references are to RSMo 2016, unless otherwise stated.

direct conflict in the testimony, we must make a choice between the conflicting testimony. *Harrington v. Smarr*, 844 S.W.2d 16, 19 (Mo. App., W.D. 1992). Our Findings of Fact reflect our credibility determination.

II. Dismissal of Claims

Parents amended complaint brings claims under the Rehabilitation Act of 1973 (§ 504), the Americans with Disabilities Act (ADA), and the Missouri Human Rights Act (MHRA). Under § 162.961, this Commission has the authority to hear claims arising under the IDEA. Because this Commission was created by state statutes, we have only such authority as the statutes give us. *State Bd. of Reg'n for the Healing Arts v. Masters*, 512 S.W.2d 150, 161 (Mo. App., K.C.D. 1974). We do not have the authority to hear § 504, ADA, and MHRA claims. *Smith v. Rockwood R-VI Sch. Dist.*, 895 F. 3d 566, 72 IDLR 111 (8th Cir. 2018). If we have no jurisdiction to hear the complaints, we cannot reach the merits of the case and can only exercise our inherent power to dismiss. *Oberreiter v. Fullbright Trucking*, 24 S.W.3d 727, 729 (Mo. App., E.D. 2000). Therefore, Parents' claims under § 504, ADA, and MHRA are dismissed.

Parents also asked for the resolution that the District “[p]rovide a compensatory education fund to be used to compensate [Student] for not receiving special education services...and for not developing needed goals... . The fund would be used to make up for services and accommodations not provided, **and to compensate the Parents for services they had to provide.**” (Emphasis added). In their prayer for relief, Parents ask us to “award a fair and reasonable monetary reward, and pay the Petitioners’ reasonable attorney’s fees and other expenses.” In essence, Parents are making a claim for money damages and for attorney fees. Money damages are not available in an IDEA claim. *Bradley v. Arkansas Dept. of Educ.*, 301 F.3d 952, 957 (8th Cir. 2002). Attorney fees are not within the authority of this Commission to award under the IDEA. A court, in its discretion, may award reasonable attorney fees to the

prevailing party, 20 U.S.C. § 1415 (i)(3)(B)(i), but an administrative tribunal may not.

Therefore, to the extent that Parents seek money damages and seek their attorney fees and expenses in bringing an IDEA claim, those requests are also denied.

III. Standing Objections/Objections Taken with the Case

We overrule all standing objections and objections taken with the case that are not specifically ruled on in this decision.

A. Specific Evidentiary Issues

In their motion to submit evidence reviewed at hearing and objection to denial of due process, Parents ask this Commission to allow into evidence testimony and exhibits that were excluded at the hearing.

While the technical rules of evidence do not apply in a contested case, the fundamental rules of evidence apply to contested case administrative proceedings such as this one. *State Board of Regis'n for the Healing Arts v. McDonagh*, 123 S.W.3d 147, 154 (Mo. banc 2004), citing *Missouri Church of Scientology v. State Tax Commission*, 650 S.W.2d 837, 839 (Mo. banc 1977).

The Missouri State Plan for Special Education, Part B, 2019, Regulation V – Procedural Safeguards/Discipline, State-Level Due Process Hearing (1), page 77, states:

The provisions of chapters 536 and 621, RSMo and the procedural rules adopted by the Administrative Hearing Commission shall be followed unless they conflict with the federal regulations or state statutes implementing the Individuals with Disabilities Education Act.

We agree that Parents' attorney did not provide a foundation for several exhibits she attempted to admit. The attorney offered many exhibits at the end of the hearing – after the witnesses who would have created a foundation for their admission had finished their testimony. We are unimpressed by Parents' argument that the laws requiring parties to formally offer evidence into the record are not clear. As the District notes, Chapter 536 governs this Commission's hearings.

Section 536.070(5) provides “[r]ecords and documents of the agency which are to be considered in the case shall be offered in evidence so as to become a part of the record, the same as any other evidence.”

We will not, however, rule against admission of the evidence solely on the basis of lack of foundation. We will analyze other objections to the testimony and exhibits and make a determination of whether admitting them at this time would prejudice the District.

1. Exhibits Already in Evidence

Parents argue that some of these documents are already in the record, and we agree. Petitioners’ Exhibit 7 consists of records from St. Luke’s Hospital of Kansas City, Midwest Ear Institute (the Institute). Records from the Institute were offered by the District and admitted as Respondent’s Exhibit 3. We have not compared every page of the two exhibits, but have noted enough similar documents to conclude there will be no prejudice to the District if the records are admitted. We admit Petitioners’ Exhibit 7 into the record.

Petitioners’ Exhibit 5 at 166-67, a letter from MEI dated November 20, 2018, is in evidence as Respondent’s exhibit E-3 at 1375-79. Petitioners’ Exhibit 5 at 171-72, a letter from MEI dated May 18, 2018, is in evidence as Respondent’s Exhibit R-1. Because the documents are already in evidence, we deny Parents’ motion to admit the duplicate records.

2. Quarterly Treatment Plans

Petitioners’ Exhibit 5 at 106-150 is a Quarterly Treatment Plan for September-December 2018. Exhibit 5 at 78-103 is a Quarterly Treatment Plan for July-October 2019. Neither of these exhibits was admitted into evidence. Jaimi Bird discussed these treatment plans at the hearing. The plans include goals for Student and his progression in reaching the goals. The District had an opportunity to cross-examine Bird. We find no prejudice to the District and admit these exhibits for what they are worth.

3. Wedemeier Records

Petitioners' Exhibit 5 at 3-77 are records from a privately hired special education team. These records were not admitted into evidence. Similar to the discussion above, Shannon Wedemeier testified about the records, and the District had an opportunity to cross-examine her. We find no prejudice to the District and admit these exhibits for what they are worth.

4. CVs and Affidavits

Parents ask that we admit the following CVs of witnesses who testified and their affidavits offered after the hearing. The District argued that it will be prejudiced if we do so because it was not given the opportunity to cross-examine the witnesses. But the District was given the opportunity when Parents questioned the witnesses about their qualifications at the hearing. Therefore, we compare the information provided at the hearing with the information in the CVs to make our determination of whether the District will suffer prejudice if the CVs are admitted. Our description of the education and experience of the witnesses, taken from their testimony, is found in our Findings of Fact.

