

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

**DECISION  
Due Process No. 19-020**

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 October 28, 29 and 30, 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' due process request. Student/Parents were represented by counsel as were the County Schools<sup>1</sup>.

**PROCEDURAL HISTORY**

On July 1, 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 July 11, 2019, in which *pro hac vice* motions for additional attorneys were filed by Student/Parents and granted. Student/Parents elected to not have Student present at the hearing and to have the hearing

---

<sup>1</sup> Pursuant 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.

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 most of the counts and remedies in Student/Parents Complaint that preceded June 28, 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 October 28, 29, 30 and 31, 2019, and to the hearing location. The hearing officer directed Student/Parents to file the individual questions to be determined at the hearing by July 19, 2019<sup>2</sup>, and the County Schools to file an Answer by July 29, 2019. The parties timely filed these pleadings. Parties timely filed their exhibits and witness lists on October 21, 2019. The parties filed a Joint Stipulated List of Exhibits at the hearing.

---

<sup>2</sup> Student/Parents also filed requested remedies, including: 1. During the pendency of this proceeding, place Student in his current educational placement at his neighborhood elementary school. Facilitate appropriate professional psychoeducational testing to assess Student's current capacities and academic progress; 2. Retain an independent behavior specialist, chosen by Student, to assist County Schools in developing and implementing a new IEP, including conducting a comprehensive FBA and developing and implementing a new BIP with training for school staff and parents; 3. Implement Student's revised IEP in a general education setting in the neighborhood public school of Student's choice; 4. Provide Student compensatory education services in form of intensive remediation for reading, written expression and math; 5. Provide necessary training to school administrators and staff; 6. Hire an agreed upon neutral consultant to review County Schools' policies, practices and resources for the provision of specialized instruction, related services, and other needed supports and interventions required by IDEA and to make recommendations about how to improve and expand effective policies and practices throughout the system; 7. Provide reasonable attorney fees and costs; and 8. Additional relief as appropriate.

On October 28, 2019, the hearing commenced with evidence received and a record of the proceedings made. Student's parents each testified on her/his own behalf, offered three (3) witnesses and introduced exhibits that were made part of the record at the hearing. County Schools presented three (3) witnesses and introduced exhibits that were made part of the record at the hearing. The transcript was delayed and not received until December 4, 2019. The parties had elected to file proposed findings and conclusions electronically and by mail on the agreed date but because of the transcript delay and other good cause as presented by each party, the hearing officer extended the due date to January 20, 2020, and the parties timely filed these pleadings. This decision is issued on the agreed date of February 10, 2020.

## **ISSUES**

- I. Whether County Schools Violated IDEA and/or WV Policy 2419 By Failing to Provide Free, Appropriate Public Education (FAPE) to Student in the Least Restrictive Environment (LRE)?**
  - A. Whether County Schools violated IDEA and/or WV Policy 2419 by failing to provide FAPE to Student in the LRE by failing to provide Student with needed behavior supports to allow him to access education?
  - B. Whether County Schools violated IDEA and/or WV Policy 2419 by failing to provide FAPE to Student by failing to provide specially designed instruction including appropriate modifications and accommodations and other related services as necessary to enable Student to achieve ambitious goals and challenging objectives?
  - C. Whether County Schools violated IDEA and/or WV Policy 2419 by failing to provide

FAPE to Student by failing to develop an IEP reasonably calculated to enable Student to make progress given his unique circumstances and achieve ambitious goals and challenging objectives?

- D. Whether County Schools violated IDEA and/or WV Policy 2419 by failing to provide FAPE to Student in the LRE by failing to include him to the maximum extent appropriate in the general education setting, and attempting to change Student's placement to a more restrictive environment without first implementing the supplementary aids and services he needs to be successful in the LRE?

**II. Whether County Schools Violated IDEA and/or WV Policy 2419 By Failing to Follow Required Procedural Safeguards?**

- A. Whether County Schools violated IDEA and/or WV Policy 2419 by failing to follow required procedural safeguards by failing to appropriately conduct an IEP meeting in October 2018 and by sending Student home early without documentation?
- B. Whether County Schools violated IDEA and/or WV Policy 2419 by failing to follow required procedural safeguards by failing to hold a manifestation determination?<sup>3</sup>

**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.

---

<sup>3</sup> These issues are those identified in Student/Parents' July 19, 2019, STATEMENT OF ISSUES TO BE DECIDED BY DUE PROCESS HEARING OFFICER as modified by Student/Parents' January 20, 2020, PETITIONER'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

## **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. Each witness made an effort to answer questions asked to the best of his/her ability and provide the truth as perceived in his/her recollections. 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 fourth grade in his small neighborhood county elementary school which he has attended since preschool. His mother attended the same school when she was in elementary school. TR. I at 29-30, 207.

2. Student's parents are active in Student's education, school life, and out-of-school activities. Student's parents testified that they were told at Student's birth that Student would not be able to do many activities, but he has already exceeded his doctor's expectations. Student plays basketball in his church league, independently rides his ATV four-wheeler and sings and plays guitar at church. TR. I at 26, 28-9, 131-34, 211.

3. Student has received special education and related services since entry into county schools in pre-kindergarten, eligible first as a student with developmental delay<sup>4</sup>(Down Syndrome). Student's parent testified that his Down Syndrome is translocational or trisomic not mosaic. Either type of Down Syndrome can lead to physical and intellectual developmental challenges. TR. I at 28, 124-5. Joint Stip. Exhibit No. 3.

---

<sup>3</sup> Student was initially eligible under the WV category developmental delay but once Student turned six (6) years old, he no longer met the eligibility criteria. WV Policy 2419 requires an IEP Team to reconvene the eligibility committee to determine eligibility under another exceptionality prior to Student's sixth birthday. *WV Policy 2419, 126CSR16, Eligibility, Ch. 4, §3. E.*

4. Student's full-scale IQ has been tested and the scores vary. Other intellectual testing demonstrates different scores earlier in his school career but the most recent assessment (two months before the hearing) reflects a full-scale score of 44. Student/Parents' Ex. No. 44 (Student/Parent expert SB's report).

5. Student has also been diagnosed with Oppositional Defiance or Conduct Disorder (ODD) and Attention Deficit/Hyperactivity Disorder (ADHD). Student takes daily medication for these conditions. TR. I at 28-9, 156.

6. Student has done well with his early communication difficulties. He has received speech therapy services at school beginning in prekindergarten. At home, he can communicate verbally without sign language or any assistive technology, such as iPads or picture communication systems. As a safety measure, before riding his four-wheeler, Student is required by his parents to recite the safe driving rules each time and he does so. Student's mother testified that she understands Student's speech and Student has no significant communication problems. TR. I at 26-7, 125-30, 130-31.

7. Student does have difficulties with fine motor skills, particularly handwriting, and he continues to receive occupational therapy (OT) at school and practices handwriting in the resource room. Student's mother testified that she is satisfied with Student's occupational therapy at school. TR. I at 190. TR. II at 117, 177-8.

8. Student continues to have academic difficulties. Student had been moved after pre-kindergarten into some special education for math and language arts but continued to have most of his day in general education. In assessing his progress towards his goals in preparation for his second grade IEP, his IEP progress report for May 2017 reflects that Student was not making sufficient progress on more than one-third (1/3) of his goals. Part of this may have been due to Student's frequent unexcused late-arrivals (tardies) and absences from school. Part of this may be attributed to Student's recognized behavior that Student didn't do tasks that he didn't want to do when he was at school and would employ "escape" tactics to avoid doing academic tasks he

disliked. TR. II at 228-29, TR. III at 21-30. Joint Stip. Exhibit No. 19. CS Exhibit No. 82, 92.

9. Student has difficulty with conforming his behavior to school rules. During his second grade year (2017-18)<sup>5</sup> Student had multiple disciplinary issues, including damaging an iPad, eloping to the rocking chairs outside school, urinating in the Principal's chair, refusing teacher requests or directives, and repeated failures to do schoolwork. Student received out-of-school suspensions three (3) times during the school year. Behavior data was collected for the County Schools' board-certified behavior analysts (BCBAs) to analyze. Student/Parents' Exhibit No. 20, 25, 27, 32. CS Exhibit No. 3, 82, 105, 109, 114-15, 119, 121, 127, 128, 131, 135.

