

**BEFORE THE WEST VIRGINIA DEPARTMENT OF EDUCATION
OFFICE OF FEDERAL PROGRAMS DUE PROCESS
HEARING OFFICER**

DUE PROCESS 19-018

Party requesting Due Process

[REDACTED]

Student

[REDACTED]

Counsel for Student/Parent

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Local Education Agency (LEA)

[REDACTED] County Schools

Counsel for LEA

[REDACTED]

Hearing Location

[REDACTED] County Board of Education

[REDACTED]

Hearing Dates

August 19, 20, and 21, 2019

Type	Closed
Transcription	Court Reporter
Student Present	No
Hearing Officer	Anne Werum Lambright, Esq. PO Box 722 Williamson WV 25661 PO Box 6023 Charleston WV 25362
Witnesses	<p><u>For Student/Parents</u></p> <p>██████████, Parent</p> <p>██████████, Parent</p> <p>██████████, Student's current special education teacher, ██████████ Elementary</p> <p>██████████, Ed.D. Student's IEE provider</p> <p>██████████, Ed.D. Student's IEE provider</p> <p>Rebuttal- ██████████ Parent</p> <p><u>For ██████████ County Schools</u></p> <p>██████████ OT, ██████████ County Schools</p> <p>██████████ Student's general education 2nd grade teacher ██████████ Elementary</p> <p>██████████ Student's Resource Room teacher ██████████ Elementary</p> <p>██████████, School Psychologist, ██████████ County Schools</p> <p>██████████, BCBA, ██████████ County Schools</p> <p>██████████ Ed.D. BCBA</p> <p>Rebuttal - ██████████ RN, ██████████ County Schools</p> <p>██████████, Counselor, ██████████ Elementary</p>
Transcript receipt	September 13, 2019
Post Hearings Findings and Conclusions	October 7, 2019
Decision Issued	October 28, 2019

**BEFORE THE WEST VIRGINIA DEPARTMENT OF
EDUCATION OFFICE OF FEDERAL PROGRAMS
DUE PROCESS HEARING OFFICER**

**DECISION
Due Process No. 19-018**

The West Virginia Department of Education Office of Federal Programs designated the undersigned to serve as impartial hearing officer in the above-referenced matter. An evidentiary hearing was conducted on the agreed dates of August 19, 20 and 21, 2019, at a location agreed to by the parties and the hearing was recorded by a certified court reporter. The purpose of the hearing was to consider evidence related to Student/Parents'¹ due process request. Student/Parents were represented by counsel as were the County Schools.

PROCEDURAL HISTORY

On June 7, 2019, the undersigned was notified of assignment by the West Virginia Department of Education Office of Federal Programs (OFP) to this due process hearing request and contacted the parties by letter dated same. A telephone scheduling conference was held June 17, 2019, in which *pro hac vice* motions for additional attorneys were filed by Student/Parents and granted.

¹Pursuant to West Virginia Department of Education student confidentiality policies, all names of individuals and entities personally identifiable to/with the student are removed and titles or functions are substituted for names. The cover sheet identifies the actual names.

Student/Parents elected to not have Student present at the hearing and to have the hearing closed. As Student/Parents had filed this due process as both an individual action and a class action, Student/Parents were provided an opportunity to meet the conditions for a class action but provided no statutory or case law authority to permit a class action in this administrative hearing forum. Student/Parents failed to show this matter met WVRCP Rule 23 that provides for class actions meeting certain requirements including numerosity, commonality and typicality. Finally, because IDEA and WV Policy 2419 provide for individual hearings and make no provision for anything other than individual hearings, the hearing officer denied class action status and struck the counts and remedies in Student/Parents Complaint framed as class action matters. As the statute of limitations in IDEA and WV Policy 2419 due process is two (2) years, the hearing officer struck the counts and remedies in Student/Parents Complaint that preceded June 7, 2017. The Complaint alleged issues that were solely Rehabilitation Act of 1973 (as amended), 29 U.S.C. 794 (§504) and Americans with Disability Act of 1990 (as amended) 42 U.S.C. 12101 (ADA) issues and those were also struck as outside the hearing officer's jurisdiction in this due process and the Student/Parents were reminded that there is a separate process for adjudication of §504 issues that are not also IDEA/WV Policy 2419 issues.

The parties were able to agree on hearing dates of August 19, 20, and 21, 2017, and to the hearing location. The hearing officer directed Student/Parents to file the individual questions to be determined at the hearing by July 22, 2019, and the County Schools to file an Answer by that same date. The parties timely filed these pleadings. Student/Parents made an oral motion to continue the hearing because one of their witnesses had developed a medical problem and was unable to travel. At the second telephone status conference, after discussion, Student/Parents were given the choice of the original dates or dates a month later. Student/Parents elected to keep the original dates and have this witness testify by telephone. Parties filed their exhibits and witness lists on August 12, 2019. Both parties filed a Joint Stipulated List of Exhibits at the hearing.

On August 19, 2019, the hearing commenced with evidence received and a record of the proceedings made. Student's parents each testified on her/his own behalf, presented witnesses and

introduced exhibits that were made part of the record at the hearing. County Schools presented witnesses and introduced exhibits that were made part of the record at the hearing. Subsequent to the hearing and as agreed to by the parties, Student/Parents filed a thumb-drive of the student on videos seen at the hearing. The transcript was delayed and not received until September 13, 2019. The parties had elected to file proposed findings and conclusions electronically and by mail on the agreed date of September 30, 2019, but because of the transcript delay, the hearing officer extended the due date to October 7, 2019, and the parties timely filed these pleadings. This decision is issued on the agreed date of October 28, 2019.

ISSUES

A. Whether County Schools violated IDEA and/or WV Policy 2419 by failing to provide to the student individualized special education and related services, including behavioral supports?

B. Whether County Schools violated IDEA and/or WV Policy 2419 by failing to develop an IEP reasonably calculated to provide a free and appropriate education (FAPE) based on the student's individualized need, containing essential components, including a behavioral intervention plan (BIP)?

C. Whether County Schools violated IDEA and/or WV Policy 2419 by failing to provide FAPE in the least restrictive environment (LRE)?

D. Whether County Schools violated IDEA and/or WV Policy 2419 by failing to follow procedural safeguards when it suspended the student, sent the student home early, placed student in

a segregated classroom, and placed student on homebound instruction for disciplinary reasons?²

MOTIONS

All decisions rendered at the aforesaid hearings on motions filed in this action are hereby affirmed and all other motions filed in this action by either of the parties which were not previously ruled upon by the hearing examiner are hereby denied and rejected except:

1. The hearing officer's provisional granting of Student/Parents' motion to allow the expert MJD's report and credentials in the record over the County Schools' objection (TR. I at 43-4) is affirmed as fully granted; and
2. The hearing officer's taking under advisement Student/Parents' motion to not find the County Schools' witness JB an expert and to disallow the CV of the County School's witness JB because the County Schools failed to provide his expert credentials until immediately before he testified is granted in part and denied in part as follows: Witness JB's CV is excluded from the evidence in this due process and since counsel for County Schools stated

²Student/Parents' original complaint contained additional issues that were identified as class action matters, solely §504 issues, Americans with Disabilities Act issues and issues that preceded the two-year statute of limitations, all of which were struck by the hearing officer. At the direction of the hearing officer, Student/Parents filed what they termed a "List of Issues for which Petitioner Seeks Declaratory Judgement;" Recognizing that *pro hac vice* counsel may not be aware that this administrative due process proceeding did and does not provide for declaratory judgments nor are the Student/Parents nominated as Petitioners except possibly on judicial appeal, the hearing officer chose to not make them redraft the requested list of issues but identify from this pleading the issues that are within the hearing officer's jurisdiction. The Student/Parents' document contained the issues above but omitted identification of an issue # 3 and continued with the solely §504 issue as number #6. The four (4) issues identified in Student/Parents' document dated July 23, 2019, in this matter that are within this due process jurisdiction are above as renumbered.

that he was offering JB as both a fact and an expert witness (TR. III at 793) the hearing officer will consider only witness JB's testimony as a fact witness in this matter.

CREDIBILITY OF WITNESSES, TESTIMONY, AND EXHIBITS

The hearing officer was and is satisfied that all records and documents entered as exhibits are now complete, authentic and valid and that they were entered with the proper evidentiary foundations.

The hearing officer was and is satisfied that the witnesses brought on by the parties were credible and truthful except as inconsistent with this decision. Neither the demeanor of the witnesses nor the substance of any testimony suggested any inconsistency, conflict, or ulterior motive except as noted below. No evidence suggested any personal gain to be achieved by any witness as a result of testifying except as noted below.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and the exhibits admitted into evidence and matters of which the hearing officer took judicial notice during the proceedings, assessing the credibility of the witnesses, and weighing the evidence in consideration of the same, this hearing officer makes the following findings of fact and conclusions of law. To the extent that the testimony of any witness is not in accord with these findings and conclusions, such testimony is not credited. Any proposed finding of fact, conclusion of law, or argument proposed and submitted by the parties but omitted herein is deemed irrelevant or unnecessary to the determination of the material issues in this matter.

Following a thorough review of the evidence, the hearing officer makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Student is nine (9) years old and is in the third grade in his neighborhood county elementary school. He likes to learn about history and social studies, particularly heroic or famous people. TR. I at 118-19, 179-80, 184, 334.

2. Student's parents are divorced and have worked out an exemplary parenting plan in which Student and Student's siblings are extremely well-cared for. Both parents are active in Student's education, school life, and activities. Usually both parents attended every IEP meeting and other school meetings. TR. I at 183-4.

3. Student has received special education and related services since entry into county schools in pre-kindergarten, initially eligible as Intellectually Disabled³, then subsequently as eligible as a student with Autism Spectrum Disorder⁴. Student has been diagnosed with Attention Deficit/Hyperactivity Disorder (ADHD).