Exhibit 3 at 6 is the CV of Sonia Culver. Culver testified about her education, and this is consistent with her CV. While her CV provides more specific information about her experience than her testimony, Tr. at 25-26, we find the District would not be prejudiced by the admission of this exhibit because the information is already in the record. We admit Petitioners' Exhibit 3 at 6 into evidence.

Exhibit 3 at 7 is the CV of Jaimi N. Bird. Bird testified about her education, and this is consistent with her CV. But her CV detailing her experience is much more extensive than her testimony, which was general in nature. Tr. at 56-57. We find the District would be prejudiced by the admission of this exhibit, and do not admit it into evidence.

Exhibit 3 at 1-2 is the CV of Jamie B. Govenal. Her two-page CV is clearly more extensive than her 17-line testimony about her education and experience. Tr. at 330-31. We find

the District would be prejudiced by the admission of this exhibit, and do not admit it into evidence.

Exhibit 3 at 3-4 is the CV of Megan A. Lawson. Again, Lawson's two-page CV is clearly more extensive than her brief testimony about her education and experience. Tr. at 473-74. We find the District would be prejudiced by the admission of this exhibit, and do not admit it into evidence.

Exhibit 2 at 1-11 is the CV of Jane R. Madell. We discuss below the admissibility of this CV and her report.

We grant the District's motion and strike the witnesses' affidavits.

IV. Due Process

Parents argue that unless all of these exhibits are admitted into evidence, they will suffer a violation of their due process rights. We disagree under our analysis above. Parents also note that this Commission limited the time of the hearing. The Court in *B.S. v. Anoka Hennepin Public Schs.*, 799 F.3d 1217 (8th Cir. 2015), found that hearing officers may set time limits on due process hearings in accordance with state guidelines, as long as both parties have an adequate opportunity to present evidence and cross-examine witnesses. The *Anoka* court found no violation of parents' due process rights when the hearing officer limited their attorney's time to present their IDEA claim to nine hours. *Id.* at 1219-21.

Missouri has set forth the following guideline in its State Plan:

LENGTH OF PRESENTATIONS

The Commission may limit the length of any presentation in order to proceed with the hearing in an expeditious manner. In general, a hearing should last no longer than two (2) days. Any hearing exceeding two (2) days requires good cause to be shown and must be documented on the record.

Missouri State Plan for Special Education, Part B, 2019, Regulation V – Procedural Safeguards/Discipline, Length of Presentations, page 80. Far from the two-day limit, this

hearing spanned six days. The parties were given the opportunity for equal time of presentation and cross-examination during those six days. We also allowed into evidence audio recordings and videos as described in fn 3 that basically comprised another day of hearing.

We find that both parties were given adequate time to offer evidence and cross-examine witnesses.

V. Gill Objections

The District filed a motion in limine, which we took with the case. The District objected to the following evidence offered.

- testimony of Jane Madell at the hearing
- Petitioners' Exhibit 1 – Madell Report produced to the District on August 2, 2019
- Petitioners' Exhibit 2 at 1-11 – Jane R. Madell's CV
- Petitioners' Exhibit 4 at 1-3 – auditory evaluation dated July 3, 2019, and produced to the District on July 22, 2019

As its primary support, the District cites *Gill v. Columbia Sch. Dist.*, 1999 WL 33486649 (W.D. Mo. 1999) (hereinafter *Gill I*) That decision was affirmed in *Gill v. Columbia Sch. Dist.*, 217 F.3d 1027 (8th Cir. 2000) (hereinafter *Gill II*). In *Gill*, the parents attempted to call two expert witnesses at the due process hearing that they had hired after the IEP meeting at issue. The hearing panel excluded their testimony because “it was not relevant to the appropriateness of the March 21 IEP because it had not been brought up at that meeting.” *Gill II* at 1033. As in this case, the parents offered the testimony as an offer of proof. The hearing panel found for the district, and the parents appealed. One of the issues was the decision to exclude the expert witnesses' testimony.

Gill II summarized the pertinent finding of *Gill I* as “[the IEP] could not be judged in hindsight],” but made no substantive finding regarding the appropriateness of admitting evidence

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

The District Court affirmed the decision, finding that the education program as modified on March 21 could not be judged in hindsight. The *Gil II* court affirmed the District Court's decision and found no justification to open the record to admit the witnesses' testimony.

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

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

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

Parents argue that the only limitation on the admission of evidence is found in 34 CFR § 300.512:

(b) *Additional disclosure of information.*

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

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

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

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

We agree with the District and exclude the above referenced evidence that was not available to the District at the time it made the decision that is under review in this due process hearing.

VI. IDEA Overview

Under the IDEA, all children with disabilities are entitled to FAPE designed to meet their unique needs. 20 U.S.C. §1400(d)(1)(A) and 34 C.F.R. §300.1(a). Missouri’s State Plan for Special Education (2019) (State Plan) generally defines FAPE as regular and specialized special education and related services provided at public expense, under public supervision and direction without charge to the parents that meet the educational standards of the state educational agency and are provided in conformity with the Student’s IEP. *State Plan*, Regulation I, §, page 3.¹² The IDEA does not prescribe any substantive standard regarding the level of education a disabled child should be accorded. *Board of Education of Hendrick Hudson Central School District, Westchester County, et al. v. Rowley*, 458 U.S. 176 (1982). It does require the school

¹² See also, 20 U.S.C. § 1401(9).

district to “provide a disabled child with such special education and related services ‘in conformity with the [child’s] individual education program.” *Endrew v. Douglas County School District RE-1*, 137 S. Ct. 988, 994 (2017).

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

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

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

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

However, an absence of the court providing a “bright-line rule” is not “an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review” and such deference is “based on the application of expertise and the exercise of judgment by school authorities” and “[a] reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decision that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.” *Endrew*, 137 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).

Educational authorities must identify and evaluate disabled children, develop an IEP for each one, and review every IEP at least once a year. §§1414(a)-(c), (d)(2) and (4). They must also re-evaluate a student every three years. 20 U.S.C. §1414(a)(2)(B)(ii); 34 C.F.R. §300.303(b)(2). Each IEP must include an assessment of the child’s current educational performance, articulate measurable educational goals, and specify the nature of the special services that the school will provide. §1414(d)(1)(A).