10. Student's attendance was also an issue during his second-grade year. In addition to the August 14, 2017 to October 2, 2017, absence, Student was frequently late to school, according to both his mother and the school. His mother testified that on days Student was tardy at school, it was not uncommon for him to miss up to three (3) hours. She testified that when Student had "a bad night" or an "upset stomach" she thought it was better for him to be late to school rather than get to school on time in a bad mood and have "a horrible day." Student was also frequently absent without excuse. TR. I at 79, 147, 149-50, TR. III at 41-2. CS Exhibit No. 4.

11. In Student's IEP for second grade, Student's school IEP Team members determined that Student needed a shift towards a more functional/life skills program and placement in a different program at a different elementary school. Parents were strongly opposed, wanting Student to attend second grade in a general education classroom at his neighborhood school and elected to not send Student to school at all for the beginning of his second-grade year.

12. The record does not reflect that County Schools did file truancy and/or a due process hearing request to return the student to school attendance in August 2017. It also does not reflect that Student/Parents filed a due process request to disagree with the June 2017 IEP.

---

<sup>5</sup> Student did not participate in the 2017 extended school year (ESY) summer program and Student/Parents kept Student out of school from the start of his second grade year (August 14, 2017) until October 2, 2017, (TR. I at 144-9, Student/Parents Exhibit No. 16, 17, and 20; CS Exhibit No. 4, 100) so these findings for second grade reflect a shortened school year for Student.



13. The record does reflect that, to resolve the impasse, a facilitated IEP meeting was held on September 28, 2017. Student was returned to his neighborhood school with some changes to his IEP and began his second-grade year on October 2, 2017. TR. I at 51-2, 142-47. Student/Parents' Exhibit No. 16, 17, 19. CS Exhibit No. 4, 100, 101.

14. During Student's second grade year, after his return to the neighborhood elementary school, an assistive technology evaluation was completed by the County Schools demonstrating Student's continuing difficulty with handwriting. It also demonstrated that Student had trouble with typing on the iPad, but this appears inconsistent with his undisputed ability to view and even make U Tube videos on his electronic devices. It may reflect his ADHD or ODD disabilities. TR. I at 26, 126, 131, 194. Student/Parents' Exhibit No. 21.

15. During Student's second grade year, cognitive evaluations were done with Student by a school psychologist from the county schools. She reported that she conducted a single non-verbal IQ test (TONI-4) on which Student scored an 80<sup>6</sup>, that score demonstrating more than one standard deviation below the mean of 100, that Student was able to stay in his seat for 25 minutes and that she also conducted the ABAS III and the CBRS tests on Student. The ABAS III assessment measures adaptive<sup>7</sup> skills and the CBRS assesses behavioral, emotional, social and academic concerns and disorders. The school psychologist testing demonstrated that Student had significant

---

<sup>6</sup> Student/Parents' licensed clinical psychologist expert testified that the TONI-4 does not offer a comprehensive assessment of someone's intelligence. She tested Student's IQ during his fourth-grade year and found his Full-Scale IQ to be at 44 which she further qualified on the basis of her testing of Student's verbal and adaptive functioning to actually be similar to students whose IQs were in the 55-65 range. Student/Parents Exhibit No. 44 and 45.

<sup>7</sup> Adaptive skills are defined in the Glossary of *WV Policy 2419* as "skills necessary to function adequately within a person's present environment. These skill areas are: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work. "Self-care" is defined as "skills involving eating, dressing, grooming, toileting and hygiene." "Social skills" is defined as referring to appropriate and inappropriate behavior." "Community use" is defined as "...the appropriate use of community resources...traveling in the community, shopping for groceries and other items...using public transportation and using public facilities (e.g. schools, parks, libraries, recreational centers, streets, sidewalks, theaters)." "Health and safety" is defined as "maintaining one's own well-being; appropriate diet; illness identification, treatment and prevention; basic first aid; sexuality; physical fitness; basic safety (e.g. following rules and laws; using seat belts, crossing streets, interacting with strangers, seeking assistance); regular physical and dental checkups; and daily habits." The "Leisure" definition includes skills such as "choosing and initiating activities...playing socially with others, taking turns..." The "Work" definition includes "participating in a voluntary activity in the community."

difficulties with academics, language, socialization and hyperactivity. Student/Parents' Exhibit No. 22.

16. During Student's second grade year, the Weschler Individual Achievement Test (WIAT-III), a test to evaluate student's listening, speaking, reading, writing and math skills, was administered to Student. Student's WIAT-III results showed significant deficits in reading (total and basic) reading comprehension and fluency, mathematics, math fluency, written expression and oral language. The examiner noted that Student was "very polite," "able to focus" on the tests being administered, and to attend to most tasks given him. CS Exhibit No. 118.

17. During Student's second grade year, Student continued to have difficulties both academically and behaviorally. His parents were provided weekly IEP progress charts. Student's mother came to school once during the school year to observe him receiving classroom instruction. TR. I at 146. CS Exhibit No. 105, 109, 111, 114, 119, 121, 128, 131.

18. During Student's third grade year (2018-19), Student received his education at his neighborhood elementary school with two general education teachers, a special education teacher and an aide and pull-outs to the resource room and OT. In addition, two County School BCBAs worked with the aide and teachers concerning Student's behavior problems. TR. II at 8,19,74.

19. Although Student's academic work was modified to adapt to his abilities and was found to not be at grade level, Student/Parents' clinical psychologist expert SB found that even the modified academic work she reviewed was still too difficult for Student. Student/Parents Exhibit No. 44.

20. Student continued<sup>8</sup> to have some violent and/or destructive behaviors in the school

---

<sup>8</sup> Student/Parents' brief references Student's third grade behaviors as "new and more challenging behaviors" without citation except to parent's testimony. A review of the record, however, reflects the same or similar behaviors in third grade as exhibited by the Student in prior school years. The behaviors appear to be more frequent although this may reflect better record keeping on the part of the school or that Student came to school more days.

classrooms and elsewhere at school during his third-grade year. Various accommodations were instituted both within and outside the classroom. CS Exhibit No. 4.

21. These violent and/or destructive behaviors included Student pushing chairs at other students, shoving a table at another student, attempting to pull a TV off the wall, standing on desks, using a rolling chair to try to hit students and teachers, throwing pencils at adults, throwing classroom items on the floor, throwing shoes, climbing on furniture, crawling under tables and chairs, throwing books at classmates, and throwing apples into a toilet, intentionally causing it to overflow. In addition, Student would run and hide in the school building, or would run into the female staff's bathroom or the clinic bathroom, disrobe and, in the clinic bathroom, urinate on the floor and walls. CS Exhibit No. 3.

22. Student was suspended out-of-school for several of these incidents for a total of ten (10) days. No manifestation determination meetings, minutes or reports were in the record referencing these incidents. Behavior data was collected through January 28, 2018, for analysis by the county schools' BCBA. Student/Parents' Exhibit No. 32. CS Exhibit No. 3.

23. On January 28, 2019, Student physically injured one of his general education teachers. Student was charged with the serious misconduct of battery of a school employee, given a seven (7) day<sup>9</sup> suspension with a subsequent period of homebound placement and the requirement of Student's successful completion of a safety-psychological evaluation. Parents initially refused to allow Student to have a safety-psychological evaluation. TR. I at 102-3. Student/Parents' Exhibit No. 32. CS Exhibit No. 3.

24. Although the accumulation of suspension days for Student exceeded ten (10) days of out-of-school suspension, the IEP Team did not conducted a manifestation determination. Student/Parents then filed an expedited due process complaint with the West Virginia Department of Education; however, the complaint was withdrawn before hearing, after the parties reached a

---

<sup>9</sup> Later reduced to a two (2) day suspension.

settlement. TR. I at 102-3. Student/Parents' Exhibit No. 32.

25. As part of the settlement agreement in the expedited due process, a new FBA and a new BIP were to be completed by a different County Schools BCBA. Also, as part of the agreement, Parents permitted the safety-psychological evaluation of Student to occur and it was completed on February 28, 2019. Finally, as part of the agreement, March 5, 2019, was the last day of Student's homebound placement. Student/Parents' Exhibit No. 32.