³ Student was determined to be eligible for special education and related services with the area of exceptionality of Intellectual Disability on April 19, 2016. LEA Exhibit 28.

⁴ Student was initially tested by the county schools for eligibility for Autism in 2014 (Student/Parents Exhibit No. 1) and again in 2015 after receipt of a short letter from his pediatrician. Student/ Parents Exhibit No. 9; CS Exhibit No. 13. Student was not found eligible under the IDEA/Policy 2419 autism spectrum category on the WV Policy 2419 required school testings which were repeated at least once each year until December 2018 when he finally met the WV Policy 2419 required eligibility criteria. Joint Exhibit Nos. 13 and 27; Student/Parents Exhibit No. 50; CS Exhibit Nos. 53, 54, 57.

4. For the two years preceding the complaint filing, when Student was in the first grade (2017-18) and second grade (2018-19), Student attended school at his neighborhood elementary school. TR. I at 210. CS Exhibit Nos. 37, 45, 68 and 73.

5. Student's first grade year (2017-18) educational placement was 90% in a special education environment and 10% in a general education environment. Student's special education services were primarily delivered by a first grade special education teacher in the intellectual/developmental disabilities (IDD) classroom at Student's neighborhood elementary school. TR. I at 141-2. CS Exhibit Nos. 34 and 37.

6. Student's mother testified that in first grade, Student had meltdowns, extreme fear and negative reactions to bees and flies both at school and at home. Student displayed behaviors at school that interfered with his education and that of other students but his triggers were not always clear. TR. I at 141, 187, 190, 332-335.

7. Student had been cognitively evaluated prior to the preceding school year (2016-17) with multiple tests including the Weschler Preschool and Primary Scale of Intelligence (WPPSI), a well-recognized individually administered assessment of the intelligence of children ages two (2) years six (6) months through seven (7) years three (3) months, the Weschler Nonverbal Scale of Ability (WNV), an individually administered assessment of the general cognitive ability of children from four (4) years to twenty-one (21) years eleven (11) months of age, and an Adaptive Behavior Assessment System (ABAS) test which measures daily living skills such as skills necessary to meet environmental demands, caring for self, interacting with others independently and effectively and other everyday activities, for persons of any age. Student was found to have a verbal comprehension composite score of 72, in the WPPI test's borderline classification, a WNV full-scale score of 63, in the extremely low category, and ABAS adaptive behavior scores in the low range. Joint Exhibit No. 1; Student/Parents Exhibit No. 3.

8. Student's educational evaluations and placements were discussed at IEP meetings. Mother

testified that the IEP team discussed transitioning Student out of the IDD classroom into a regular education setting during his first grade year. Parent believed Student was capable of completing more academically challenging school work so in April 2018, additional student assessments were agreed to be conducted. The appropriate procedural safeguards were followed and the evaluations were timely completed. TR. I at 140-5. Joint Exhibit Nos. 22 and 23. Student/Parents Exhibit Nos. 32, 33 and 34. CS Exhibit Nos. 46, 47, 48, 49, 50 and 51.

9. In August 2018, new cognitive evaluations were done with Student. These tests and others were completed and/or commenced in October 2018 again with similar results. The Weschler Intelligence Test for Children (WISC) a well-recognized individually administered assessment of the intelligence of children ages six (6) years through sixteen (16) years seven (7) months and the Weschler Individual Achievement Test (WIAT), an academic achievement evaluation were administered. Student's WISC full-scale IQ score was 63 in the extremely low range and consistent with all his previous IQ tests but his WIAT showed some subtest scores that included average and even above-average ratings. The examiner noted that Student was cooperative and relatively focused on the tests being administered, yielding results that were deemed reliable and valid. CS Exhibit Nos. 48-51.

10. The County Schools interpreted these WIAT test scores as demonstrating that Student had been learning and retaining educational information and making progress in his academic skills in first grade. Student/Parents may have interpreted these scores to demonstrate that Student was not being academically challenged and that his IEP goals were insufficiently ambitious in first grade as alleged in the Complaint.⁵

⁵Student/Parents introduced no evidence at the hearing to substantiate this claim. Neither expert of Student/Parents spoke to the first grade portion of this complaint. CQ found the testing valid but she was not sure that Student showed all that he knows. MJD addressed the ability or achievement testing by inflating Student's ability scores and then dismissing the scores as not indicative of a student's ability. Neither expert offered any alternative testing results to demonstrate what Student's ability was. TR. I at 87-8, 271.

11. At the beginning of Student's second grade year (his school started August 20, 2018), the Student's placement was still 90%/10% as the IEP team had not met to go over the new tests. On August 24, 2018, Student/Parents agreed to attend an IEP meeting on September 5, 2018. Joint Exhibit No. 24; Student/Parents Exhibit No. 36; CS Exhibit No. 42.

12. On September 4, 2018, Student's multi disciplinary team met and on September 5, 2018, the Student's IEP team met as scheduled and both parents attended. Joint Exhibit No. 25-6; Student/Parents Exhibit No. 37-8; CS Exhibit Nos. 41, 42 and 45.

13. At the IEP meeting, the team reviewed Student's triennial re-evaluation plan and after extensive discussion, Student's placement increased his general education environment time to 76% and decreased his special education environment to 24% of Student's time at school. Joint Exhibit No. 26; Student/Parents Exhibit No. 37; CS Exhibit No. 45.

14. Student was assigned to and attended in a general education second grade classroom in his neighborhood school. Student's classroom teacher was certified in both regular and special education K-6 and is also the parent of a student who receives special education and related services with an eligibility of Autism and has ADHD. TR. II at 456-491.

15. Student's second grade classroom had twenty-three (23) students with a wide range of academic skills and abilities. These students included several other students with disabilities requiring special education and the classroom teacher provided instruction to all students in all core academic subjects. TR. II at 457, 499 and 504.

16. When Student started in this classroom in September 2018, the teacher initially allowed him time to adjust to the new classroom without the added stress of new academic tasks. Subsequently, Student was taught using on-grade level materials but the length of the assignments was shortened to accommodate Student's ADHD. TR. II at 479, 457-469, 499, 504.

17. In addition, as an accommodation, the classroom teacher allowed Student to walk around the classroom at times since he was paying attention to the instruction and could answer questions about the lessons. TR. II at 474.

18. Student continued to occasionally have meltdowns in the classroom which were sometimes preceded by Student placing his hands over his ears. Student's extreme reaction to flies and bees continued. It was agreed that Student does not like to change schedules or to be in a loud environment or around large numbers of other children. Various accommodations were instituted both within and outside the classroom. TR. I and TR. II at 332-5, 383-4, 475-504.

19. The itinerant autism specialists finished Student's Autism Diagnostic Observation Schedule (ADOS) on September 25, 2018. TR. III at 628-30. CS Exhibit No. 46-7.

20. On October 1, 2018, Student returned from physical education class apparently upset over the loss of a DOJO point⁶ and not only refused to open his reading book as requested by his teacher, yelling at her and repeating "no" but also turned his desk over narrowly missing the teacher's foot. The incident report notes that Student has been brought to the office several times for yelling and being disruptive and then after getting calmed down is returned to the classroom. This incident was determined to be an escalation and a safety concern and the administration suspended the student for one day, notifying both parents. CS Exhibit No. 4.

21. Upon his return day to school after the one-day suspension, Student was in the library

⁶The DOJO is a communication system used by the County Schools that allows teachers, parents and administrators the ability to exchange information. It also permits the creation and tracking of classroom positive behavior plans which subtract points for misbehavior and add points for good behavior which are totaled for some weekly award. Student's classroom teacher used this behavior plan for the students in her classroom but modified it for Student so that Student had greatly increased opportunities to win points and could exchange them for a daily prize. The teacher later further modified the positive behavior plan for Student by discontinuing subtracting or loss of points as that caused Student to become very upset and did not help him control his behavior. TR. II at 332, 470-2.

with his class for a book fair and got upset when the librarian told the class that whoever had money could shop first and then the other students could look. Student began to cry, got up and tried to push over a table set up with book fair books and then began beating on the table with his fists. His classroom teacher was sent for and he was removed from the library as his behavior was considered to be a safety issue. The incident report notes that he was suspended for two and one-half days to return on Monday, October 8, 2018. An IEP meeting was noted to be scheduled for the following week. TR. I at 200-2. CS Exhibit No. 4.

22. On October 17, 2018, the school psychologist finished her draft behavior intervention plan for Student because of these two behavior incidents. TR. III at 635-6. CS Exhibit No. 51.

23. As part of the behavior intervention plan, Student's classroom teacher was to take notes of Student's behavior during the day and share them with the school psychologist. She did so both in handwritten form and by entering into the school's DOJO system, and the school psychologist entered the information into her record keeping for her report. TR. II at 479. CS Exhibit Nos. 78, 79 and 81.

24. On November 13, 2018, the incident report stated that Student refused to do any work in his classroom, had been sent to the office twice for running around the room, screaming and running from adults. In his home room, he got mad at his teacher because she wouldn't give him her i-Pad, and kicked the trash can across the room, picked up a chair and when the teacher took it away from him, Student ran out of the room. He ran to the office, took off his shirt and told the vice principal he was going to beat her ass. Student/Parents Exhibit No. 42. CS Exhibit No. 4.