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

VII. Issues in This Case

A. Change in Eligibility Category

Parents argue that by changing the category under which Student is eligible under the IDEA, the District denied him FAPE. To qualify as a student with a disability under the IDEA, a student must have one of the disabilities identified in the statute and require special education and related services as a result. 34 CFR § 300.8 (a). The District found Student eligible under the category specific learning disability (SLD) in math calculation, rather than deaf/hearing impairment (D/HI). The following is required to establish a student's eligibility as a child with a hearing impairment:

1. The student has a hearing impairment that adversely affects his academic performance, even when corrected; and
2. The student needs specialized instruction to address the hearing impairment in order to receive FAPE.

The State Plan lists 13 educational disabilities and provides the qualifying criteria for each.¹³ Thus, there are children who may benefit from certain improvements to a skill or

¹³ The 13 categories are autism, deaf/blindness, emotional disturbance, hearing impairment/deafness, intellectual disability, multiple disabilities, orthopedic impairment, OHI, SLD, speech/language impairment, visual impairment/blindness, and YCDD. State Plan, Regulation III at 23.

attribute, but who do not fit into the specific categories dictated by the law. The two categories at issue in this case are defined in 34 CFR §300.8(c):

(2) *Deafness* means a hearing impairment that is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification that adversely affects a child's educational performance.

(10) *Specific learning disability –(i) General.* Specific learning disability means a disorder in one or more of the basic psychological processes involved in understanding or in using language spoken or written that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

The State Plan provides the following definitions:

Hearing Impairment means an impairment in hearing, whether permanent or fluctuating, that adversely affects a student's educational performance, but is not included in the following definition for deafness. Deafness means a hearing impairment that is so severe that the student is impaired in processing linguistic information through hearing, with or without amplification, that adversely affects a student's educational performance.

A student displays a Hearing Impairment/Deafness when:

- (1) A hearing impairment has been diagnosed by an audiologist, and
- (2) The hearing impairment adversely affects the student's educational performance.

State Plan, Regulation III, at 26.

Specific Learning Disability: Specific Learning Disability means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations. The term includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. The term does not include learning problems that are primarily the result of a visual, hearing, or motor disability; intellectual disability; emotional disturbance; cultural factors; environmental or economic disadvantage; or, limited English proficiency.

A student has a specific learning disability when:

- (1) The student does not achieve adequately for the student's age or to meet state approved grade-level standards in one or more of the following areas, when provided with learning experiences and

instruction appropriate for the student's age or state approved grade-level standards:

- a. Oral Expression
- b. Listening Comprehension
- c. Written Expression
- d. Basic Reading Skill
- e. Reading Fluency Skills
- f. Reading Comprehension
- g. Mathematics Calculation; and,
- h. Mathematics Problem Solving

(2) The student does not make sufficient progress to meet age or state approved grade-level standards in one or more of the areas identified above when using a process based on the student's response to scientific, research-based intervention; or the student exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, state approved grade-level standards, or intellectual development, that is determined by the group to be relevant to the identification of a specific learning disability, using appropriate assessments, consistent with 34 CFR 300.307-300.311. A pattern of strengths and weaknesses is defined as a severe discrepancy between achievement and intellectual ability of at least 1.5 standard deviations; and,

(3) The group determines that its findings under this section are not primarily the result of:

- a. A visual, hearing, or motor disability;
- b. Intellectual disability;
- c. Emotional disturbance;
- d. Cultural factors;
- e. Environmental or economic disadvantage;
- f. Limited English Proficiency;
- g. Lack of appropriate instruction in reading, including the essential components of comprehensive literacy instruction (as defined in section 2221(b)(1) of the ESEA);
- h. Lack of appropriate instruction in math; and,

(4) To ensure that underachievement in a student suspected of having a specific learning disability is not due to lack of appropriate instruction in reading or math, the group must consider, as part of the evaluation:

- a. Data that demonstrate that prior to or as part of the referral process, the student was provided appropriate instruction in regular education settings, delivered by qualified personnel, and
- b. Data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, which was provided to the student's parents.

Professional Judgment

If a responsible public agency uses a severe discrepancy method: A student who does not display a discrepancy of at least 1.5 standard deviations as defined above, may nonetheless be deemed to have a specific learning disability if:

- (1) The student meets the other criteria of this rule; and
- (2) Based upon professional judgment and review of formal and informal assessments, the evaluation team concludes that a severe discrepancy exists.

In such cases, sufficient data must be presented in the evaluation report to document the existence of a specific learning disability.

State Plan, Regulation III, at 27-29.

We agree with the District that an educational diagnosis is different than a medical diagnosis. As the letter and cases below illustrate, the disability qualifying the student for special education services under the IDEA must adversely affect the student's educational performance.

OSEP has pointed out that even if a child no longer meets the eligibility criteria for a hearing impairment because the student's condition has been corrected to the point where the student's hearing is within normal limits, the student may still meet the criteria for one of the disabilities listed in the IDEA. *Letter to Blodgett*, 65 IDELR 51 (OSEP 2014).

If a student's hearing impairment adversely affects the student's educational performance, the IEP team must determine whether, as a result, the student needs special education. *Marshall Joint Sch. Dist. No. 2 v. Brian D.*, 54 IDELR 307 (7th Cir. 2010). Courts and hearing officers have indicated that the impact on the student's educational performance must be more than trivial. *Ashli and Gordon C. v. State of Hawaii, Dep't of Educ.*, 47 IDELR 65 (D. Hawaii 2007) (noting that the ordinary meaning of the term "adversely affects" requires more than a slight impact on educational performance); and *Board of Educ. of New York City*, 47 IDELR 120 (SEA NY 2007) (finding that a student's social and emotional difficulties were not significant enough to impede her educational performance).

A high school student who chose not to wear his hearing aid at school due to teasing and embarrassment didn't have a hearing impairment that was significant enough to impede his education. *Molina ex rel. D.M. v. Bd. of Ed. of Los Lunas Schs.*, 64 IDELR 321 (SEA NM 2014).