26. On March 1, 2019, Student's IEP Team met. Student/Parents' Exhibit No. 34.

27. On Student's return to school on March 6, 2019, the County Schools' BCBA began collecting new data and prepared a functional behavior assessment (FBA) dated April 12, 2019. This assessment was to be revisited April 26, 2019. The BCBA sought information from the parents to understand more completely Student's strengths. The FBA (and subsequent BIP) were more comprehensive, contained more data, specified the timing of observations and included observations collected from different school personnel. TR. III at 150-51. Student/Parents' Exhibit No. 36. CS Exhibit No. 178. Joint Stip. Exhibit No. 41-2.

28. Student/Parents' expert SB found this FBA and BIP going in the right direction but still lacking because, in her opinion, the BCBA did not collect enough of the data herself and the BCBA did not observe Student in his home. Student/Parents' expert SB is not a board-certified behavior analyst. TR. II at 182, 206, 226. Student/Parents' Exhibit No. 45.

29. County Schools' expert JB is a board-certified behavior analyst<sup>10</sup> 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 this County School, to other West Virginia school districts and to other school districts outside the state for about twenty-five years. He reviewed

---

<sup>10</sup> County School's footnote 8 on page 14 of its proposed findings mistakenly states that "[REDACTED] is not a board-certified behavior analyst." However, the footnote follows the name of the Student/Parents' expert SB who is not a board-certified behavior analyst while County School's expert JB from his testimony and CV is a board-certified behavior analyst. The hearing officer assumes this was a typo.

Student's records and testified that the 2019 FBA and the resulting BIP, based on the information available, were consistent with best practices. TR. III at 235-6, 252-3.

30. On March 18, 2019, Student/Parents' expert SB visited Student's elementary school for approximately seventy-five (75) minutes. SB also visited Student in his home that day for around an hour. SB is a licensed clinical psychologist with degrees in both counseling and clinical psychology; her expertise is primarily forensic, and she frequently works with students who are in the penal system. TR. II at 256. Student/Parents' Exhibit No. 44, 45.

31. On April 5, 2019, Student injured his teacher by altering the teacher's chair and was suspended out-of-school for two (2) days. CS Exhibit No. 3.

32. On April 12, 2019, Parent/Students' expert MJD visited Student's elementary school for approximately one and one-half (1½) hours. MJD also visited Student in his home around that same time. MJD has an Indiana director of special education license, a doctorate in educational policy/leadership and her experience is primarily administrative. Student/Parents' Exhibit No. 43. TR. I at 261-2.

33. On May 2, 2019, Student's IEP Team developed a Behavior Intervention Plan (BIP) based on the BCBA's FBA. CS Exhibit No. 180, 181.

34. On June 28, 2019, Student/Parents filed this due process hearing request, by counsel, with the West Virginia Department of Education Office of Federal Programs and it was docketed and assigned to the undersigned hearing officer July 1, 2019.

35. On July 11, 2019, a telephone status conference was held with the parties and counsel and the following matters were determined:

- a. *Pro hac vice* appearance motions for three (3) out-of-state counsel for Student/Parents were granted;
- b. As Student/Parents were unable to demonstrate the requirements necessary for certifying a class action, those enumerated paragraphs and remedies were struck by the hearing officer; also stricken were the enumerated paragraphs and remedies solely concerning the Americans with Disabilities Act, §504, and the Rehabilitation Act as the hearing officer is without jurisdiction to decide those issues;
- c. Student/Parents were directed to file a list of issues and remedies they wanted resolved and County Schools were directed to file the Answer;
- d. Student/Parents refused mediation, chose a closed hearing<sup>11</sup> and noted that the student would not be present;
- e. Both parties agreed to waive the forty-five (45) day decision time deadline and chose hearing dates of October 28-31, 2019, selected location of the Board Room at the County Schools and agreed to telephonic testimony, if necessary;
- f. Motions were to be filed by October 4, 2019, for determination at a second telephone conference on October 9, 2019. Witness and exhibit lists were to be exchanged by October 21, 2019.

36. The parties timely filed all required documents.

37. On August 24 and 25, 2019, Student/Parents' licensed clinical psychologist expert SB returned to West Virginia and conducted testing on Student at his home, making modifications during the testing for Student's needs. SB measured Student's full-scale IQ at 44 but noted that score might be low as there was a large variability in his performance attributable, in her opinion, to Student's motivation and/or to cognitive impairments in children with Down Syndrome. In one vocabulary subtest, Student received a score that could translate to an IQ of 70. She also noted that Student's verbal and adaptive functioning was similar to students with IQs in a 55-65 range. TR. II at 174-82, 244, 300. Student/Parents' Exhibit No. 44.

---

<sup>11</sup> Student/Parents subsequently revised their choice and changed the hearing to open.

38. On October 28, 2019, the due process hearing commenced. Student/Parents offered themselves as witnesses, and called Student's third grade aide at school, Student/Parents' expert witnesses former Indiana school administrator MJD and clinical psychologist SB and introduced multiple Student/Parents' exhibits as well as Joint Exhibits with County Schools. County Schools offered a former County BCBA now working in a different West Virginia school district (AJ), a currently employed County BCBA (JC) and an expert and fact BCBA witness JB and introduced multiple CS exhibits as well as Joint Exhibits with Student/Parents. TR. I, II, and III. Exhibits as noted in transcript.

39. Each of Student's parents testified about their knowledge of Student, his behavior at home, on the church basketball team, singing and playing his guitar at church, playing with his dog and riding his ATV, as well as his skills at making U Tube videos. Student's father explained how he manages Student's behaviors at home and how he felt the school was adversarial to Student and the family. Mother explained about how she wanted her Student to go to elementary school where she went to school and that the school was not doing what it should. She admitted that Student was absent from school many days and was late to school many more days, sometimes three (3) hours late, because she thought it was important for him to stay home after having a bad night or an upset stomach. Their goal for Student is that he will mature into a productive member of society and live an independent life. TR. I at 25-225.

40. Student/Parent's fact witness/Student's aide testified about her work with Student, that she does not teach Student as only teachers can do that, but she helps him with his work and helps Student control his behavior. She also explained about Student's data collection and her training. She testified that her "day is spent containing {Student} from hitting other kids with objects and not running out of the room." TR. II at 26, 7-146.

41. None of Student's general education or special education teachers were called to testify.

42. Student/Parents' clinical psychologist expert SB was found to be an expert in

psychological evaluation and testing of students with developmental delays/intellectual disabilities and in clinical psychological treatment. This was her first testimony in a due process. SB is not a certified school psychologist or a board-certified behavior analyst. TR. I at 161-7.

43. In addition to testifying about the intelligence testing she completed on Student in August 2019, Student/Parents' expert SB offered her opinion on appropriate data collection for effective FBAs and that additional and better data should have been recorded for the FBAs developed by the County Schools' BCBAs to be of use to Student. TR. II at 202-6, 216-7, 233-4, 268, 271, 331.

44. Student/Parents' expert SB offered her opinions as to what constitutes adequate BIPs, behavioral supports and the appropriate setting for Student, appropriate staff training, and effective social skills instruction for students for relationships with peers. TR. II at 191-9, 208-13.

45. Student/Parents' expert SB noted that she "cannot comment, because I am a psychologist and not an education specialist about the exact teaching strategy that needs to be used and here's exactly how this curriculum needs to be modified because that is not my area of expertise and it would not be appropriate..." In response to a question as to whether Student is to accomplish the same grade level contents and objectives that neurotypical children are going to be working on, SB answered "Right now, no....And what I'm not advocating for is an immediate return (to a 75% time general education classroom)." TR. II at 249 -53.

46. Student/Parents' expert SB offered her opinions on whether FAPE was provided for Student, but they were not given any weight pursuant to Conclusion of Law number 37 as these opinions go to the ultimate issue.

47. Student/Parents' expert MJD was found to be an expert in special education<sup>12</sup>. MJD

---

<sup>12</sup> The Glossary of WV Policy 2419 defines special education in part as "specially designed instruction..." which is defined as instruction in which the "content, methodology or delivery of instruction" is adapted "to address the unique needs of an eligible student that result 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."



is not a licensed clinical psychologist, certified school psychologist or BCBA. She has testified as an expert in two other due process hearings for parents. TR. I at 248-60.