25. After returning from a one-day suspension, on November 15, 2018, Student was having physical education class in his classroom as the gym was being used for a different function. Student didn't want to participate and sat at a table sobbing. When the male gym teacher came over to see what was wrong, he sat down and the student then put his hands on the teacher's neck trying to choke him. When the teacher told him to stop, Student continued, so the teacher reached for his phone to

get the administration and Student knocked the phone out of his hand. The classroom teacher came in and told Student to stop and that he would have to go to the office. Student refused to go and lay on the floor and cried. The gym teacher picked him up and tried to take him to the office; Student grabbed the teacher's eyeglasses off and the teacher put him down and asked for his glasses back. Student complied and returned the eyeglasses. In the office, Student started throwing things and turning over chairs, screaming and crying. Parents were called but were unable to come get him so Student was placed in in-school suspension. Student/Parents Exhibit No. 44. CS Exhibit No. 4.

26. On November 26, 2018, Student refused to go into the lunchroom because they were serving eggrolls, dropping to the floor and requiring his teacher to pick him up and take him to the office. There, Student lay on the office floor, covering his ears and repeating over and over "I don't like eggrolls." The principal was finally able to calm him, got him a tray and he ate. Student/Parents Exhibit No. 45. CS Exhibit No. 4.

27. On November 29, 2018, Student took a sucker from his teacher's desk and when he was asked to return it because he hadn't earned it yet, Student became angry, pushing things off her desk, kicking at things and screaming. Because Student refused to stop, the teacher took the other students out of the classroom and called the office. When the administration came to the classroom, Student refused to walk to the office, took off his shoes and socks and threw them at the administration who escorted Student to the office. Student bit the principal twice, hit the vice principal in the head and pulled her hair, and kicked both of them. Once contained in the office, Student continued screaming, kicking, hitting and took a plaque off the wall and threw it at the vice principal. Student's parents were called, his father came to school and Student continued screaming and kicking and hitting his father. The incident report notes that father informed administration that Student had an appointment with a psychiatrist on December 5, 2018. The incident report noted that there was another IEP meeting scheduled for December 3, 2018 and Student was suspended for repeated employee battery for three (3) days. CS Exhibit No. 4.

28. On December 3, 2018, Student's Eligibility Committee completed its evaluation, finding

Student eligible for special education and related services under the WV Policy 2419 category of Autism. CS Exhibit Nos. 53, 54, 57.

29. On December 10, 2018, Student's new IEP was completed at the IEP meeting with parents in attendance, after notice. Joint Exhibit No 27. Student/Parents Exhibit No. CS Exhibit Nos. 58 and 60.

30. On Tuesday, December 11, 2018, Student became upset in his classroom because he didn't bring money for the scheduled Santa's workshop and began running around the room and throwing things onto the floor. Because Student refused to stop, the teacher took the other students out of the classroom and called the office. The teacher got him calmed down but then shortly thereafter Student became upset and began running around the room and tried to throw the computer keyboard. Because Student again refused to stop, the teacher again took the other students out of the classroom and called the office. Student then went to the office for the second meltdown where he climbed on furniture, threw things off a desk and ripped up papers that were on a counter. While Student was in the office, his father came in to leave some money for him for the Santa's workshop. Student wanted to go with him when his father was getting ready to leave and when told he couldn't, Student screamed and ran out of the office, down the hallway, into the cafeteria and out the cafeteria doors to Ohio Street, continuing to run down Maple Street and Kentucky Street, with administration and his father chasing him. When they finally caught up with Student, his father took him by the arm and Student was refusing to come back to school. The incident report notes that he tried to bite his father several times and that Student was suspended for ten (10) days with a possibility of expulsion, depending on the manifestation determination. TR. II at 313-15. Student/Parents Exhibit Nos. 53-4. CS Exhibit No. 4.

31. Prior to this incident, Student had been suspended for six and one-half (6 ½) or eight (8) days, depending on how some suspensions are counted. Student/parents received a Prior Written Notice dated December 11, 2018, to change Student's educational placement and have a manifestation determination meeting pursuant to WV Policy 2419. Parents were also sent a Services

Provided During Special Education Suspension form dated December 11, 2018, although the Student had not been out on suspension ten days. Student remained out of school on suspension for the remainder of that week (December 12, 13, and 14) and the manifestation determination meeting was held Monday, December 17, 2018 with both parents attending and signing the Notice and the Review Form. The IEP team determined that Student's repeated employee batteries and elopement had a direct and substantial relationship to the student's disabilities. The team also checked that this manifestation determination disciplinary action review was caused by a series of removals that constitute a pattern as established by meeting all three (3) criteria (more than 10 cumulative school days, similarity of behaviors and length and proximity of removals). Joint Exhibit Nos. 29, 30 and 62. Student/Parents Exhibit Nos. 55, 57, 58, 59, 61, 62. CS Exhibit Nos. 62, 63, 64, 66 and 67.

32. Sometime in 2018, Student was prescribed and began taking Focalin, a nervous system stimulant utilized primarily in the TR. treatment for ADHD. Unfortunately, because the start date of this medication was not made part of the record, it is unknown whether this medication helped increase Student's behavior problems in the autumn or helped decrease his behavior issues in the spring of his second grade year. Student also takes Risperdal. TR. I at 184-5, 312.

33. Student's educational placement was changed at the December 10, 2018, IEP meeting from the second grade general education classroom to a different classroom but the Student suspension interrupted the transfer. At the December 17, 2018, IEP meeting which both the parents and their attorney attended, the team determined that Student would be placed in a separate classroom and that he would be provided 35% general education and 65% special education. Joint Exhibit Nos. 32. Student/Parents' Exhibit No. 62. CS Exhibit Nos. 60 and 68

34. For the rest of the 2018-19 school year, Student continued with his resource room work in reading and math with two teachers (one half-time), with the full-time teacher certified to teach students with mental impairments, learning disabilities and behavioral disabilities. There are usually five students, most of whom are in regular education for most of their days, in the room with Student who started there in September 2018. TR. III at 515-519.

35. For the rest of the 2018-19 school year, in addition to the resource room, Student was in the behavior disorder classroom for his special education with an aide and a teacher who is certified in the areas of intellectual disabilities, behavior disabilities and learning disabilities. In this classroom, Student receives the county schools' social skills program and the i-ready math program and the visual program ST Math. Student also receives a special needs counseling class which follows a WV mandated curriculum. TR. I at 108. TR. II at 318, 325-6, 335, 369. TR. III at 407, 756-7.

36. For the rest of the 2018-19 school year, Student was with regular education peers in a weekly counseling class, physical education, art, music, and library. TR. II at 319.

37. The reading program that Student received in second grade is the County Schools' second grade comprehensive language arts program. It is an evidence-based program. His fall semester general education teacher noted that it is modified extensively for Student and accommodations included extended time to complete reading, tests read aloud and peer helper for reading, reduced assignments and answer choices. In the resource room, Student also used a student workbook and the Dynamic Indicators of Basic Early Literacy Skills (DIBELS) which are measures that help gauge how well students are doing on critical reading skills. TR. 324, 327, 518-9. Student/Parents' Exhibit No. 40. CS Exhibit Nos. 59 and 60.

38. Because of the Student's October 1, 2018 and the October 3, 2018 behavior incidents causing suspension, the school psychologist completed her draft of Student's behavioral intervention plan (BIP) for the October 17, 2018, IEP meeting. His classroom teacher entered notes in DOJO and also did handwritten notes on Student's behavior and shared them with the school psychologist to use for the plan. CS Exhibit Nos. 78, 79 and 81.

39. Data on Student's behavior was collected from all teachers and the parents on December 3, 2018. TR. III at 643-4. CS Exhibit Nos. 55 and 56.

40. A functional behavior assessment (FBA) was conducted on the student by the County Schools' board certified behavior analyst (BCBA). The assessment data collection and file review was started in January 2019 and completed, based on the available data, before the February 7, 2019 IEP meeting. At the IEP meeting, at which both parents and their attorney were in attendance, the IEP team with the BCBA created a new BIP for Student, including a reference to a crisis plan. On April 3, 2019, the BCBA wrote an Applied Behavior Analysis Recommendation for the Student. Student/Parents Exhibit No. 64. CS Exhibit Nos. 71, 74 and 76.

41. County Schools' autism programming consultant JB is a board certified behavior analyst and holds a certificate in autism, as well as being a licensed teacher supervisor and a certified teacher. He provides and has provided consulting services to nine (9) other West Virginia school districts and other school districts outside the state for about twenty-five years. He reviewed Student's records and testified that the FBA and the resulting BIP, based on the information available, were consistent with best practices.

42. JB testified that to successfully integrate Student back into a regular education classroom would require determining the exact triggers that caused Student to be unsuccessful behaviorally in his second grade regular education classroom. Once those triggers are determined and accommodated, Student should begin spending increasing amounts of time in the regular education classroom although Student may never be able to tolerate a whole day in the general education setting. TR. III at 788-95, 802-5.

43. In March and April, 2019, Student/Parents' two experts (MJD and CQ) came to Student's school and home. Student had been in his current placement three (3) or four (4) months at the times of their respective visits. Student/Parents' Exhibits 70 and 72.

44. MJD visited the Student's school on April 11, 2019 for about three hours (TR. I at 85); observing him in a special education class, a general education music class and in something she

referred to as “a counseling session⁷.” She reviewed a portion of Student’s records and met with the parents at home with all their children. She prepared a report dated August 12, 2019, and signed August 6, 2019.⁸ MJD’s report says “I have worked as an expert witness on educational matters for the US Department of Justice, Disability Rights Ohio, Disability Rights California, and the Bazelon Center for Mental Health Law.” (MJD Report at 2) At the hearing, MJD testified that she was an “expert witness in educational matters” all over Indiana, Ohio, California, Georgia and Mississippi (TR. I at 26) but later in answer to another question, she answered that she had only done one other expert report and that was in Mississippi a long time ago. (TR. I at 109, 115) Her CV shows that her professional experience was primarily in Indiana and that she was the Special Education Director for the Indianapolis public schools from 1989-2005, as well as supervising student teachers and teaching at the Indianapolis campus of Purdue and Indiana Universities beginning in 2006. In 2001, MJD received her EdD in Educational Policy and Leadership, in 1972 she received her M. Ed. in Special Education and a certificate in learning disabilities and emotionally-handicapped in 1977.