The district prevailed in *Lyon County School District*, 55 IDELR 301 (SEA NV 2010). A student was classified with autism exhibits aggression and severe hyperactivity. His school district decided to change his eligibility category to other health impaired (OHI). The student's parents filed a complaint. They claimed their child was frequently withdrawn and engaged in atypical behaviors at home, so he should retain the autism identification. The state review officer (SRO) noted the student had autistic-like behaviors as a young child, but testing revealed such behaviors no longer affected his education. The student engaged in a lot of social interaction, had good eye contact, used appropriate social communication, and seemed well adjusted to school. At the same time, the student exhibited aggression and severe hyperactivity, which were addressed in his IEP and behavior plan.

In the case before us, Student initially qualified for special education under the IDEA in August of 2016. His eligibility category was D/HI. Under that category, the District provided speech therapy-articulation goals to Student. Student was re-evaluated, and on November 13, 2018, he was found to be ineligible under that category, but found to be eligible under the SLD in the math calculation category.

In making the eligibility determination, the IEP team looked at language ability, language scores, and language skills. They considered classroom observations, standardized test scores, grades, and state-wide assessments to determine whether Student was below grade level or significantly below his cognitive ability. Student was average or above average in his language skills. He was not displaying signs that his hearing was impacting his education; in

fact, two of his strongest academic areas were reading and writing. Parents presented evidence that Student performed below average in two subtests on different assessments, but considering all the factors, these weaknesses do not adversely impact Student's ability to access the general curriculum. Student had successfully completed the only articulation goal in his IEP. Thus, the IEP team determined that accommodations for his hearing loss would continue, but his special education related to his hearing loss was not required.¹⁴ Based on the evidence before us, we agree with that determination.

The IEP team determined that Student was still eligible for special education services under the IDEA under the SLD in the math calculation category because Student scored in the "Low Average" range in certain math-based skills. Comparing his test scores in mathematics to his IQ score, the IEP team determined he met the criteria (a discrepancy of 1.5 standard deviations) under the new category. The team also determined that the low average performance in math was not due to his hearing loss and was not due to the lack of appropriate instruction. Based on the evidence before us, we agree with that determination.

We note that under the new category of eligibility, Student's individual educational needs will still be addressed. The Court in *Fort Osage R-1 Sch. Dist. v. Sims*, 641 F.3d 996 (8th Cir. 2011) stated:

Given the IDEA's strong emphasis on identifying a disabled child's specific needs and addressing them, we believe that the particular disability diagnosis affixed to a child in an IEP will, in many cases, be substantively immaterial because the IEP will be tailored to the child's specific needs. Consequently, while the IDEA intends that IEPs contain accurate disability diagnoses, we will not automatically set aside an IEP for failing to include a specific disability diagnosis or containing an incorrect diagnosis. . . . Instead, as with any other purported procedural defect, the party challenging the IEP must show that the failure to include a proper disability diagnosis "compromised the pupil's right to an

¹⁴ We note that certified audiologist Amy Lane opined that Student could be best served by a §504 Plan rather than an IEP for his hearing loss. Tr. at 876. She described his most current IEP as having accommodations for his hearing loss that would look like a §504 Plan if Student were not otherwise eligible under the IDEA. Tr. at 931-32.

appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits.”

Id. at 1004 (citations omitted).

Parents have not shown that there was a failure to include a proper diagnosis. The IEP includes information about the nature and extent of Student’s hearing as well as support for the educational diagnosis of mathematical calculation learning disability. Student is making progress in advancing from year to year and is above average or working at grade level in academics. Therefore, there is not any compromise to Student’s FAPE. Finally, the educational diagnosis has no effect on Parents’ ability to participate in the process, nor has it caused a deprivation of any educational progress. The IEP adequately addresses both the educational diagnosis as well as the accommodations necessary for Student, as a hearing impaired individual, to learn.

Parents also raise concerns about Student’s future problems in the area of hearing loss. Parents are concerned that without an educational diagnosis of HI and a deaf educator, Student will lack early intervention, and gaps in learning might occur. But Student’s current performance levels do not indicate that this is happening, and these concerns are anticipatory.

The Court in *Mowery v. Bd. of Education of the School Dist. of Springfield R-12*, 2011 WL 1044145 (W.D. Mo. 2011), described the eligibility standard under the IDEA:

The IDEA further requires that for eligibility the child must be found to have one of the enumerated disabilities that affects the child’s educational performance and by reason thereof the child needs special education services. 34 C.F.R. § 300.8(c)(9)(ii). **“It is not whether something, when considered in the abstract, can adversely affect a student’s educational performance, but whether in reality it does.”** *Marshall Joint School District No. 2 v. C.D. ex rel. Brian D.*, 616 F.3d 632, 637 (7th Cir 2010), citing 34 C.F.R. § 300.8(c)(9)(ii).

Id. at *1 (emphasis added). The “adverse effect” that is required must actually impact the student's educational performance. The question is not whether something, in the abstract, might

impact educational performance. *Marshall Joint Sch. Dist. No. 2 v. C.D.*, 54 IDELR 307 (7th Cir. 2010).

In addition, this is a determination that can be revisited in the future. While we cannot speculate about Student's future needs, the determination that Student is not eligible for services or is only eligible in a particular category under the IDEA can change. *See Regional School Unit 51 v. Doe*, 920 F.Supp.2d 168 (D. Me. 2013). IEPs can and must be revised to meet Student's needs and to assure adequate progress.

The burden of proof is on Parents, and they did not prove that Student qualifies for IEP services under the D/HI category. We find that Student's change in eligibility from D/HI to SLD in math calculation was reasonable and appropriate. It did not violate Student's right to FAPE.

B. District's Staff Credentials

Parents argue that the lack of a "deaf educator or a speech language pathologist who is a Listening Spoken Language Specialist and/or an Auditory Training Specialist who specializes in working with children who are deaf or hearing impaired"¹⁵ on the District's staff impaired its ability to provide FAPE for Student. We do not agree. The District is under contract and continues to be under contract with MDD/HPP. MDD/HPP provides consultation audiology, deaf educators, and other services as needed or required by the District. MDD/HPP has been integrally involved in reviewing MEI's testing and audiologic services. Once Parents requested a deaf educator, MDD/HPP was again placed under contract to provide services as determined by them to be needed.