48. Student/Parents' expert MJD did not conduct any assessments on Student. She briefly observed Student at school and at home on one day and offered her opinion on data collection, behavioral supports, staff training and instruction methodology as well as student discipline and suspensions. TR. II at 227-338.

49. Student/Parents' expert MJD offered her opinions on whether FAPE was provided for Student, but they were not given any weight pursuant to Conclusion of Law number 37 as these opinions went to the ultimate issue.

50. County School's fact BCBA witness AJ testified that she was now working as a BCBA in another WV school district, that she had worked with Student, Student's special and regular education providers, Student's aide and others through the first semester of his third-grade year. She explained how the data collection worked, how she did the original BIP, how she did the revised IEP, how the BIPs and Student's IEPs worked together, the smiley charts, and her understanding of changes, if any, in Student's behavior; she did not explain why she delayed eighteen (18) months in creating the first (2017) BIP. TR. III 12-110. Joint. Stip. Exhibit No. 23, 27, 31, 32, 33, 34, 35. CS Exhibit No. 115, 191.

51. County School's fact BCBA witness JC testified that she was a BCBA in the district, that she had worked with Student, Student's special and regular education providers, Student's aide and others beginning in Student's third-grade year. She collected and analyzed the data for the Student's Spring 2019 FBA and BIP. She explained how the data collection worked, the follow-ups and fidelity checks, the staff training and the hypothesized functions of Student's behaviors. TR. III at 111-221. Joint Stip. Exhibit No. 41-2.

52. County School's fact and expert BCBA witness JB testified, in addition to his opinion on the 2019 FBA and BIP noted above, that fidelity checks (to make sure teachers and

opinion on the 2019 FBA and BIP noted above, that fidelity checks (to make sure teachers and others are following the plan or need questions answered) and inter-observer agreement follow-ups did not occur until the implementation of the May 2019 BIP. JB explained that getting instructional control of the Student was a necessary prerequisite to addressing the questions concerning the function of Student's behavior as Student must at least attend to the classroom activities before Student can be expected to learn. Changing the instructional presentation might cause Student to pay more attention; Student's enjoyment and interest in videos might be used to motivate Student in the academic work given to him. JB noted that some of the BIP contains DRIs (differentially reinforced incompatible behaviors) that could prevent some of the behaviors. TR. III at 222-321.

53. Student/Parents' expert witness SB testified on rebuttal that some of Student's behaviors with multiple functions might actually be behavior chains and each behavior in the chain could have a different function. She also noted that JB's DRIs, in her view, can sometimes be overwhelmed by symptom substitution and the ideal interventions are both DRIs and replacement behaviors. She stated that, in her opinion, instructional control is the relationship between the instructor and child and not necessarily getting the child to be quiet and have ready hands but the relationship to "ideally gain compliance from the child to participate in the treatment." TR. III at 329-30.

54. The hearing was recorded and transcribed by certified court reporters and the transcripts were delivered December 4, 2019. Each party requested extensions of time to file post-hearing submissions; both requests were granted for good cause.

55. On January 20, 2020, both parties timely filed proposed findings of fact and conclusions of law and the hearing officer timely issued this decision on February 10, 2020.

## 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. This complaint was filed June 27, 2019 so the commencement date for evidence in this hearing is June 27, 2017<sup>13</sup>. *WV Policy 2419 (126 CSR 16) Dispute Resolution, Ch. 11, §4.A.*

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 prevails 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 rule in the party's favor.

3. 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).

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

5. 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

---

<sup>13</sup> Many of the events involved in this due process led out of a June 1, 2017, IEP and its antecedent documents so the hearing officer permitted entry of and evidence related to that document although it preceded the June 27, 2017 date.

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, §2.A.*

6. 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.*

7. 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 service needs, whether or not commonly linked to the suspected exceptionality. *WV Policy 2419, Evaluation/Reevaluation, Ch. 3, §4.A.*

8. 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 timeline. *WV Policy 2419, Evaluation/Reevaluation, Ch. 3, §§4. B and C.*

9. 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.*

10. 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.*

11. 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.*

12. 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.*

13. 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.*

14. 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.*

15. Down Syndrome is a congenital condition consisting of an extra 21<sup>st</sup> chromosome and has three different types, two of which are applicable in this due process. Trisomy 21 Down Syndrome is the most common type (about 95%) and references that each cell has three (3) separate copies of chromosome 21 instead of the usual two copies. Translocation Down Syndrome (3%) is much less common and references that an extra chromosome 21 or part of one is present but is attached to a different chromosome rather than being a separate chromosome 21. Either type of Down Syndrome can lead to physical and intellectual developmental challenges for a student.

16. Down Syndrome is not a nominated area of exceptionality under IDEA or *WV Policy*

2419. Down Syndrome is generally placed under the area of exceptionality nominated “developmental disability” until a student reaches age six (6) and then, depending on the student, the area of exceptionality is usually identified as “intellectual disability”

17. “Intellectual Disability” is defined as significantly subaverage intellectual functioning that exists concurrently with deficits in adaptive skill areas. These deficits are manifested during the developmental period and adversely affect the student’s educational performance. 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;
- or
- the student with the most significant cognitive disabilities (moderate to severe intellectual disability) has general intellectual functioning more than 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, § 3.1.*

18. Student met eligibility criteria for special education services as a student with Intellectual Disability.

19. The exceptionality nominated other health impaired (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.*

20. 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.*

21. Student met eligibility criteria for OHI because of his ADHD.

22. Student’s third diagnosis of Oppositional Defiance or Conduct Disorder does not meet the eligibility criteria for Emotional/Behavioral Disorder as his inability to learn and his inability to build or maintain satisfactory interpersonal relationships with peers and teachers can be explained by his intellectual disability and he does not meet the other criteria.

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

23. A low incidence disability is any educational disability that affects relatively few students in the total number of students with disabilities who are receiving special education.

Hearing impairment, blindness and intellectual disabilities are examples of low incidence disabilities. Under the reauthorized Individuals with Disabilities Act (IDEA 2004) school systems are still permitted to serve students with low incidence disabilities in non-neighborhood schools if they cannot be served effectively or efficiently on an individual school basis. 20 U.S.C. 1462(c)(3).

24. 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, Dispute Resolution, §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 (4<sup>th</sup> Cir. 2019).

25. The free appropriate public education (FAPE) standard was clarified by the US Supreme Court in March of 2017 from the Rowley<sup>10</sup> 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).

---

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



26. The choice of the particular educational methodology employed with the student is left to the school system. Board of Ed. Of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley, 458 U.S. 176, 208 (1982)

27. IDEA is not intended to deprive educators of the right to apply their “professional judgment.” Hartmann v. Loudoun County Bd. Of Educ., 118 F3d 996, 1001 (4<sup>th</sup> Cir. 1997)

28. IDEA mandates an education for each handicapped child that is responsive to his or her needs but leaves the substance and the details of that education to state and local school officials. Barnett v. Fairfax County Sch., 927 F2d 146, 151-2 (4<sup>th</sup> Cir. 1991) *cert. denied*, 502 U. S. 859 (1991)

29. An IEP is the “primary vehicle” through which a school provides a student with FAPE. M.S. ex rel Simchuck v. Fairfax County Sch. Bd., 553F3d 315, 319 (4<sup>th</sup> Cir. 2009)

30. Once a procedurally proper IEP has been formulated, courts should be reluctant to second guess the judgment of education professionals. Tice v. Botetourt County School Bd., 908 F2d 1200, 1207 (4<sup>th</sup> Cir. 1990)

31. Parent disagreements with the provision of a particular service, or a change in placement or other IEP components may be addressed by the IEP Team and the dispute resolution processes. *WV Policy 2419, Ch. 5, Individualized Education Programs §2. L.*

32. 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 §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, Chapter 7, Discipline, §2. A and B* provide additional rules.

33. 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 a school employee. 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 or student, by leaving school without permission (elopement), by intentionally damaging school property or by disruptive conduct at school. W. Va. Code §18A-5-1a (i).

34. 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.