45. MJD denied being a school or clinical psychologist and denied being a board certified behavior analyst but said she supervised psychologists. (TR. I at 112) She was confused, apparently by her review of the records as to Student’s BIPs and she was critical of the FBA, misstating that County Schools had a “ whole semester” from the time of the FBA to the end of the school year to adjust it: the undisputed record evidence that the FBA was done in January 2019 and MJD visited on

⁷ MJD’s report criticized that “instead of counseling, the students played basketball with aides in the gymnasium, while the counselor sat on the bleachers.” She also testified that she spoke with the counselor and the counselor told her “she didn’t have a curriculum.” TR. I at 109. The counselor adamantly denied saying that to MJD insisting that she teaches a curriculum following the WV state standards and that it includes bullying, conflict resolution, self esteem... TR. III at 756. The counselor also testified that Student not only came to her in the fourth nine-weeks for pull-out counseling, he also came to her in small-group of six to eight children where they played games, tell stories, read books and talk about the book’s messages in an effort to teach the students social skills and how to get along. She testified that as a reward the students play team games and the adults play with them. TR. III at 756-8. MJD apparently didn’t know or understand how counseling in West Virginia is delivered.

⁸MJD was unable to explain this discrepancy but allowed the report date to be changed at the hearing. TR. I at 113-14.

April 11 so it was only several months. In addition, she noted that Student had not had a meltdown since December 2018 when he left the general education classroom. TR. I at 97-8.

46. MJD administered and/or provided no educational testing of Student but repeatedly wrote in her report and testified that he was capable of grade level work apparently without modifications. She testified that based on her short time with Student at his home and based on a game she plays with her grandchildren, she was able to determine Student has great strengths in math and is capable of doing much more academically. (TR. I at 102) Student/Parents' Exhibit Nos. 70 and 73.

47. CQ visited the Student's school on March 18, 2019 for about three hours (TR. I at 234; CQ Report at 3) She reviewed a portion of Student's records and met with the parents at home for about an hour. TR. I at 304-5. She prepared a report dated August 12, 2019, and signed it August 9, 2019⁹. CQ received her doctorate in severe disabilities-communication disorders in 1988 from Johns Hopkins University and her masters in educational psychology in 1975 with a minor in gifted education from University of Connecticut. Since 1990, CQ founded and has been employed at The Maryland Coalition for Inclusive Education, Inc. which she identified as a "professional development in autism institute" TR. I at 225. Her CV reflects that she provided intensive training to educators in Kazakhstan in 2018, consulted in Moscow in 2017, provided training to parents, teacher, faculty and administrators of children with Down Syndrome in Ekaterinburg Russia in 2013, in 2012 and 2013 provided training and developed guides for a school to work pilot in Viet Nam, and in 2011 and 2012 provided training on inclusion in multiple locations in Russia. Student/Parents Exhibit No. 71. CQ is an experienced witness and has been an expert witness in approximately seven (7) due process cases. In the due process cases in which she testified, she has always testified that the student with significant cognitive and/or behavioral disabilities be educated in a general education environment and be fully included. TR. I at 290.

48. CQ testified that Student should be in the regular education classroom and could return

⁹CQ's report was similarly formatted to MJD's report which also had the seemingly impossible combination of a dated signature occurring before the report was dated and written.

to the regular education classroom on a gradual transition basis. TR. I at 284. She noted that Student “is always going to have problems in terms of self-regulation...he really needs techniques to help himself to regulate when he’s upset. That’s the kind of learning he needs. And he’s always going to have to practice it. It’s not going to go away.” TR. I at 270. Although she testified that she had not reviewed the state (WV) standards, she said that his IEP math goals were below the regular second grade math curriculum standards. (TR. I at 273 and 299) CQ explained that one strategy to respond to behaviors is to ignore the behavior and move on “as long as it didn’t pose a danger to the student or other students.” TR. I at 280. Student’s second grade regular education classroom teacher testified that she would ignore Student’s behaviors when she could and when it wasn’t dangerous to the other students.

49. Both experts used similar phrases and came to the same conclusions that the Student should be in a general education classroom in his neighborhood school. Both seemed surprised that Student was in his neighborhood school. TR. I at 93 and 291.

50. Both experts emphasized their personal and organization’s experience and abilities to come into a school system and train in what they consider to be the appropriate strategies. CQ wrote that the school system needs “an outside consultant who is specially trained on supporting planning for students with significant disabilities...” and when asked whether her organization could provide this consultant, she answered in the affirmative. (TR. I at 68 and 291-4) Although this might suggest that both witnesses had ulterior motives, conflicts or possible personal gain, in the opinion of the hearing officer it did not affect their credibility to such an extent to find either of them incredible on this basis.

51. CQ testified that she was familiar with video modeling relating to social stories and that research has shown it is a very effective instructional tool. TR. I at 274. MJD testified that she was familiar with video modeling related to social stories but she believes in direct instruction. TR. I at 105-6. MJD also testified that Student needed direct social stories. TR. I at 70. Both experts were apparently unaware that Student was daily using Teach Town, a video modeling program with social

stories. TR. II at 319.

52. Both experts made other factual errors in their respective reports and in their testimony. For example, MJD testified that no data was collected in the general education classroom about Student's behavior. (TR. I at 55, 104-5) When questioned further, she reviewed her materials and said the data in her record was only from the resource teacher and the BD class teacher. The hearing record includes multiple examples and exhibits of data that were collected in the general education classroom (see for example, TR. II at 331, CS Exhibits 46, 78 and 79). The most likely cause of these repeated errors was found in reviewing the Student's educational and testing materials each expert was provided by the Student/Parents. Both of the experts were apparently not given many of the documents that were admitted into the record, provision of which may have given them a better foundation to offer opinions on Student.

53. Neither expert displayed any knowledge of the repeated employee batteries and escalation of violence by Student in the fall of 2018. For example, Student/Parents Exhibit No. 44 is labeled "Incident Summary- Aggressive Conduct involving screaming and crying in gym class; Resulting Action: In-school suspension" in their Exhibit List. A brief glance at Student/Parents titling of the incident document would suggest that Student was having "typical autism meltdowns" as his mother referenced these behaviors. However, the actual incident report says that Student was having physical education class in his classroom as the gym was being used for a different function. Student didn't want to participate and sat at a table sobbing. When the male gym teacher came over to see what was wrong, he sat down and **Student then put his hands on the teacher's neck trying to choke him.** When the teacher told him to stop, Student continued, so the teacher reached for his phone to get the administration and Student **knocked the phone out of his hand.** The classroom teacher came in and told Student to stop and that he would have to go to the office. Student refused to go and lay on the floor and cried. The gym teacher picked him up and tried to take him to the office; Student grabbed the teacher's eyeglasses off and the teacher put him down and asked for his glasses back. Student complied and returned the eyeglasses. In the office, Student started throwing things and turning over chairs, screaming and crying. Parents were called but were unable to come get him so Student was

placed in-school suspension. **(Emphasis added)**

56. In another example, Student/Parents' Exhibit No. 42 is captioned "Incident Summary-Disrespectful/Inappropriate Conduct involving running around classroom and running to office; Resulting Action: one day out of school suspension" in their Exhibit List. However, a complete reading of the incident report is that Student refused to do any work in his classroom, had been sent to the office twice for running around the room, screaming and running from adults. In his home room, he got mad at his teacher because she wouldn't give him her I-pad, and kicked the trash can across the room, picked up a chair and when the teacher took it away from him, Student ran out of the room. He ran to the office, took off his shirt and **told the vice principal he was going to beat her ass. (Emphasis added)**

57. The serious discipline problems that caused the principal to request a hearing on expulsion if the conduct was not the result of a disability manifestation occurring on December 11, 2018, are again misleadingly labeled in Student/Parents Exhibit Nos. 53 and 54 emphasizing not having money or being upset at Santa's Workshop. Again a brief glance at Student/Parents titling of the incident documents would suggest that Student was having "typical autism meltdowns" as his mother referenced these behaviors. However, the exhibit says Student began running around the room and throwing things onto the floor. **Because Student refused to stop, the teacher took the other students out of the classroom** and called the office. The teacher got him calmed down but then shortly thereafter Student became upset and began running around the room and tried to throw the computer keyboard. Because Student again refused to stop, **the teacher again took the other students out of the classroom** and called the office. Student then went to the office for the second meltdown where he climbed on furniture, threw things off a desk and ripped up papers that were on a counter. While Student was in the office, his father came in to leave some money for him for the Santa's workshop. Student wanted to go with him when his father was getting ready to leave and when told he couldn't, **Student screamed and ran out of the office, down the hallway, into the cafeteria and out the cafeteria doors to Ohio Street, continuing to run down Maple Street and Kentucky Street, with administration and his father chasing him.** When they finally caught up

with Student, his father took him by the arm and Student was refusing to come back to school. The incident report notes that he **tried to bite his father several times** and that Student was suspended for ten (10) days with a possibility of expulsion, depending on the manifestation determination **(Emphasis added)**

58. Perhaps most telling, the November 29, 2018, incident report was not even included as a Student/Parent exhibit and was presumably not shared with their experts, although the parents and counsel were aware of this report. That incident report says that Student took a sucker from his teacher's desk and when he was asked to return it because he hadn't earned it yet, Student became angry, pushing things off her desk, kicking at things and screaming. Because Student refused to stop, **the teacher took the other students out of the classroom** and called the office. When the administration came to the classroom, Student refused to walk to the office, took off his shoes and socks and threw them at the administration who escorted Student to the office. **Student bit the principal twice, hit the vice principal in the head and pulled her hair, and kicked both of them. Once contained in the office, Student continued screaming, kicking, hitting and took a plaque off the wall and threw it at the vice principal.** Student's parents were called, his father came to school and Student continued screaming and kicking and hitting his father. The incident report notes that father informed administration that Student had an appointment with a psychiatrist on December 5, 2018. There was another IEP meeting scheduled for December 3, 2018 and Student was suspended for repeated employee battery for three (3) days. **(Emphasis added)**

59. Many of Student's behavior incidents placed other students in harm's way. Student/Parents' expert CQ repeatedly emphasized the safety of the Student and the other students at school when using her technique of ignoring behaviors. Since she never addressed Student's behaviors in reference to other students in her testimony or her report, it could be possible that she didn't review these incident reports or that she didn't recognize the repeated threats to other students by Student's behaviors. (TR. I at 280-83).