We find that the District's service providers and educators are licensed by DESE and are qualified to meet the requirements of the IDEA. There is ample evidence in Student's educational achievement and progress. The District did not deny FAPE to Student by failing to

¹⁵ This is the description of the qualifications Parents are seeking to work with Student. Amended complaint at 1.

have staff or service providers with the exact credentials Parents request. MDD/HPP did not find Student to be in need of a deaf educator. We also do not find Jordan's report in regard to Student's need for a deaf educator to be a credible, professional opinion on Student's needs, particularly since this information was included at Parents' request.

C. Outside Services

Parents counter the District's argument that it provided FAPE to Student by pointing to the outside services they have privately paid for and offered to Student. Student received no outside services or tutoring until the summer of 2018. The District argues that, before this time, both during the 2016-2017 and 2017-2018 school years, Student's academic performance was at an average or above average in every area. The outside tutoring did not noticeably increase his performance.

Based on the evidence before us, we find that the District was providing FAPE to Student before and after the privately paid services were initiated.

D. Implementation/Accommodations and Modifications

Parents argue that the District failed to provide FAPE to Student because his 2017-2018 IEP was not properly implemented. Specifically, Parents argue that the District's staff was not using his equipment correctly.

The District cites *I.Z.M. v. Rosemount-Apple Valley-Eagan Public Schools*, 863 F.3d 966 (8th Cir. 2017), for its position that the IDEA does not require perfection from school districts in implementing a student's IEP. At the due process hearing level, parents argued that a visually impaired student's IEP was not being followed. The hearing officer found that the "provisions in the IEP were largely, although not perfectly, implemented." *Id.* at 969. The hearing officer also stated that, "although problems arose, '[t]he number of issues the Student had could be expected given the number and complexity of the devices the Student was provided' and District staff

‘were almost always immediately responsive to issues.’” *Id.* The *Rosemount* court confirmed the district court’s decision that:

(1) significant evidence showed the District took steps to provide I.Z.M. accessible instructional materials in a timely manner; (2) to the extent the District may have imperfectly complied with IEP requirements, the IDEA does not require perfection, and (3) I.Z.M. received an educational benefit from the services the District provided, as reflected by his grades.

Id. at 970.

Student’s IEP provides for an accommodation of a personal FM system at all times during school instruction. Student’s FM system includes an FM microphone worn by his teachers. Student hears the teacher as though the teacher is always standing directly in front of him. The FM system includes a pass-around microphone, and a Roger Soundfield Tower, which amplifies the sound from the teacher in the classroom.

The District presented evidence that it had performed hearing/FM checks each day and maintained logs for the school year. Parents argued that this equipment was not used correctly because a data logging report suggests his hearing aids were not in the correct program a majority of the time. But Student’s audiologist testified that the data logging was not 100% accurate and the information logged was unusual. Even if the data logging was correct, Student may have toggled out of the FM program himself, which was the conclusion of Student’s audiologist during the state training provided.

Parents argue that Chapman did not know how Student’s hearing aids worked because she did not understand she could not check the FM system standing right by Student and covering her mouth. Collins primarily provided the listening checks and set up in the morning. Chapman was only a backup in the fall of 2018. Regardless, the MEI hearing tests showed that Student generally had good understanding and comprehension through hearing aids alone. The District additionally routinely used the Soundfield and FM device. Even if data loggings

established times when the technology was not used correctly, Student showed no regression. We conclude that the District appropriately used the technology and find Govenal's explanation of what might have occurred to be credible.

Chapman did listening checks with Student when Collins was unavailable (about 10% of the time). Chapman used the FM system, pass-around microphones that used the Soundfield speaker, and Roger system in small groups. During the 2017-2018 school year, Collins frequently conferred with Student's teacher and Parents via e-mail regarding the use, checking of connections, hooking into smart boards, tracking Student's self-advocacy in class, concerns about announcements and Student's ability to hear them, concerns about Student being able to hear during assemblies at the District's Performing Arts Center, contacting the hearing aid manufacturer to make sure that training was appropriate and making sure substitutes had the information on how to use the system. We find Chapman and Collins credible regarding the listening checks.

During 2017 and up through September 20, 2018, Student had routine visits with MEI to address programming and adjustment of hearing aids, obtaining new hearing aids, adjustments for wind during soccer practice, program updates and general checks. After an evaluation in May of 2017, it was reported by the school that Student typically used his FM device during most activities.

During the 2017-2018 school year, Collins charted her morning listening checks with Student. Collins sometimes used a stethoscope to make her checks. Sometimes she would check randomly in the afternoon to make sure Student was still synced to the FM system. The first year, she would do listening checks from across the room, and she was later advised that listening checks needed to be conducted outside the room and from then on did the checks in that manner. While listening checks outside the classroom were preferred by Govenal, there is no

credible evidence to support that even the failure to implement one part of the listening check in the preferred manner adversely impacted Student.

In August 2018, Lane became involved with Student and the District. She did an in-service to talk about hearing loss and to go through training on the equipment in use at the school. They spoke of things to look for when there are students with hearing loss in a classroom. At the time Lane reviewed the equipment at the school and was impressed that the District provided both the sound field and the FM system. For Student, having both systems provided a safety net in the event the FM system was not working because both are not necessary with Student's hearing loss. Lane had no concerns about what the District was doing for Student. Chambers arranged for MDD/HPP and Phonak to meet with staff to update staff on changes with Student's assistive technology. On September 24, 2018, Collins discovered that Student's hearing aids did not automatically sync to the FM and contacted Mother. On September 26, 2018, Collins again contacted Mother about problems with Student's FM system. This illustrates how pro-active the District was with regard to Student.

In the amended complaint, Parents stated that Student was falling behind and became withdrawn. This was contradicted by testimony at the hearing. He was not falling behind – he remained average or above average in every area except mathematics, and was described as a very social child at school. We find Gabbert's and Chapman's descriptions of Student's social skills to be credible.

E. Progress on Goals

2017-2018 and 2018-2019

Parents' amended complaint alleges that Student made no progress or minimal progress on five of his five goals during the 2017-2018 school year. Parents further allege that their own professionals they hired can verify that Student had not reached the goals as reported in May of 2018 and that the District made false reports. Further, Parents claim that because the District

was not using the technology correctly in 2017-2018, this information demonstrates that Student did not ask for help as needed or self-advocate.