35. For students such as Student, *WV Policy 2419, Chapter 7, Discipline*, § 2 provides
- A. School must provide same day notice of the removal, Prior Written Notice; and
  - B. Conduct a manifestation determination meeting within ten (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.

36. §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 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.

37. 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.

38. A district may change the physical location of a student's services. R.M. by S.M. and M.M. v. Gilbert Unified Sch. Dist. 768 F. App'x 720, 74 IDELR 92 (9<sup>th</sup> Cir. 2019) (unpublished).

39. A school district did not violate IDEA by placing an elementary school student with Down Syndrome and other disabilities in a special education classroom for instruction in core subjects when the student struggled to access the general education curriculum, disrupted the class, and became aggressive to teachers and other students. Clasen ex rel. M.S. v. Unified Sch. Dist. No. 266, 75 IDELR 5 (D. Kansas 2019).

40. Copying the same student goals from IEP to IEP without revision is evidence that the IEPs were not designed to enable the child to make progress. (Student had the same IEP goals for first grade through eighth grade) Damaecus S. v. District of Columbia, 190 F. Supp. 3d 35, 52-53 (D.D.C. 2016).

41. Expert witness opinions about legal conclusions are generally inadmissible. The prohibition of opinion testimony on an ultimate issue of law recognizes that when an expert undertakes to tell a jury what result to reach, this does not aid the jury in reaching a decision but rather attempts to substitute the expert's judgment for the jury's. United States v Denean, 42 F3d 97, 101 (2<sup>nd</sup> Cir. 1994). An expert witness cannot give an opinion as to her legal conclusion, i.e. an opinion on the ultimate issue of law. Hangarten v. Provident Life and Accident Ins. Co., 373 F3d 998, 1016 (9<sup>th</sup> Cir. 2004)

42. Attorney fees may be awarded by a court or agreed to by the parties but may not be awarded by a due process hearing officer. *WV Policy 2419, Dispute Resolution Ch. 11 §4. O.*

## **DISCUSSION and DECISION**

### **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.

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 and share control; in this matter, it appears that at least in the time period of this due process, there was no real consensus on Student's plan of 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.

As noted above, as Student is eligible for special education and related services as an intellectually disabled student, an eligibility that is considered low incidence, federal and state law permit a county school system to serve Student in a non-neighborhood school if he can not be served effectively or efficiently at his current neighborhood school. As County Schools did not chose to provide evidence that Student could not be served effectively or efficiently at his current neighborhood elementary school, this decision will not address that issue.

## II. Student/Parents' Identified Issues

A. Whether County Schools violated IDEA and/or WV Policy 2419 by failing to provide free, appropriate, public education (FAPE) to the student in the least restrictive environment (LRE) by failing to provide Student with needed behavior supports to allow him to access education?

As noted above, Student/Parents and County Schools greatly differed on what were necessary and appropriate behavioral supports. Both parties agreed that Student needed a BIP which contains positive behavioral interventions, strategies and supports to help implement Student's IEP goals and objectives and that is based on Student's FBA.

Student/Parents' first argument is that County Schools' reliance on a previous FBA that was inadequate and incomplete because of insufficient data caused lack of FAPE. In addition, they argued that County Schools failure to develop a BIP for a year and a half after the inadequate and incomplete FBA denied Student FAPE and that County Schools subsequently wrote inadequate and ineffective behavior plans that were inconsistently implemented.

County Schools argue in response that Student's initial FBA was adequate and complete. If there were any elements that were not complete, this incompleteness was due to Student's frequent unexcused absences from and lateness to school. Student/Parents' expert psychologist SB's opinion was that far more data should have been collected for the initial (and subsequent) FBA. County School's expert BCBA JB found that the data collection for the initial FBA was consistent with standard practice for BCBAs.

The County Schools did not address the eighteen (18) month delay in creating Student's BIP after the FBA. The initial FBA in this record was created by County Schools BCBA from data collected since 2016 and dated November 2016. The County BCBA AJ testified that the IEP Team would have developed a BIP at the next IEP meeting after she completed the FBA (TR. III at 86) but the records reflect that she did not attend that meeting. (Joint Stip. Exhibit No. 25) County

Schools expert BCBA JB noted that it is typical for the findings and strategies of the FBA to be discussed and it would be unusual if the findings weren't presented to the parents or IEP Team. (TR. III at 272-4) However, the record reflects that the subsequent IEP did not contain or even reference a BIP.

In the September 2017 IEP, a notation on a goal was that Student would use "a scripted" behavior intervention plan "when developed" but no BIP with or without a scripted plan was included with the September 2017 IEP. (Joint Stip. Exhibit No. 27) In November 2017, County Schools BCBA AJ conducted a "behavior performance update" using the Functional Assessment Screening Measure (FAST) that BCBA AJ admitted is only accurate about two-thirds (2/3) of the time and is not a thorough assessment tool. TR. III at 100-2. The County Schools continued to use a "smiley face" chart for Student's behaviors until Student's general education teacher asked for its revision or discontinuance as ineffective. TR. III at 46. Joint Stip. Exhibit No. 32.

The record does not contain any written BIPs until April 2018, more than eighteen (18) months after the FBA was completed. County Schools BCBA AJ offered no justification for this delay; County Schools BCBA JC who completed a subsequent FBA and BIP for Student noted that it is important to create a BIP for school staff to follow as soon as possible after completion of the FBA. When BCBA JC took over the data collection and created an FBA in the spring of 2019, Student's BIP was discussed and drafted at the subsequent May 2019 IEP meeting.

County Schools response to the allegation that the April 2018 BIP was inadequate and ineffective was that the April 2018 BIP and the April 2018 IEP were to be read together and that together they were adequate. County School's expert BCBA JB found that the April 2018 BIP was consistent with standard practice for BCBAs.

A revised BIP for Student was developed at the October 2018 IEP meeting (third grade), without a new FBA being conducted. Although Student/Parents refer to these Student behaviors as "new" and "changed" (See e.g. *Student/Parents' Proposed Findings and Conclusions* ¶85, 88-9)

County Schools saw them as continuing, still stemming from Student's wanting to gain attention and avoid doing things he didn't want to do, but more frequent, destructive and dangerous. (*County Schools' Proposed Findings and Conclusions* ¶61) Joint Stip. Exhibit 33. A review of the documented behaviors for both second grade and third grade reflect Student behaviors of harming school property (iPad, clinic bathroom, toilets, etc.), harming school students (pushing or rolling chairs at, shoving tables at, throwing books at) harming school staff (shoving, throwing pencils at, rolling chairs into) and harming himself (eloping, running into bathrooms, locking himself in a classroom, hiding from teachers, etc.)

It was very hard for Student's parents to see that Student was sometimes a danger to himself and others. Student's parents appeared offended at the hearing that Student's aide testified that her job involved preventing Student from throwing things at other kids and running away. County School BCBA AJ testified that "the main focus of this document (October 2018 BIP) [was] to maintain safety from the danger that [Student's name] was at that time." TR. III at 61. Nonetheless, an objective review of Student's behaviors is that sometimes in both second and third grades, Student was a danger to himself and others.

Student/Parents argued that County Schools personnel inconsistently implemented Student's BIPs. Student/Parents' expert SB on her short visit to the elementary school saw teachers and staff responding differently to various Student behaviors despite being directed to follow the plan. No follow-up from the BCBA or fidelity checks were documented in school records. County School BCBA AJ identified (in the November 2016 FBA and the October 2018 BIP) as a problem that staff were negotiating with Student to comply and when he didn't, they would remove the task demand – the exact opposite of what they were supposed to do. County School BCBA JC testified that she observed that staff was failing to reward Student's appropriate behaviors as in when he was behaving well, staff didn't reward him by giving him attention or speaking to him. (TR. III at 134) Student/Parents claim in their proposed findings that none of Student's teachers were trained (See, e.g. "No other teachers were specifically trained" on how to implement BIPs *Student/Parents Proposed Findings* ¶124) but without direct testimony on that allegation, that remains only a speculative cause of inconsistent implementation.

Student/Parents did not meet their burden of proof that County Schools' initial data collection/FBA was incomplete and inadequate but Student/Parents met their burden of proof that County Schools failed to timely develop a BIP for the majority of Student's second grade year and failed during the whole period of this due process until May 2019 to ensure that the BIP in effect was consistently implemented by school personnel. Therefore, County Schools failed to provide FAPE for these reasons.