60. MJD noted in both her report and her testimony that when she saw Student in school in

April, student had no difficulty when his normal schedule was changed because of a meeting, although transitions and schedule changes were historically difficulties for him. CQ failed to put in her report but did testify on cross about an improvement she saw in Student in March. She testified that when Student was using headphones and doing his math, he took off his headphones and put his hands on his ears (his normal signal that he was starting on a meltdown) “began rocking a little bit, he slapped his hand a little bit, he cried a little bit and then he went back to the program.” CQ testified that he was managing himself and raising his ability to tolerate something. TR. I at 276-8.

61. The evidence was undisputed that Student’s behavior both in the classrooms and elsewhere in the school improved during the spring semester of second grade. There was consistent testimony that Student’s serious explosive incidents have dramatically decreased. Student is more likely to de-escalate especially with the use of preferred activities and when he can’t de-escalate, he will cooldown by, either asking for a break or asking to go to another nearby teacher’s room that has fish. Student’s violent tendencies and elopements had also diminished by the end of the 2018-19 school year, although he still has occasional meltdowns. TR. II at 336-8 TR. III at 694-5.

CONCLUSIONS OF LAW

1. A due process complaint must be initiated within two (2) years of the date a parent or district knew or should have known of a disputed decision or alleged action that forms the basis for the complaint. *WV Policy 2419 (126 CSR 16) Dispute Resolution, Ch. 11, §4A.*

2. The burden of proof in a due process complaint consists of the burden of production and the burden of persuasion. The burden of production is the duty of a party to be the first to introduce evidence to prove a disputed fact such that if the party with the burden fails to satisfy the initial burden, the other party wins without having to present evidence on that disputed fact. The burden of persuasion is the responsibility of a party to convince the trier of fact that they have presented

sufficient evidence to persuade the trier of fact to award them a win. The United States Supreme Court has determined that in a due process hearing challenging the school system's provision of FAPE, the burden of proof is placed upon the party seeking relief which, in this matter, is the Student/Parents. Schaffer v. Weast, 546 US 49, 62 (2005).

3. The burden of proof in West Virginia is "on the party seeking relief..." *WV Policy 2419 (126 CSR 16) Dispute Resolution, Ch. 11, §4.A.*

4. When a student is suspected of needing special education and related services, WV Policy 2419 establishes the procedures and requirements for evaluating the student. The initial evaluation is expected to gather information to determine whether the student has a disability, what the educational needs of the student are including his present levels of academic achievement and his related developmental needs, the effects of the disability on educational and functional performance, whether the student needs specially designed instruction and the nature and extent of the special education needed by the student. *WV Policy 2419 Evaluation/Reevaluation, Ch. 3, §2A.*

4. The evaluation team has an eighty (80) day time line to complete this work (with some exceptions) and if appropriate the team should look at information provided by the parent and/or data from current classroom-based assessments and observations, observations by teachers and related service providers and/or results from district-wide or statewide testing. *WV Policy 2419 Evaluation/Reevaluation, Ch. 3, §2 A.*

5. In an initial evaluation, the student needs to be evaluated in all areas related to the suspected disability including, if appropriate, health, social and emotional status, behavioral performance, general intelligence, and academic performance and must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the suspected exceptionality. *WV Policy 2419, Evaluation/Reevaluation, Ch. 3, §4 A.*

6. The evaluation procedures and instruments must include those tailored to assess specific

educational need and must be provided at no expense to the parent. The evaluators must meet the qualifications and the evaluators must write, sign and date the evaluation report which must be available to the committee and the parent within the eighty (80) day time line. *WV Policy 2419, Evaluation/Reevaluation, Ch. 3, §§ 4 B and C.*

7. No single measure or evaluation may be used as the sole criterion for determining whether a student is a student with a disability and for determining an appropriate educational program for the student. *WV Policy 2419, Evaluation/Reevaluation, Ch. 3, § 4 B.2.*

8. The results of an independent educational evaluation (IEE) may not be the sole determining factor for eligibility. *WV Policy 2419, Procedural Safeguards, Ch. 10, §7 D.*

9. The student must meet the requirements of the “three-prong test of eligibility” or is not eligible for special education. *WV Policy 2419, Eligibility, Ch. 4, §3.*

10. The three-prong test requirements are:

- a. student meets state requirements for one or more specific exceptionalities;
- b. student experiences adverse effects on his educational performance (except gifted);
- and
- c. student needs special education.

WV Policy 2419, Eligibility, Ch. 4, §3.

11. Special education is defined as “specially designed instruction, at no cost to the parents, to meet the unique needs of the student with an exceptionality.” *WV Policy 2419, Eligibility, Ch. 4, § 3.*

12. Specially designed instruction means “the content, methodology, or delivery of instruction is adapted, as appropriate, to address the unique needs of the student that results from the student’s exceptionality and to ensure access of the student to the general curriculum so that the student can

meet the educational standards that apply to all students.” *WV Policy 2419, Eligibility, Ch. 4, § 3 A.*

13. The exceptionality nominated Other Health Impairment (OHI) is defined as meaning “having limited strength, vitality or alertness, including heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment that is due to chronic or acute health problems. These health problems may include but are not limited to asthma, attention deficit hyperactivity disorder (ADHD), cancer, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, Tourette syndrome and stroke to such a degree that it adversely affects the student’s educational performance.” *WV Policy 2419, Eligibility, Ch. 4, §3 K.*

14. A student is eligible for special education services as a student with other health impairment (OHI) when documentation of five (5) criteria exist:

- A. The student exhibits characteristics consistent with the definition,
- B. The student has been diagnosed with a chronic or acute medical or health condition by a licensed physician or has ADHD diagnosed by a school or licensed psychologist or physician,
- C. The student has educational needs as a result of the health condition,
- D. The condition adversely effects the educational performance of the student and
- E. The student needs special education.

WV Policy 2419, Eligibility, Ch. 4, § 3.K.

15. A student is eligible for special education services as a student with Intellectual Disability if

- A. The student with mild to moderate intellectual disability has general intellectual functioning ranging from two to three standard deviations below the mean as determined by a qualified psychologist using an individually administered intelligence test;
- B. The student exhibits concurrent deficits in adaptive functioning expected for the student’s age based on clinical and standardized assessments in at least one domain (conceptual, social or practical;

- C. The age of onset is eighteen years of age or below;
- D. The condition adversely effects the educational performance of the student; and
- E. The student needs special education.

WV Policy 2419, Eligibility, Ch. 4, § 3.I.

16. A student is eligible for special education services as a student with Autism if all the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-5) criteria are met:

I. Documentation of

A. Persistent deficits in social communication and social interaction across multiple contexts:

- 1. Deficits in social-emotional reciprocity...;
- 2. Deficits in nonverbal communicative behaviors used for social interaction...;
- 3. Deficits in developing, maintaining and understanding relationships....;

B. Restricted repetitive and stereotyped patterns of behavior, interests and activities, shown by at least 2 of the following:

- 1. Stereotyped or repetitive motor movements, use of objects, speech...;
- 2. Insistence on sameness, inflexible adherence to routines or ritualized patterns of behavior....;
- 3. Highly restricted fixated interests that are abnormal in intensity or focus....;
- 4. Hyper or hypo-reactivity to sensory input...;

C. Symptoms must be present in early development (but may be fully manifested or masked later);

D. Symptoms cause clinically significant impairment in social occupational, or other important areas;

E. These are not better explained by intellectual disability....

II. Autism is diagnosed by a psychiatrist, physician, licensed psychologist or school psychologist;

III. The condition adversely effects the educational performance of the student;

IV. The student needs special education; and

V. The student's educational performance is not adversely affected primarily because the student has

an emotional/behavioral disorder.

WV Policy 2419, Eligibility, Ch. 4, § 3.A.

17. In matters alleging a procedural violation, a hearing officer may find that a student did not receive a free appropriate education only if the procedural inadequacies “...(i) impeded the child’s right to a free appropriate education; or (ii) significantly impeded Parent’s opportunity to participate in the decision making process regarding the provision of a free appropriate public education to parents’ child; or (iii) caused a deprivation of educational benefits to the student.” 20 U.S.C. §1415(F)(3)(E)(ii) and *WV Policy 2419, Ch. 11 §4.M.* However, the Fourth Circuit has recently determined that the hearing officer may find that a student did not receive a free appropriate public education only if the procedural inadequacies (i) impeded the child’s right to a free appropriate education; **and** (ii) significantly impeded Parent’s opportunity to participate in the decision making process regarding the provision of a free appropriate public education to parents’ child; **and** (iii) caused a deprivation of educational benefits to the student. (Emphasis added) *R.F. v. Cecil County Public Schools*, 74 IDELR 31 (4th Cir. 2019)

18. The free appropriate public education (FAPE) standard was clarified by the US Supreme Court in March of 2017 from the Rowley¹⁰ standard that a student requiring special education and related services must receive some benefit from his educational services to the Endrew F. standard focusing on the student’s progress and requiring a school to provide the student with meaningful benefit, although not necessarily equivalent to those benefits provided to other students. The IEP must be reasonably calculated to enable a child to make progress appropriate in light of the individual child’s circumstances and the goals for the child must be appropriately ambitious. *Endrew F. ex rel. Joseph F. v. Douglas County School Dist. RE-1*, 137 S. Ct. 988 (2017).