The IEP for the 2017-2018 school year was from the meeting of May 17, 2017. Parents actively participated in the meeting and received notices of the implementation of the IEP.¹⁶ The IEP goals included 1) articulation of /th/; 2) following 2-3 step directions; 3) increase in vocabulary skills with measurable benchmarks of basic time concepts, spatial concepts, multiple meaning words, and idioms; 4) self-advocacy by identification of strategies, asking for clarification, etc.; 5) self-advocacy by seeking assistance when not receiving the entire message in the classroom. Collins and Chapman found that Student met Goal 1 by December 21, 2017 and Goal 2 by March 9, 2018. By the next IEP meeting, Student had met all other goals except he was still making progress on articulation in general.

The IEP for the 2018-2019 school year was developed at an IEP meeting on May 2, 2018. Parents actively participated in the meeting and received notices of implementation. The sole goal was maintaining intelligible speech in all academic settings. At this IEP meeting, the goals were specifically discussed, and the team found that Student met all of the goals in the classroom. Further, the IEP team reviewed information from MEI and found that Student's testing overall had improved. MEI confirmed Collins' opinions and found that Student performed in the average range and within normal limits on all testing and that his skills were beyond listening age---this is even before MEI discovered anything from the data logging as to the use of the hearing aid technology. Both the school and MEI found that Student had developed an increased self-advocacy. Part of this self-advocacy included Student's irritation with being pulled out of the general classroom for speech services.

¹⁶ This IEP involved Regina Knott (the former special education director) and Dana O'Toole (the former speech pathologist) for the District. Parents participated in the meeting that adopted the goals. So the goals that were developed were not developed by the persons who ultimately implemented the goals.

Academically, Student had vocabulary skills and self-advocacy skills. He performed well at a school and excelled, including his reading, which was a 3.1 grade equivalency in 2nd grade and a 4.0 grade equivalency in 3rd grade.

Gabbert and Collins found Student to be within the normal range of where a 3rd grade level student should be performing. Academic testing confirmed that Student was understanding what he read, and his writing skills were spot on. MDD/HHP reviewed Student and found that Student did not require a deaf educator, that Student's scores were good, and Student again performed within normal limits based on MEI testing.

While Wedemeier testified that Student did not meet 2nd or 3rd grade levels in his writing, speech and understanding, we find her testimony lacking because of her unfamiliarity with the Missouri learning standards. We find the District's witnesses credible with regard to Student's progress and meeting the goals of the IEP, particularly Chapman, Gabbert, Nesbitt, and Collins. There is no evidence that the District falsely reported that Student mastered three of the five goals or that the Student did not self-advocate even with the technology issue that was only discovered later. Parents' allegations are without merit. Student was performing at or above grade level, and was appropriately promoted.

We conclude that there is no evidentiary support for Parents' assertion that Student made either no or minimal progress on the goals of the IEP for the 2017-2018 school year or for the 2018-2019 school year.

Parents' amended complaint raises the additional issue that "the goal on articulation was not implemented throughout the year [2018-2019] and when it was implemented, it was not implemented correctly." First Amended Complaint at 5.

We disagree with Parents' conclusion. Student did not receive any services at Mother's request in the first quarter of 2018. The District maintained Student's eligibility. Upon the completion of the evaluations in the fall of 2018, the District resumed speech services. The

subsequent and multiple evaluations by the District, Jordan, and MEI do not support the claim of Parents. Further, Parents presented no evidence to show that when the goal was implemented, it was implemented incorrectly.

The District did not fail to provide FAPE to Student based on the IEP goals, the progress on the IEP goals, or the implementation of the IEP goals for 2nd and 3rd grade.

F. Failure to Develop Appropriate IEP/Failure to Develop Goals

Parents argue that the District failed to develop an IEP with all the accommodations and related services needed for his hearing impairment for the 2017-2018 and 2018-2019 school years. In particular, Parents assert that a deaf educator was necessary to develop and carry out IEP goals.

On May 17, 2017, Student's IEP was developed for his 2nd grade school year. In determining what services to include in Student's IEP, the team considered Student's most recent data from a District evaluation from September 2016. That evaluation incorporated the MEI evaluation results from August of 2016. Student scored in the average range on every assessment. The only area in which Student demonstrated any need for services was in articulation, and the IEP team determined that he qualified for 100 minutes of speech therapy (articulation).¹⁷ The IEP contained an accommodation to send home vocabulary, but did not provide for pre-teaching of vocabulary at school.¹⁸ Parents attended this meeting, but they did not voice concerns about any part of the IEP or make suggestions about other accommodations. Their comments concerned speech improvement and self-advocacy.

We have found that Chapman and Collins both worked to make sure that Student had the tools he needed to hear announcements and while in the PAC, use of the FM and microphone,

¹⁷ The District notes that an MEI evaluation at this time recommended a reduction in services (from 100 hours to 60 hours of speech therapy) and eliminated any recommendation for auditory verbal therapy. The District continued to provide 100 hours of speech therapy that school year.

¹⁸ Evidence was presented that Gabbert routinely sent vocabulary and upcoming work to Parents.

training of other teachers and substitutes, and numerous other matters that they brought up to Parents as the year progressed.¹⁹ Chapman routinely sent home vocabulary words. We have also found that Collins, Chambers, Gabbert, and MDD/HPP all worked toward making sure appropriate goals for Student's hearing impairment were created and implemented for the 2018-2019 year.²⁰ Additionally, once eligibility was changed in November 2018, Chambers made every effort to schedule IEP team meetings to complete a new IEP with the new goals. The new IEP was not completed until March 2019, after the due process complaint was filed.²¹

Parents provided no evidence that the accommodations listed in the amended complaint were necessary for Student to receive FAPE. To the contrary, Student showed strong progress in this school year as discussed above. Student was at grade level in all areas. Student's IEP and goals in that IEP were appropriate for school year 2017-2018.

On May 2, 2018, Student's IEP was developed for his 3rd grade school year. The team discussed Student's progress during 2nd grade, which we have noted above was strong. He was average or above average in all areas, and had met or made progress on all his goals. The most recent MEI evaluation again recommended a reduction of service. The IEP team decided to reduce Student's speech therapy minutes from 100 to 30. The IEP team discontinued Student's supplementary goals in the areas of language and self-advocacy.

Parents argue that these actions denied Student FAPE. They argue that the language and self-advocacy goals should have been retained and the services and goals should have been expanded to include social skills and technology skills. Parents have failed to provide proof to refute the District's evidence to the contrary. The District's staff testified that Student's social skills were good, and there was no evidence Student had problems with technology. Student's

¹⁹ See findings of fact for 2017-2018 school year (2nd grade).