B. Whether County Schools violated IDEA and/or WV Policy 2419 by failing to provide FAPE to Student by failing to provide specially designed instruction including appropriate modifications and accommodations and other related services as necessary to enable Student to achieve ambitious goals and challenging objectives?

Student/Parents' first argument in support of this allegation is that although County Schools conducted an assistive technology evaluation to determine Student's needs for assistive technology some of the recommendations were not implemented by County Schools. Student's mother testified that she has not seen Student use the recommended stylus or other assistive technology at school, but she testified that she only went once to school to observe. Student's current aide was not clear on what assistive technology was or what Student's technology evaluation recommended. It is difficult to conclude that no recommended assistive technology was being used with or by Student at school, based on a parent's single visit and an aide's lack of understanding. Testimony from Student's teachers and related service providers would have been helpful. Student/Parents did not meet their burden of proof on this allegation.

Student/Parents' second argument is that County Schools failed to implement many of the modifications, aids and services listed in his second grade and third grade IEPs, particularly academic curriculum modifications. The evidence reflected that Student's primary modifications of grade level written worksheets were reductions in the number of spelling words or math problems. Sometimes he was given the exact same worksheets as his non-disabled peers without



modifications. Unfortunately, Student/Parents failed to offer any testimony from teachers as to curriculum modifications.

County Schools failed to offer evidence that these curriculum modifications are appropriate or, in the alternative, that they didn't occur. Therefore, Student/Parents met their burden of proof that County Schools failed to provide specially designed instruction including appropriate curriculum modifications as necessary for Student and as listed on Student's second and third grade IEPs and County Schools failed to provide FAPE for these reasons.

C. Whether County Schools violated IDEA and/or WV Policy 2419 by failing to provide FAPE to Student by failing to develop an IEP reasonably calculated to enable Student to make progress given his unique circumstances and achieve ambitious goals and challenging objectives?

As noted above, Endrew F. requires County Schools to "offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." 137 S. Ct. at 999. Student/Parents' argument is that County Schools repeated some of the same goals year after year, that the goals were not revised based on Student's progress or lack thereof, and that Student made little if any academic progress because of County School's failure to create IEPs that offer ambitious goals and challenging objectives.

Student's unique circumstances include interested and caring parents, Student's interest in singing or playing a guitar and his awareness of U Tube videos, both watching and making. Student's unique circumstances also include his moderate to severe intellectual disability with concurrent deficits in adaptive functioning in social, conceptual and possibly practical domains.<sup>14</sup> In addition, Student's unique circumstances include his attention deficit hyperactivity (ADHD) and

---

<sup>14</sup> Student's norm-referenced assessment of adaptive skills, CBRS testing in second grade reflected significant difficulties with academics, language, socialization and hyperactivity. Student/Parents' Exhibit No. 22.

his oppositional defiance or conduct disorder (ODD).<sup>15</sup>

These unique circumstances make it difficult to create an IEP reasonably calculated to enable Student to make progress. It is also extremely difficult to craft ambitious goals and challenging objectives towards which Student might make progress.

The one ambitious goal that County Schools and Parents agreed upon was that Student could live an independent life as he matured. Parents wanted Student to work towards that goal at his small neighborhood elementary school in the general education classroom.<sup>16</sup> County Schools initially wanted Student to attend the functional skills/life skills program special education class at another elementary school<sup>17</sup> for second grade but when parents kept Student out of school for almost two (2) months because they didn't want Student to attend another school, and after a facilitated IEP, County Schools and parents agreed that Student would be in the second grade general education classroom with some special education resource room time. This continued through third grade. County Schools then proposed a different special education program at a different elementary school for Student's fourth grade; Parents refused and subsequently filed this due process.

Student/Parents are correct that Student's IEPs reflect that his present levels have scarcely progressed. His May 2019 (end of third grade) IEP finds his present level in math to still be at

---

<sup>15</sup> Although Student/Parents' psychologist expert SB does not like the term "Oppositional Defiance or Conduct Disorder" as she finds it unhelpful, the term is utilized in *WV Policy 2419 Glossary* as a synonym for "Socially Maladjusted" to describe the diagnosis of students who "typically display a persistent pattern of willful refusal to meet even minimum standards of conduct...they exhibit a consistent pattern of antisocial behavior without genuine signs of guilt, remorse or concern for the feelings of others."

<sup>16</sup> Student/Parents' education expert MJD supported the parents in this full general education placement but she did so apparently based on her incorrect belief that Student was "functioning on a higher cognitive level" than her fellow Student/Parents' psychologist expert SB, who actually and appropriately tested Student and found his full-scale I.Q. to be 44 (which translates to severe intellectual disability) and who thought his functioning to be slightly higher (similar to students scoring 55-65). Student/Parents' expert SB found that Student should NOT be in the general education classroom now but needed a small classroom with "relatively intensive behavior supports" for some time. TR. II at 249-50.

<sup>17</sup> As noted above, since there are very few students in County Schools who need this program, IDEA and *WV Policy 2419* permit County Schools to consolidate these low-incidence students in a program not at the students' neighborhood schools.

kindergarten level; his English Language Arts is at Level 1 in “Smarty Ants.” Jt. Stip. Exhibit No. 46. However, Student/Parents failed to demonstrate that County School’s IEP goals are unambitious or the objectives not challenging. If anything, based on Student’s evaluations and assessments by County Schools and by Student/Parents’ expert SB, the goals and objectives as well as the curriculum may be too ambitious or challenging for Student. Student/Parents also failed to demonstrate that County Schools IEPs are the cause of Student’s failure to progress. In addition to his unique circumstances, Student’s attendance at school was sporadic with his parents removing him from a good portion of second grade, either by their initial removal because of their disagreement with the proposed school and classroom change and by the many unexcused days from and lateness to school referenced above. The records reflect that Student had many unexcused days absent from school both because of disciplinary removals and because his parents kept him home for unexcused reasons. The record reflects that Student had even more tardies during his third-grade year than in second grade.

Therefore, Student/Parents failed to prove that County Schools failed to develop IEPs reasonably calculated to enable Student to make progress given his unique circumstances and achieve ambitious goals and challenging objectives.

D. Whether County Schools violated IDEA and/or WV Policy 2419 by failing to provide FAPE to Student in the LRE by failing to include him to the maximum extent appropriate in the general education setting, and attempting to change Student’s placement to a more restrictive environment without first implementing the supplementary aids and services he needs to be successful in the LRE?

Student/Parents offered four arguments to support this allegation:

1) That County Schools failed to include Student in activities with his non-disabled peers in art, music and general education. Even when Student was with his peers,

Student/Parents argue that his seating prevented him from participating and that opportunities for group projects in science and social studies were not offered to Student;

2) That a social skills curriculum should have been but was not implemented for Student;

3) That County Schools failed to allow enough time after the May 2019 BIP was implemented to determine its efficacy; and

4) That County Schools failed to follow *WV Policy 2419* procedures (Alternate Standards Guidelines) before attempting to remove him to another school and program in June 2017<sup>18</sup>.

County Schools argued that Student was offered inclusion in general education, music and art but that Student's behavior issues prevented him from participating in group projects in some subject matters and prevented him from fully participating in other general education activities. County Schools did not address the social skills curriculum or the issue of sufficient time after the May 2019 BIP to appropriately assess.

Student/Parents offered persuasive evidence that Student needed a social skills curriculum (which was apparently not offered to Student in second or third grade) and that there was insufficient time after the May 2019 BIP was instituted for Student to assess whether it was assisting Student to meet his goals and therefore met its burden of proof. Therefore, County Schools failed to provide FAPE for these reasons.

E. Whether County Schools violated IDEA and/or WV Policy 2419 by failing to follow required procedural safeguards by failing to appropriately conduct an IEP meeting in October 2018 and by sending Student home early without documentation?

As this issue alleges County School procedural violations, after proving that an actual violation occurred, Parent/Students are required to show three (3) elements:

---

<sup>18</sup> Upon review of the evidence, the Alternate Standards Guidelines argument actually applies to events that occurred prior to June 27, 2017, so will not be addressed.