19. The rules and laws concerning student behavior and discipline that apply to all students attending public schools in West Virginia include the *West Virginia Safe Schools Act*, W. Va. Code

¹⁰*Board of Ed. Of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U.S. 176 (1982)

§18A-5-1a and *Expected Behavior in Safe and Supportive Schools*, West Virginia Board of Education Policy 4373. This County Schools has adopted Policy J25 *Student Behavior Code*. For students with disabilities, WV Policy 2419, Discipline, 126CSR16, 7.2 provides additional rules.

20. Unless the behavior is a manifestation of a student's disability, a student must be expelled for a period of not less than twelve consecutive months, after hearing, if the student has violated the provisions of W. Va. Code § 18A-5-1a (a), in particular, committing battery on school employees. A student may be expelled for a period not to exceed one school year, after hearing, if the student has violated any of the provisions of W. Va. Code § 18A-5-1a (b), in particular, by threatening to injure or injuring a school employee, by leaving school without permission (elopement), or by disruptive conduct at school. W. Va. Code §18A-5-1a (i).

21. Level 4 Safe Schools Act Behaviors and Level 3 Imminently Dangerous, Illegal or Aggressive Behaviors under *Expected Behavior in Safe and Supportive Schools*, West Virginia Board of Education Policy 4373, require direct referral to the Superintendent because of the serious nature of the student's conduct and suspension and possible expulsion.

22. For students such as Student, WV Policy 2419, Discipline, 126CSR16, 7.2 provides

A. School must provide same day notice of the removal, PWN; and

B. Conduct a manifestation determination meeting within 10 school days of any decision to change placement because of disciplinary reasons.

If it is a manifestation,

C. Conduct an FBA unless an FBA was conducted before the behavior;

D. Develop and implement a BIP or review the existing BIP and modify as needed;

E. Return the student to the placement or an agreed changed placement as part of the BIP modification.

23. §504 of the Rehabilitation Act is a federal law designed to protect individuals with disabilities in programs and activities that receive federal financial assistance from the U.S.

Department of Education. It prohibits discrimination and requires school districts to provide free, appropriate public education (FAPE) to students with disabilities no matter what the disability is. §504 defines FAPE as the provision of regular and special education and related services designed to meet the students individual educational needs as adequately as the needs of students without disabilities are met. The law is Rehabilitation Act of 1973 (as amended), 29 U.S.C. §794 (Section 504); the regulations implementing §504 in the context of education are found at 34 CFR Part 104.

24. If a student is eligible for services under IDEA, the student must have an IEP, not a §504 Plan. Generally, a student would not have both a §504 Plan and an IEP, since an IEP is one way to meet the anti-discrimination provisions of §504.

25. Attorney fees may be awarded by a court or agreed to by the parties. *WV Policy 2419, Dispute Resolution Ch. 11 §4 O.*

DISCUSSION

I. Overview

As noted above, the burden of proof in this due process hearing belongs to Student/Parents and involves both the burden of production and the burden of persuasion. The Student/Parents have the obligation to provide evidence on each allegation and then demonstrating that this evidence is sufficient and outweighs any evidence offered by County Schools.

In reviewing the evidence, the hearing officer finds that the word “meltdown” is used frequently without definition. Student’s second grade regular education classroom teacher used the word “tantrum” as synonymous with the word “meltdown” and “tantrum” is defined in the Oxford

University Press dictionary as “an uncontrolled outburst of anger and frustration, typically in a young child.” In exhibits and testimony concerning behavior management of Student, meltdowns were identified as target behaviors to either be ignored (extinction) or prevented by identifying and avoiding the triggers that cause the meltdown. Descriptions of Student’s meltdowns usually include the words “screaming,” “throwing” objects, “turning over” desks/chairs, etc., “kicking” people and objects like trashcans, “hitting” “slapping” “pulling hair” and “biting” adults.

In additional to the issues identified by Student/Parents’ counsel to be decided in this due process, there were three other issues that arose during the course of the hearing: provision/cessation of occupational therapy services to student, eligibility for special education under autism or intellectual disability, and school-parent communication, trust and control.

A. Occupational therapy

Although provision or cessation of occupational therapy (OT) to Student was not an identified issue to be determined by this due process, Parents objected to the Student’s dismissal from school-based OT services. The record reflected that Student had received OT at school since 2013 (preschool). In 2016, Student’s “inconsistency with fine motor and sensory motor skills” required the continuing provision of OT. Joint Exhibit No. 11. Student/Parents’ Exhibit No. 22. CS Exhibit No. 27. By December 2018, his OT therapist found that Student had achieved his OT goals and no longer required OT to access his educational environment. Student’s OT therapist who has a masters degree in OT and has served Student since 2013 recommended he be dismissed from OT. Joint Exhibit No. 31. Student/Parents’ Exhibit No. 63. CS Exhibit No. 65. TR. III at 579-80, 584-5. Parents’ expert CQ disagreed with the school OT therapist’s conclusions but she does not appear to have any education, training or experience as an occupational therapist. TR. I at 259. Student/Parents’ Exhibit No. 71.

Therefore, Student/Parents failed to offer sufficient evidence at the hearing to show that Student’s occupational therapy services should not have been discontinued or that Student needs

another occupational therapy evaluation as requested as a Student/Parents' remedy.

B. Eligibility - Area of Exceptionality

Although Student's area of exceptionality for eligibility for special education was not an issue identified by Student/Parents' counsel to be resolved in this due process, the difference of opinion between Student/Parents and the County Schools as to Student's area of exceptionality pervaded the hearing. Mother identified Student's areas of disability as autism and attention deficit hyperactivity disorder, not agreeing that he is intellectually disabled. TR. I at 118.

The student was initially served in the Birth to Three program as developmentally delayed and then transitioned into County Schools for pre-school, and then to pre-kindergarten where he received his first IEP and was retained there by request of Parents. CS Exhibit No. 14. This IEP identified Student's area of exceptionality as Intellectually Disabled. Parents disagreed and continue to disagree with this identification and believe Student's areas of exceptionality should have been and should be ADHD and Autism.

A student with an intellectual disability has general intellectual functioning ranging from two (2) to three (3) standard deviations below the mean as determined by a qualified psychologist using an individually administered intelligence test.¹¹ Student's IQ has been appropriately tested in the 60s and 70s¹² and therefore meets the determined requirement,¹³ Student/Parents do not believe that is

¹¹The complete eligibility criteria for Intellectual Disability are found in *WV Policy 2419*, 126CSR16, 4. 3. I.

¹²Student's April 2016 WPPSI-IV fullscale IQ score was 63 in the Extremely Low range. Student's August 2018 WISC-V fullscale IQ score was 63 in the Extremely Low range but the school psychologist opined that his GAI score of 71 is the best representation of Student's current level of ability, placing him in the Borderline range. CS Exhibit No. 48.

¹³On the WISC-V, the mean is 100 and a standard deviation is 15 so a score of 63 would be more than two standard deviations from the mean. TR. III at 632.

an appropriate score but did not offer at the hearing any testing of Student by a qualified psychologist using an individually administered intelligence test to demonstrate that Student does not meet the criteria of intellectual disability. Student/Parents' expert MJD said she thought his tested IQ score was in the 80s but testified that she did not believe that any students' "full scale IQ is indicative of their ability because they have some varied skills." (TR. I at 87) Student/Parents' expert CQ said that an IQ score "is really unrelated to placement." (TR. I at 298) but offered no opinion as to whether or not Student met the eligibility criteria for intellectual disability.

Parents believed that Student's primary area of exceptionality is Autism and communicated that to County Schools personnel. The record reflects that on October 28, 2014, Student at age four (4) was administered the ADOS-2 test utilized by County Schools pursuant to WV Policy 2419 126CSR16 4. 3. A.¹⁴ This ADOS evaluation and report (CS Exhibit No. 9) found that Student was autistic with a moderate level of symptoms but he did not meet the criteria for eligibility for Autism requiring special education. This test showed he did not have serious communication problems or restricted/repetitive behaviors as required by WV Policy 2419 126CSR16 4. 3. A.

Student was again evaluated for Autism in April 2015 at the end of his repeat pre-K year and that evaluation found that Student was autistic but he did not meet the criteria for eligibility for Autism requiring special education. CS Exhibit No. 12. This assessment showed Student did not have restricted/repetitive behaviors as required by WV Policy 2419 126CSR16 4. 3. A. It also noted that there was not a physician's diagnosis and report of autism. Subsequently, the school principal received a one sentence letter dated May 12, 2015, from Student's pediatrician (CS Exhibit No. 13) that Student "was evaluated and dignosed (sic) to have Autistic Spectrum Disorder in sept. (sic) 2013. Sincerely," and signed by the pediatrician.¹⁵

¹⁴The complete eligibility criteria for Autism is found in *WV Policy 2419*, 126CSR16, 4. 3. A.

¹⁵This pediatrician is a well-respected Charleston physician known personally by the hearing officer.