²⁰ See findings of fact for the 2018-2019 school year (3rd grade).

²¹ The March 2019 IEP contained new goals for the mathematical calculation SLD as well as almost all the accommodations recommended by the IEE from Jordan.

language skills are one of his strengths, and the District provided evidence of Student’s self-advocacy when his hearing aid batteries needed to be changed, when his FM system was not working properly, and when he needed something repeated.

The District showed that Student no longer needed special education services in order to receive an educational benefit, *See, e.g., D.L. v. Clear Creek Indep. Sch. Dist.*, 70 IDELR 32 (5th Cir. 2017) (holding that a high schooler with anxiety, depression, and ADHD did not require special education or related services under the IDEA). *See also Durbrow v. Cobb County Sch. Dist.*, 72 IDELR 1 (11th Cir. 2018) (Finding that a high schooler's ADHD did not impede his academic performance during his first three years in a magnet program for high-achieving students, the 11th Circuit ruled that the student did not establish a need for special education.).

While some accommodations suggested might benefit Student, the IEP is not required to maximize the educational benefit to the child, but must be “reasonable” and “not ideal.” *Rowley*, 458 U.S. at 199 and *Andrew*, 137 S. Ct. at 999. We find that both IEPs and the goals were appropriate and reasonable and provided Student with FAPE.

G. Procedural Violations

1. March 6, 2019 IEP Meeting

In the amended complaint, Parents argue that the District had pre-judged the decision made at the March 6, 2019 IEP meeting, and failed to provide for parental participation. Such a failure, as well as other alleged violations, could be procedural violations of the IDEA. State Plan , Reg. V, p. 78, describes when procedural violations rise to the level of denying Student FAPE:

In matters alleging a procedural violation, the Administrative Hearing Commission may find that a student did not receive FAPE only if the procedural inadequacies:

- (1) Impeded the student’s right to a free appropriate public education (FAPE);

(2) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a free appropriate public education (FAPE) to his/her child; or,

(3) Caused a deprivation of an educational benefit.

The District was required to keep an open mind and consider parental input before reaching its final decision.²² To support this allegation, Parents argue that the District prepared a draft IEP for the meeting and did not provide it to them in advance of the meeting. They also find fault with the District's decision to distribute the draft in sections at the meeting.

The District argues that there was a good reason to prepare the draft IEP and that there is no requirement to distribute it in advance. The District stated that staff prepared the draft IEP and distributed it in sections to keep the team members focused and on topic. Chambers testified that there is no requirement to create a draft or to distribute it before the meeting. She testified that it is the District's practice to create a draft because it is "best practice" to do so. Tr. at 1677. But it is not the District's practice to provide the draft to the parents in advance, and the District has not provided such a draft to Parents before. In addition, a child's previous IEP serves as the draft for the next IEP meeting. We find that failure to provide the draft IEP to Parents before the IEP meeting was not improper and did not indicate that the District had predetermined the outcome of the meeting.

We also find that Parents participated in the meeting. Parents attended the meeting with their attorney, an advocate, an outside provider, a clinical audiologist (via telephone), and a clinical speech-language pathologist (via telephone). The meeting lasted approximately three hours. The District provided evidence of Parents' participation in the form of District staff

²² *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988, 999 (2017); *R.L. v. Miami-Dade Co. Sch. Bd.*, 757 F.3d 1173, 1188 (11th Cir. 2014) ("Predetermination occurs when the state makes educational decisions too early in the planning process, in a way that deprives the parents of a meaningful opportunity to fully participate as equal members of the IEP team").

testimony and a video of the meeting. The video clearly shows that Parents or their advocates/experts spoke more than the District's staff or attorney did.

Parents argue that they were not allowed to discuss the outside evaluation from Jordan, which the District had received on March 4, 2019, at the meeting, and that it was placed at the end of the agenda. The District stated that the first thing that had to be accomplished at the meeting was completing the IEP using Student's last evaluation. Chambers testified:

Q: . . . Why did you not go over the outside evaluation before finishing [Student's] IEP?

A: Truthfully, the reason why I didn't want to go over that outside evaluation first is because we really needed to develop an IEP; and the way that our past meetings had been going, there – I knew that if we started with that outside eval, that we would never get to the IEP.

Q: And when you say you really needed to get an IEP together, why did you feel some urgency to get an IEP together for [Student]?

A: Because he had an eligibility as of December 6th that we had determined, and he – it was now March 6th, and he still hadn't received any services in the area of math calculation.

Tr. at 1754. The IEP team was unable to finish the IEP and scheduled the next IEP meeting for March 27, 2019.

We do not find that the District's treatment of Jordan's report to be improper and did not violate Student's FAPE.

2. March 27, 2019 IEP Meeting

Parents argue that the District should consider Jordan's report before finalizing the IEP for Student. But the meeting was the continuation of the March 6, 2019 IEP meeting based on Student's last evaluation. It was not an eligibility meeting, as that had already been held on November 13, 2018. Parents chose not to attend the March 27 meeting because Parents had already filed the due process complaint and Student was in stay-put. The District also argues that it discussed Parents' prior requests and Jordan's report at this meeting.

The District's conduct at the March 27, 2019 IEP meeting did not violate Student's FAPE.

3. General Allegations as to IEP Meetings and Development

Parents argue that for both the 2017-2018 and 2018-2019 school years, the District engaged in a pattern of behavior that was deceptive, disorganized, and uncooperative. Parents allege that the District was dishonest in that notices were backdated and falsified, and that the IEP notes were false or misleading. Parents offered no evidence to support these allegations.

Parents argued that they were not provided with documents and that the information they gave to the District was not included in its records. Evidence at the hearing refuted this contention. Parents were provided with records, such as 685 pages of Student's educational file that they requested, in a reasonable time period. The District's exhibits at the hearing included documents, such as the Jordan evaluation, that had been provided by Parents, indicating that those documents were part of its record.

There was no evidence to support Parents' allegations that Parents and Student were treated differently because of Parents' advocacy efforts.

Parents were not denied parent participation during the 2017-2018 or 2018-2019 school years. Any procedural violations were minor and did not rise to the level of denying Student FAPE.