- 1) That by violating the procedure, County Schools impeded Student's right to FAPE;
- 2) That by violating the procedure, County Schools significantly impeded Parents' opportunity to participate in the decision-making process regarding the County Schools' provision of FAPE; and
- 3) That by violating the procedure, County Schools caused a deprivation of educational benefits to Student.

Student/ Parents' argument is that County Schools intentionally held an IEP meeting in October 2018 without the parents in attendance, thus violating IDEA and *WV Policy 2419* provisions concerning scheduling and conducting an IEP meeting.

The evidence reflected that County Schools had attempted to schedule this IEP meeting multiple times. County Schools' first Notice was sent dated September 11, 2018, scheduling the IEP meeting for September 20, 2018; Parent checked the box "I wish to have this rescheduled." (CS Exhibit No. 137) County Schools, honoring the parents' request, then sent a Notice dated September 17, 2018, rescheduling the meeting for September 26, 2018; Parent again checked the box "I wish to have this rescheduled." (CS Exhibit No. 138) County Schools, again honoring the parents' request, then sent a Notice dated October 3, 2018, attempting for a third time to schedule and scheduled the IEP meeting for October 15, 2018; Parent for the third time checked the box "I wish to have this rescheduled." (CS Exhibit No. 140) This time parent proposed a different date with a question mark. The County Schools tried a fourth time, sending the Notice dated October 11, 2018, scheduling the IEP for October 18, 2019; Parent for the fourth time checked the box "I wish to have this rescheduled" and wrote another date (October 23). (CS Exhibit No. 141) The Principal sent an additional letter to parents dated October 15, 2018, noting the four attempts to schedule refused by parents, emphasizing the meeting's importance and asking them to please attend. (CS Exhibit No. 142)

Neither IDEA nor *WV Policy 2419* require a County School to reschedule an IEP meeting four (4) times. Each County School notice notified parents "early enough to ensure that they will

have an opportunity to attend” and the County School followed the appropriate documentation requirement to show that it had taken “reasonable measures” to ensure parent participation, thus going forward without the parents at the fourth rescheduling of the IEP meeting. There is no caselaw establishing how many times an LEA has to try to arrange a mutually agreed upon meeting time and date but four (4) times plus a personal letter from the principal seems to meet the “reasonable measures taken to ensure parent participation standard.” Therefore, Student/Parents failed to prove the underlying element that the County Schools deliberately held an IEP meeting without the parents, without giving them appropriate notices and without giving them four (4) opportunities and four different meeting dates and times, and without appropriate documentation that reasonable measures were taken to ensure parent participation.

Student/ Parents’ argument on the second allegation is that County Schools sent Student home early from his LRE in 2018-19 without appropriate documentation and, by doing so, failed to track Student’s early removals from school to determine whether they constituted a pattern of behaviors such that would “have triggered (Student’s name)’s procedural safeguards, and if followed, would have led to a new FBA or revisions of the BIP, in order to reduce the behaviors contributing to the removals.” (Student/Parents’ Proposed Findings, p. 61 ¶263)

As proof of the underlying violation, Student/Parents offered testimony from Student’s mother that she had been called multiple times to pick up Student early from school because of his behavior. She was not able to identify when these requests for early pickups occurred or how many times Student came home early but she was certain she had not received any documentation on these early pickups. County Schools’ records demonstrate that some, if not all, of these early pickups were documented in Student’s attendance records and so may have been considered in the Student’s FBAs or BIPS. Without more evidence of how many times and when these early Student pickups without documentation occurred, the basic facts of the alleged County Schools’ failure to document any early pickups not documented remain unproven. Student/Parents’ failed to prove that there were undocumented Student removals from his LRE that County Schools should have documented.

F. Whether County Schools violated IDEA and/or WV Policy 2419 by failing to follow required procedural safeguards by failing to hold a manifestation determination during 2018-19?

Student/Parents' offer two (2) arguments to support this alleged violation: 1) that Student's cumulative behavior record in 2018-19 should have been analyzed earlier for change in placement because County Schools failed to count the days Student was sent home early for behavior issues; and 2) that Student's IEP Team failed to conduct a manifestation determination within the statutory ten (10) days.

1. Student's cumulative behavior record in 2018-19 should have been analyzed earlier for change in placement because County Schools failed to count the days Student was sent home early for behavior issues

Student/Parents' first argument on this allegation is that the conditions that constitute a change in placement occurred earlier than the County School records demonstrate. Student/Parents' base this on their allegation that County Schools sent Student home early in 2018-19 without appropriate documentation and, by doing so, missed the opportunity to analyze Student's early removals from school along with his actual disciplinary suspensions from school to determine whether they constituted a pattern of behaviors such that would qualify as a change of placement and require a manifestation determination meeting and review.

As noted above, IDEA and *WV Policy 2419* identify that a change in placement for a student with a disability could occur if a student is removed for ten (10) or more consecutive days disciplinary reasons for one (1) incident or if he is removed from school in a series of removals that total ten (10) or more school days in the school year, and the removals are for behavior that is similar to behaviors exhibited in prior removals, and additional factors including length of each removal, proximity of removals to each other and total amount of time. Manifestation

determination must occur when the number of days of proposed suspension exceeds ten (10) cumulative or consecutive.

As proof of the underlying violation, Student/Parents offered testimony that Student's mother had been called multiple times to pick up Student early from school because of his behavior. She was not able to identify when these requests for early pickups occurred or how many times Student came home early but she was certain she had not received any documentation on these early pickups. County Schools' records demonstrate that some, if not all, of these early pickups were documented in Student's attendance records.

Without more evidence of how many times and when these early Student pickups without documentation occurred, the basic facts of the alleged violation remain speculative. Without meeting the burden of proof on the underlying violation, this hearing officer is unable to determine whether or not the County Schools should have conducted a manifestation determination review and meeting earlier in the school year based on these allegations of multiple early pickups for disciplinary reasons.

Student/Parents' failed to meet their burden of proof that County Schools should have conducted a manifestation determination earlier in the 2018-19 school year because of any early pickups.

2. Student's IEP Team failed to conduct a manifestation determination within the statutory ten (10) days after the April 5, 2019, suspension.

As noted above, the West Virginia Safe Schools Act and *WV Policy 4373*, as well as IDEA and *WV Policy 2419*, require that, if a student with a disability is suspended for ten (10) or more consecutive days for disciplinary reasons for one (1) incident or if a student with a disability is removed from school in a series of removals that total ten (10) or more school days in the school year, and the removals are for behavior that is similar to behaviors exhibited in prior removals, and



additional factors including length of each removal, proximity of removals to each other and total amount of time, then manifestation determination review must occur. This review must occur when the number of days of proposed suspension exceeds ten (10) cumulative or consecutive.

Student/Parents are correct in this allegation. The records reflect that County Schools failed to timely conduct a manifestation determination after suspension on April 5, 2019. The record reflects that County Schools filed three documents each with a proposed suspension of “~~10 days~~” marked through and “2 days” inserted: an *Incident Report* in WVEIS ( (CS Exhibit No. 174), a completed *Services Provided during Special Education Suspension* form (CS Exhibit No. 175) and a *Prior Written Notice* (CS Exhibit No. 173) on that date proposing to suspend Student for harming a teacher by causing a chair to fall out from underneath the teacher who fell on the floor and was injured. The Incident Report, signed by parent and principal on that date, notes that “notification for a manifestation meeting and expulsion hearing will be forthcoming.” No documents reflect that the expulsion hearing was ever noticed or held, despite the mandatory statutory requirement that, as noted above, serious disciplinary incidents, such as employee battery, must be referred to the Superintendent for expulsion hearing scheduling if the manifestation determination finds it is not a manifestation of a student’s disability. Not only did County Schools fail to have a timely manifestation meeting and fail to refer the matter to the Superintendent, the records reflect there was no manifestation meeting at all, as the next procedural record chronologically is dated April 24, 2019, noticing an IEP meeting for May 2, 2019. (CS Exhibit No. 177)

Since the Student/Parents proved the underlying violation, the Fourth Circuit requires an analysis of three mandatory elements.