In March and April 2016, Student was again evaluated for Autism after almost two (2) years of pre-k at his neighborhood elementary school. Joint Exhibit No. 13. Parent/Students' Exhibit No. 19. CS Exhibit Nos. 22 and 29. This assessment showed higher numbers in the social affect score but still showed no deficits in the restricted and repetitive behaviors. He also was given some additional evaluations in April 2016 which included several IQ type tests, an Autism Spectrum Rating Scale (ASRS) and an Adaptive Behavior Assessment (ABAS-II) completed by Student's teacher and/or aide. The IQ evaluations are addressed above; the other tests show a low range in adaptive behavior and the ASRS was noted as 65 indicating the student "presents many behavioral characteristics similar to children diagnosed with Autism." CS Exhibit No. 23.

After Student had moved to his new neighborhood elementary school in first grade and was in second grade, he was again evaluated in August, September and October 2018. CS Exhibit Nos. 46, 47, 48 and 51. Mother participated in some of the tests but did not return the completed ABAS III. A basic behavior intervention plan with daily data collection was prepared in October for use by the teacher to be reviewed and revised in 6 to 8 weeks as Student was exhibiting meltdowns including screaming, crying and sometimes physical aggression that includes damaging school property. CS Exhibit No. 50.

Mother said that Parents were told by County School personnel that although Student had an autism diagnosis by a physician that it didn't qualify him for the area of exceptionality of Autism. TR. I at 199. The school people were correct. WV Policy 2419 requires that the student meet five (5) criteria to be eligible for special education and related services with the category of Autism and only one of those five is a physician's diagnosis. Student/Parents apparently heard that as the Student not having Autism but the initial and repeat school autism assessments do not say that. The evaluations do not discount Student's medical diagnosis of Autism but determine that he did not meet the educational Autism eligibility requirements until the 2018 testing.

Student/Parents' Exhibit 75 is a video of Student taken on the evening of the second day of hearing and introduced in rebuttal to the evidence from teachers, evaluators, school psychologists as

to Student's cognitive abilities. The video shows Student having fun and playing games with his mother at home and demonstrates in the game that he knows some of the multiplication tables numbers that some teachers had testified he doesn't consistently know or show at school. Although this was a delightful video, it provided insufficient evidence to prove that County Schools were wrong in all of its assessments of Student's cognitive abilities or in determining his area of eligibility from entry until December 2018.

Therefore, without appropriate tests administered by qualified professionals to contradict the tests in the record, or without qualified expert testimony, Student/Parents failed to offer sufficient evidence at the hearing to demonstrate that County Schools was incorrect to find Student eligible for special education and related services with the area of exceptionality of Intellectual Disability. Without appropriate tests or qualified expert testimony, Student/Parents failed to offer sufficient evidence at the hearing to demonstrate that County Schools' assessments of Student's cognitive abilities and his academic achievements was incorrect.

C. School-Parent Communication, Trust and Control

The record reflects that there were incidents of communication failures between school personnel and parents. In Student's second grade, his regular education teacher testified that there were some issues with the school communication system called DOJO; his mother told his behavior disorder teacher in March 2019 that she had concerns with the school's communications with her, particularly finding two (2) months later work in Student's bookbag that his parents were supposed to help him with.

Both Student/Parents' experts' reports reflect parents mistrust of the school. CQ advocates school consultation with the parents and older sister. MJD writes that "the parents have fought to be included in planning his program but I don't think they believe that (name of Student's) school values their input." Student/Parents Exhibit Nos. 70 at 12 and 72 at 14.

As in many due process hearings, the issues often revolve around who is going to control the student's school experience. In good situations, parents and school personnel are able to work as a team; in this matter, it appears that although the parents are invited to and participate in every IEP meeting, every eligibility committee meeting and other Student meetings, there was no consensus on Student's area of exceptionality, how and where he should be taught, what he should be taught and how Student's behaviors could best be helped. It is a difficult situation for everyone.

II. Student/Parents' Identified Issues

A. Whether County Schools violated IDEA and/or WV Policy 2419 by failing to provide to the student individualized special education and related services, including behavioral supports?

As discussed above and the record reflects, there was no evidence to demonstrate that Student did not have appropriate individualized special education and related services in his first grade year, 2017-18.

As discussed above and the record reflects, the evidence in second grade (2018-19) was that as soon as Student began displaying serious behaviors that impacted the safety of other students in his regular education classroom, the school psychologist created a BIP for the student and asked all his teachers to document his behaviors to help determine his triggers. The plan called for his general education classroom teacher to collect the information from his other teachers and send that and her own observations to the psychologist. The undisputed evidence is that all his teachers followed the plan but unfortunately Student's aggressive and violent behaviors increased and it was undisputed that Student hit, kicked, pulled hair and threw things at teachers and administrators. His classroom teacher, who is also certified in special education and has a son who is diagnosed with ADHD and autism, followed the BIP getting Student to his cooldown room or the office but found that she was having to remove all twenty-two other students for their safety when Student had a serious meltdown.

Everyone, including parents, agree that although there are historically-known triggers, not all Student's triggers may yet be known. Noise, number of children, personal space, negative versus positive rewards were proposed as possible triggers. Unlike the elementary student in a recent Fifth Circuit case (*A. B. by Jamie B. and Nicole B. v. Clear Creek Independent Sch. Dist.*, 75 IDELR 90 (5th Cir 2019), Student did not make academic, behavioral or social progress in the general education classroom.

When the Student's physical and educational placement was changed in December 2018, the undisputed evidence is that Student's violent and aggressive behaviors generally ceased. The FBA conducted in January 2019 and the BIP adopted soon thereafter seems to have been relatively effective concerning historically-known triggers since, in March 2019, Student/Parents' expert CQ testified on cross about improvement she saw in Student. She testified that when Student was using headphones and doing his math, he took off his headphones and put his hands on his ears (his normal signal that he was starting on a meltdown) "began rocking a little bit, he slapped his hand a little bit, he cried a little bit and then he went back to the program." CQ testified that he was managing himself and raising his ability to tolerate some anxiety-provoking schoolwork. Student/Parents' expert MJD testified and wrote that she saw Student having no problem in April 2019 when his schedule was changed, schedule changes being an historically-known trigger.

Student/Parents' brief claims that Student is not being taught the social skills and behaviors he needs to succeed. Student/Parents' brief page 5 at ¶s 25-7. However, as noted above, Student is daily using Teach Town, a video modeling program with social stories. Student/Parents' expert CQ testified that she was familiar with video modeling relating to social stories and that research has shown it is a very effective instructional tool. Student/Parents' expert MJD testified that Student needed direct social stories. However, how the student receives training on social skills and behaviors Student needs to succeed is a methodology issue to be determined by Student's IEP team. That he is receiving social skills training as a behavioral support is the determining factor.

Therefore, Student/Parents failed to offer sufficient evidence to prove that County Schools

did not provide Student with appropriate individualized special education and related services including behavioral supports in his first and second grade years at his neighborhood school.

B. Whether County Schools violated IDEA and/or WV Policy 2419 by failing to develop an IEP reasonably calculated to provide a free and appropriate education (FAPE) based on the student's individualized need, containing essential components, including a behavioral intervention plan (BIP)?

The evidence demonstrated that Student has had many IEPs over the two-year period at issue in this due process and certainly, many before this time. Once Student started having serious behavior problems in second grade, particularly involving employee battery and safety issues for the other students, the evidence reflects that the school psychologist created and implemented a BIP, asking the teachers to collect data on his behaviors to assist in improving the plan. It was incorporated into an IEP. Unfortunately, Student's violent behaviors escalated, he was suspended and when the manifestation determination was made, County Schools followed the WV Policy 2419 procedures and conducted a Functional Behavior Assessment (FBA). This FBA was done by a board certified behavior analyst (BCBA) who then developed and implemented a new BIP after reviewing the existing BIP. The new BIP is incorporated in Student's IEP and his violent behaviors decreased. The record reflects that Student is learning to manage some of his behaviors.

The Student/Parents' expert CQ noted that Student's behavior difficulties are not going to disappear and he will always have to work on them. Student/Parents' expert CQ opined that the Student's BIP was too general or not complete enough to allow Student's teachers to know what to do. None of Student's teachers testified that they had any difficulty in following his BIP, although CQ, in a brief three hour visit, did not think the teachers or aides were all following it. She also opined that Student's BIP did not have a transition plan, although she doesn't know whether he has difficulties with transitions and Student/Parents' expert MJD testified that she saw him weather a change in schedule transition without any difficulty, as noted above. Expert CQ also noted that she had reviewed his records and she agrees with some things in Student's BIP.

Neither of Student/Parents' experts are board certified behavior analysts. The County Schools board certified behavior analyst and the consultant board certified behavior analyst testified that the FBA and the BIP were consistent with best practices and were based on Student's individualized needs.

Therefore, the Student/Parents failed to provide sufficient evidence to prove that County Schools failed to develop an IEP reasonably calculated to provide a free and appropriate education (FAPE) based on the student's individualized need, containing essential components, including a behavioral intervention plan (BIP).

C. Whether County Schools violated IDEA and/or WV Policy 2419 by failing to provide FAPE in the least restrictive environment (LRE)?

1. First Grade (2017-18)

As noted above, Student received 90% special education and 10% regular education. Student/Parents failed to provide any evidence that this was not the appropriate and least restrictive environment.

2. Second Grade (2018-19)

Student began his second grade year in 90% special education and 10% regular education and then apparently because his parents thought he needed more rigorous academic work, Student in late September 2018 went to a general education second grade with 24% special education and 76% regular education. The evidence reflects that Student's second grade teacher was also certified in special education and is personally familiar with autism and ADHD. Part of each day Student went to the resource room. This second grade regular education placement did not appear to benefit the student as he did not react well to the noise of the other students, to changes in schedule, to negative points in the class and school behavior scheme and to other triggers. His classroom teacher noted that

Student “ has consistently struggled with his behavior in a general education setting which has an adverse impact on his education and that of his peers.” CS Exhibit No. 60 at 185.