4. IEP/Meaningful Participation

Parents also failed to prove that the IEP that resulted from the District's evaluation violated Student's right to FAPE. The IDEA does not require a school district and a parent to reach consensus. If consensus cannot be reached, the District must make a determination, and the parent may appeal that determination. *Fitzgerald v. Fairfax County School Board*, 556 F. Supp.2d 543 (E.D. Va. 2008).

Parents were allowed meaningful participation and attended all but one of the IEP meetings. Parents attended the RED meeting, the eligibility meeting, and IEP meetings. Mother testified that she felt her input was ignored by the District, but the evidence shows otherwise. Mother also had frequent contact with Chapman, Chambers, and Gabbert, and routinely e-mailed her thanks for what they did for Student. Parents had significant input at each meeting – revising minutes, revising verbiage in the IEP, and sending e-mails about scheduling and topics. The District tried to accommodate Parents even when they could have terminated services and even when they were not required to allow an IEE.

While Parents’ demands increased over time, and the District chose not to implement all of what Parents wanted, there is no evidence to support a finding that Parents lacked the opportunity to have meaningful participation.

Parents failed to prove that the IEP was insufficient or that they were denied participation in its preparation.

Summary

Despite the efforts of the District to complete a timely IEP on the change in eligibility on November 13, 2018, it was not accomplished until March 27, 2019. The District had previously sent a NOM for a December 6, 2018 meeting to review/revise the IEP. At that meeting, the IEP team concluded that additional evaluations were needed. The team then performed an additional RED. In January 2019, there still was not parental consent for additional evaluations. The District scheduled another meeting for January 30, 2019. Since there was not a completion of the District’s evaluation as determined by the December RED meeting and no consent of Parents, the District agreed to move forward and to allow and pay for Parents to obtain an IEE,

pursuant to District policies. The District sent another NOM for the purpose of review/revise the IEP.²³ At the request of Parents, the meeting was rescheduled.

Parents filed a Child Complaint with DESE on February 4, 2019. Another IEP meeting was scheduled for February 5, 2019. That was rescheduled at Parents' request. Another IEP meeting was scheduled for February 8, 2019 with Parents waiving the notification. This meeting was not held due to Parents' illness. Another NOM was sent to review/revise the IEP for February 20, 2019. Due to the request for a facilitated meeting, the meeting dates changed, and a facilitated IEP meeting was rescheduled to March 6, 2019. The facilitator was unable to proceed because a facilitated IEP meeting cannot address eligibility, which was the topic Mother communicated with the facilitator as needing to be primarily discussed and communicated that to Mother on March 4, 2019.

Finally, the IEP meeting was held on March 6, 2019 to review/revise the IEP. Despite meeting for over three hours and despite the fact that the agenda was revised to include the IEE following the discussion of the IEP, the IEP was not completed, and the District and Parents were at odds over the prioritization of the agenda to complete the IEP and the discussion of the recently received IEE with the result of nothing being accomplished toward finalization of the IEP.²⁴ The District then on March 8, 2019 sent a NOM for March 27, 2019 to revise/review the IEP. On March 22, 2019 Parents filed their due process complaint and e-mailed Chambers on March 25, 2019 that they would not be participating in the meeting because of "stay put."

²³ It is noted that intake for the IEE was February 4, 2019 with dates of evaluation of February 14 and 22, 2019. Jordan shared a draft of the IEE and allowed Parents to review the report and make edits on March 1, 2019. Jordan finalized the IEE, and it was received by the District on March 4, 2019.

²⁴ The dispute over whether the IEE was considered first or the IEP was completed and then reviewed in light of the IEE is basically a "chicken or the egg" argument especially since the District revised the agenda to include the IEE. The District has the ultimate responsibility to carry out the requirements of the IDEA. These disputes at the meeting overrode the basic fact that it was in Student's best interest to have an IEP finalized with whatever revisions were needed to accommodate Student's needs.

Although “stay put” precludes a district from changing placement or services, it does not relieve a district from its duty to convene an IEP team meeting and undertake revisions of an IEP as may be needed. *Letter to Watson*, 48 IDELR 284 (OSEP 2007); and *Anchorage Sch. Dist. v. M.P.*, 59 IDELR 91 (9th Cir. 2012). The District proceeded with the March 27, 2019 meeting to discuss Student’s IEP. The District also considered Jordan’s IEE at that meeting. The District considered the results of Jordan’s IEE and incorporated almost all of the recommendations except for the deaf educator and the eligibility. While a district must consider the results of an IEE, it has no obligation to adopt the evaluator's recommendations or conclusions. *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). Because the District also considered the IEE at the same meeting where they reviewed and revised the IEP, it makes little difference which came first.

Parents’ refusal to attend the March 27, 2019 meeting due to the “stay put” provisions did not negate the District’s responsibilities under the IDEA. While districts must ensure parents’ meaningful participation, the refusal of Parents to attend an IEP meeting does not mean that the District is required not to hold the meeting. *A.L. v. Jackson County Sch. Bd.*, 66 IDELR 271 (11th Cir. 2015, *unpublished*). FAPE was not denied by the District’s completion of the IEP meeting.

Therefore, we adopt the March 27, 2019 IEP and order that it be finalized and implemented upon receipt of this decision.

SO ORDERED on October 31, 2019.

AUDREY HANSON MCINTOSH
Commissioner

Appeal Procedure

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

- (1) The court shall hear the case without a jury and shall:
 - (a) Receive the records of the administrative proceedings;
 - (b) Hear additional evidence at the request of a party; and
 - (c) Grant the relief that the court determines to be appropriate, basing its decision on the preponderance of the evidence.
- (2) Appeals may be taken from the judgment of the court as in other civil cases.
- (3) Judicial review of the administrative hearing commission's decision may be instituted by filing a petition in a state or federal court of competent jurisdiction. Appeals to state court shall be filed within forty-five days after the receipt of the notice of the agency's final decision;
- (4) Except when provided otherwise within this chapter or Part 300 of Title 34 of the Code of Federal Regulations, the provisions of chapter 536 are applicable to special education due process hearings and appeal of same.
- (5) When a commissioner renders a final decision, such decision shall not be amended or modified by the commissioner or administrative hearing commission.

The right to appeal and time limit is addressed in 34 C.F.R. §300.516.