The general education second grade teacher testified that when Student was first placed in her classroom behavior was not an issue for him because she was letting him get used to her classroom routines and procedures. She was not asking a lot from him academically. TR. II at 490-1. The general education teacher testified that sometimes she could ignore the behaviors but couldn't always because of the other students' safety. TR. II at 497. The evidence was that even with the BIP, Student struggled with his behaviors which were impacting his education.

The IEP Team, with both parents and their counsel in attendance, decided that Student was being triggered by too many things in the regular education second grade classroom to the detriment of other students and safety of himself, notwithstanding Student's BIP, Student's curriculum modifications, the modifications to the ClassDOJO, the teachers' use of small group work, and the accommodations listed in his IEPs. The IEP Team decided in December 2018, based on all the information they had at the time, that Student needed to be in a self-contained classroom with trained and certified teachers and aides for more of his time in school.

Student/Parents offered no evidence at the hearing that showed Student could safely and beneficially remain in his regular education second grade classroom as of December 2018 and only speculative evidence from Student/Parents' experts that he could do so in March or April 2019. Therefore, Student/Parents failed to provide sufficient evidence that County Schools violated IDEA and/or WV Policy 2419 least restrictive environment (LRE) provisions by providing FAPE in the IDD classroom in first grade and in second grade first in the regular education second grade classroom with resource room and then in the BD classroom and resource room with regular education pullouts of music, art, library, counseling and physical education.

D. Whether County Schools violated IDEA and/or WV Policy 2419 by failing to follow procedural safeguards when it suspended the student, sent the student home early, placed student in

a segregated classroom, and placed student on homebound instruction for disciplinary reasons?

As this issue actually contains multiple parts, the hearing officer has placed the discussion in its components for clarity.

1. Failure to follow procedural safeguards when it suspended Student for disciplinary reasons.

The record reflects that Student was suspended several times in October and November 2018 primarily for battery on school employees. Student/ Parents consistently misrepresented the cause of Student's suspensions; for example County School "made the unilateral, rash decision to suspend [Student] for ten days following him running out of the school after his father." (Student/Parents brief page 10 para 51.) As documented above, Student had been exhibiting escalating violent behaviors in the classroom, at teachers, and at administrative personnel, despite a BIP, and on the day of the ten (10) day suspension, the record also reflects that

- a. Student became upset in his classroom because he didn't bring money for the scheduled Santa's workshop and began running around the room and throwing things onto the floor. Because Student refused to stop, the teacher took the other students out of the classroom and called the office.
- b. The teacher got him calmed down but then shortly thereafter Student became upset and began running around the room and tried to throw the computer keyboard. Because Student again refused to stop, the teacher again took the other students out of the classroom and called the office.
- c. Student then went to the office for the second meltdown where he climbed on furniture, threw things off a desk and ripped up papers that were on a counter.
- d. While Student was in the office, his father came in to leave some money for him for the Santa's workshop. Student wanted to go with him when his

father was getting ready to leave and when told he couldn't, Student screamed and ran out of the office, down the hallway, into the cafeteria and out the cafeteria doors to Ohio Street, continuing to run down Maple Street and Kentucky Street, with administration and his father chasing him. When they finally caught up with Student, his father took him by the arm and Student was refusing to come back to school. The incident report notes that he tried to bite his father several times.

Suspension on that day was not rash as claimed in Student/Parents' brief. It was unilateral if that means the suspension was made by the school within the appropriate discipline guidelines of *West Virginia Safe Schools Act*, W. Va. Code §18A-5-1a and *Expected Behavior in Safe and Supportive Schools*, West Virginia Board of Education Policy 4373, County Schools Policy J25 *Student Behavior Code* and the record reflects that the county schools followed the provisions of WV Policy 2419, Discipline, 126CSR16, 7.2 in that the County School provided same day notice of the removal, PWN (December 11, 2018) and conducted a manifestation determination meeting within 10 school days of any decision to change placement because of disciplinary reasons (December 17, 2018).

After the IEP team determined Student's conduct to be a manifestation, the undisputed record reflects that the County School conducted an FBA, developed and implemented a new BIP after reviewing the existing BIP and returned the student to the placement determined at the December 10, 2018, IEP meeting. County Schools followed WV Policy 2419 procedural safeguards when it suspended the student on December 11, 2018.

As to the question of whether Student was suspended for more than ten (10) days before the manifestation determination, the evidence is disputed. Assuming that Student did serve cumulatively more than ten (10) days out of school, then each day could be a procedural violation. However, as noted above, the Fourth Circuit has recently determined that the hearing officer may find that a student did not receive a free appropriate public education only if the procedural inadequacies (i)

impeded the child's right to a free appropriate education; (ii) significantly impeded Parent's opportunity to participate in the decision making process regarding the provision of a free appropriate public education to parents' child; and (iii) caused a deprivation of educational benefits to the student. *R.F. v. Cecil County Public Schools*, 74 IDELR 31 (4th Cir. 2019). Based on this standard, Student/Parents did not provide any evidence that additional few days of suspension, if they occurred, caused Student's right to FAPE to be impeded and caused a deprivation of educational benefits to the student. There was no showing that Student's additional few days of suspension, if they occurred, significantly impeded Parent's opportunity to participate in the decision making process regarding the provision of a free appropriate public education to parents' child. Therefore Student/Parents failed to provide sufficient evidence that County Schools violated IDEA and/or WV Policy 2419.

2. Failure to follow procedural safeguards when it sent Student home early for disciplinary reasons

There was insufficient evidence at the hearing to show that the county school sent the student home early in violation of procedural safeguards. Student's mother testified she picked student up after being called on a disciplinary behavior issue and was not given the paperwork when she picked him up. Student/Parents' brief speculated that since Student was sent home early "without... documentation, it was unclear how many times that procedural violation happened." (Student/Parents brief page 11 €58) However, Mother identified the date that she went to pick up Student (as well as his brother who had thrown crayons) (TR. I at 200-05) testified there was just this one time and Student/Parents made no showing of any requirement or procedural safeguard that filling out all the incident report forms must be completed by the school before the parent picks a student up. Without dates or times or any other evidence of any Student removal from school not recorded and with the consistent testimony by all school personnel that all removals from school were documented in the computer system, the Student/Parents have not met their burden of proof on this issue.

3. Failure to follow procedural safeguards when Student was placed in a segregated classroom for disciplinary reasons

The IEP team including the parents placed Student in a “segregated” classroom in first grade and at the December 10, 2018, second grade IEP before the suspension. Student/Parents offered no evidence that Student was placed in a segregated classroom for disciplinary reasons.

4. Failure to follow procedural safeguards when placing student on homebound instruction for disciplinary reasons.

Student/Parents offered no evidence at the hearing that student was placed on homebound at all, let alone for disciplinary reasons. The only evidence in the record related to this allegation was a document required by WV Policy 2419 which County Schools sent to the parents on the date of the suspension (December 11, 2018) informing them that if the student was found, after a manifest determination (and a hearing if not a manifestation) by the hearing examiner to warrant expulsion then the student would receive his IEP mandated services at home. Student’s behaviors were found by his IEP team to be a manifestation so there was no need for Student to go to an expulsion hearing and therefore, no need for homebound IEP provision.

Therefore Student/Parent failed to meet the burden of proof on this allegation.

DECISION

1. Whether County Schools violated IDEA and/or WV Policy 2419 by failing to provide to the student individualized special education and related services, including behavioral supports?

Based on the preceding findings of fact and conclusions of law, and as described in the discussion section, the impartial hearing officer finds that Student/Parents have not met their burden of proof showing that the County Schools violated provisions of IDEA and WV Policy 2419 by failing to provide to Student individualized special education and related services, including behavioral supports.

2. Whether County Schools violated IDEA and/or WV Policy 2419 by failing to develop an IEP reasonably calculated to provide a free and appropriate education (FAPE) based on Student's individualized need, containing essential components, including a behavioral intervention plan (BIP)?

Based on the preceding findings of fact and conclusions of law, and as described in the discussion section, the impartial hearing officer finds that Student/Parents have not met their burden of proof showing that the County Schools violated IDEA and/or WV Policy 2419 by failing to develop an IEP reasonably calculated to provide a free and appropriate education (FAPE) based on Student's individualized need, containing essential components, including a behavioral intervention plan (BIP).

3. Whether County Schools violated IDEA and/or WV Policy 2419 by failing to provide Student FAPE in the least restrictive environment (LRE)?

Based on the preceding findings of fact and conclusions of law, and as described in the discussion section, the impartial hearing officer finds that Student/Parents have not met their burden of proof showing that the County Schools violated provisions of IDEA and WV Policy 2419 by

failing to provide FAPE in Student's least restrictive environment.

4. Whether County Schools violated IDEA and/or WV Policy 2419 by failing to follow procedural safeguards when it suspended Student, sent Student home early, placed Student in a segregated classroom, and placed Student on homebound instruction for disciplinary reasons?

Based on the preceding findings of fact and conclusions of law, and as described in the discussion section, the impartial hearing officer finds that Student/Parents have not met their burden of proof showing that County Schools violated the IDEA and WV Policy 2419 by failing to follow procedural safeguards when it suspended Student or placed Student in a segregated classroom. There was no evidence offered that the County Schools ever sent Student home early without appropriately documenting or placed Student on homebound instruction for disciplinary reasons.

DIRECTIVES FOR IMPLEMENTATION

As the Student/Parents were unable to demonstrate by sufficient evidence that County Schools violated IDEA or WV Policy 2419, there are no directives for implementation.

APPEAL RIGHTS

Any party aggrieved by the findings and decisions made in the hearing has the right to bring a civil action with respect to the due process complaint in any state court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy within ninety

days of the issuance of the due process hearing officer's written decision.

DATE: October 28, 2019



Anne Werum Lambright
Impartial Due Process Hearing Officer