- a. Did County Schools impede Student’s right to FAPE by not timely conducting a manifestation determination within ten (10) days after the April 5, 2019 suspension?

By failing to follow the procedural requirements, County Schools did impede Student’s right to FAPE.

- b. Did County Schools significantly impede Parents' opportunity to participate in the decision-making process regarding the County Schools' provision of FAPE by not timely conducting a manifestation determination within ten (10) days after April 5, 2019?

By failing to follow the procedural requirements, County Schools did impede Parents' opportunity to participate in the decision-making process. Without conducting a meeting and allowing the parents to attend, there was no opportunity for Parents to participate in the manifestation determination.

- c. Did County Schools cause a deprivation of educational benefits to Student by not timely conducting a manifestation determination within ten (10) days after April 5, 2019?

The evidence at the hearing did not reflect that Student served more than two (2) days out-of-school and his mother received schoolwork for him to do during those two (2) days. There is insufficient evidence to show that County Schools' failure to follow the procedure to timely conduct a manifestation meeting actually caused Student to be deprived of educational benefits. Although Student/Parents clearly proved that County Schools failed to conduct a timely manifestation determination meeting after Student's April 5, 2019, employee battery, Student/Parents failed to demonstrate that the Student actually was deprived of educational benefits, thus not meeting all the elements of the three-prong test for procedural violations.

## **DECISION**

Student/Parents requested in its issue revision pleadings filed in July 2019 eight (8) remedies (see footnote for specifics) but in Student/Parents' *Proposed Findings and Conclusions* (pg. 62) these remedies were revised to read:

1. Enjoin County Schools from conducting IEP meetings without the parents present when the parents have specifically requested to be present;
2. Enjoin County Schools from informally sending Student home as a result of behavior incidents, and track all removals from the educational setting that are a result of Student's behaviors;
3. Direct County Schools to train or retrain all administration and staff at Student's neighborhood elementary school on writing and implementing IEPs and on the implementation of procedural safeguards for students who are removed, including holding manifestation determination meetings;
4. Direct County Schools to provide an independent psychoeducational evaluation;
5. Direct County Schools to amend Student's IEP to change his educational setting from a behavior disorder classroom at a school out of his district to his home school and in the general education environment, to the maximum extent possible;
6. Direct County Schools to retain an independent behavior specialist, chosen or approved by Student's parents, to assist County Schools in conducting a comprehensive FBA and developing a new BIP, retaining this specialist to be paid to conduct training for Student's parents, teachers, etc.;
7. Direct County Schools to provide Student with behavioral supports as identified by the independent behavior specialist;
8. Direct County Schools to hire an independent expert, chosen or approved by Student's parents, to train general and special education teachers how to modify Student's curriculum to his current level of academic performance;

9. Direct County Schools to implement an evidence-based social skills program with Student to help him develop skills for appropriate interactions with his non-disabled peers;
10. Direct County Schools to implement assistive technology as recommended by Student's second grade AT evaluation;
11. Order compensatory education to remedy the denial of FAPE for the two-year period prior to the filing of the due process complaint; and
12. Preserve Student/Parents' right to seek reasonable costs and attorney fees.

As Student/Parents failed to meet their burden of proof on whether the County Schools' FBAs were adequate and complete or on whether assistive technology was being used with Student at school or that County Schools failed to follow Alternate Standards Guidelines before attempting to remove Student to another school or failed to appropriately include Student in activities with non-disabled peers, no requested remedies will be awarded that address those claims. As Student/Parents failed to meet their burden of proof on the procedural issues of inappropriate conduct of an IEP meeting in October 2018, failing to document sending Student home early for behavior issues without documentation and failing to hold a manifestation determination, no requested remedies will be awarded addressing those claims.

As Student/Parents met their burden that County Schools failed to timely develop a BIP for almost eighteen (18) months after an FBA was completed, that County Schools failed to ensure that the BIP in effect was consistently implemented by school personnel, that County Schools failed to provide appropriate curriculum modifications, that County Schools failed to offer Student a necessary social skills program and that there was insufficient time after the May 2019 BIP to assess whether it was assisting Student to meet his goals, the following will be directed:

1. By March 1, 2020, County Schools shall consult with its BCBA consultant JB to review Student's May 2019 BIP and any subsequent revisions to it instituted during Student's fourth grade year to determine if the BIP is assisting Student meet his goals; if it is not,

then County Schools is directed to have BCBA consultant JB direct another FBA and create a BIP from those new assessments by April 15, 2020;

2. By March 1, 2020, County Schools shall institute a follow-up program to ensure consistency in Student's behavior management by administrators, teachers, aides and other educational professionals working with Student and provide any required training;
3. As Student/Parents' clinical psychologist has recently and appropriately tested Student's I.Q. and academic abilities to be in the moderate to severe category of intellectual disability, there is no need to require Student to go through additional psychoeducational evaluations; however, given this evaluation, Student's academic curriculum must be modified to meet this level. County Schools shall have its curriculum specialists review Student's academic curriculum and modify it as needed by March 1, 2020;
4. By March 15, 2020, Student's IEP Team shall meet to revise Student's IEP to include an evidence-based social skills curriculum to help the student with his interactions with other students, and appropriate curriculum modifications as directed above;
5. Although Student/Parents failed to prove its assistive technology allegations, County Schools is directed to update its 2017-18 assistive technology evaluation and include any necessary technology in Student's IEP on or before March 15, 2020;
6. As no expert recommended that Student's LRE is solely the general education fourth grade classroom<sup>19</sup> at his neighborhood school, but Student/Parents' expert SB recommended a small classroom with intensive behavioral supports, County Schools

---

<sup>19</sup> Student/Parents' expert MJD supported a primarily general education LRE for Student but apparently did not agree with her fellow expert's intelligence and ability testing and her recommendations concerning Student's LRE. However, MJD did not do any of her own intelligence and ability testing as she admitted to not being qualified to do so, and her belief that Student's intelligence and academic ability are "greater than 80% of students in a special education classroom" was not attributed to any objective information or basis. Therefore, as noted above, Student/Parents' expert MJD's opinions were given less weight than those of Student/Parents' expert SB.

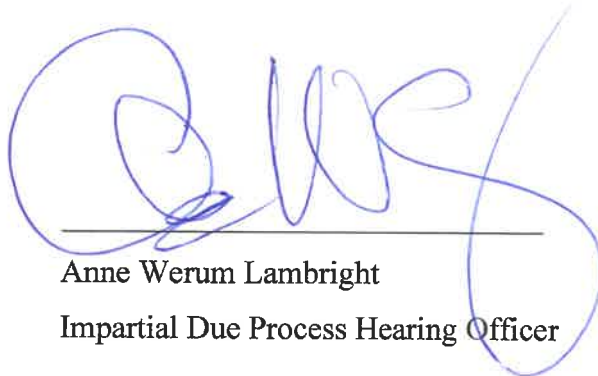
are directed to consider all educational environments at the neighborhood elementary school for Student at its March 15, 2020, or before, IEP meeting;

7. If County Schools determines that Student's neighborhood elementary school is unable to serve Student effectively or efficiently because of his low-incidence disability, County Schools should follow the appropriate procedures to determine the appropriate, effective program for Student in a non-neighborhood elementary school. Student's current elementary school feeds into a middle school that also includes many other elementary schools; it would be beneficial for Student, should his current elementary school decide it is unable to serve Student effectively or efficiently, that it investigate programs at other elementary schools that also feed Student's upcoming middle school, as Student will be moving to middle school in another year;
8. Because County Schools failed to timely develop a BIP for almost eighteen (18) months after an FBA was completed, failed to ensure that the BIP in effect was consistently implemented by school personnel, failed to provide appropriate academic curriculum modifications, and failed to offer Student a necessary social skills program, and, therefore, denied Student FAPE, County Schools must provide Student with one hundred twenty (120) hours of compensatory education for a portion of the two-year period preceding the filing of this due process. No compensatory education is awarded for any period in which parents voluntarily kept Student away from school, including the beginning of the 2017-18 school year and any unexcused absences from and lateness to school. No compensatory education is awarded for the waiver period from January 28 through March 1, 2019. (Student/Parents' Exhibit No. 32) Appropriate compensatory education should be offered to Student as intensive remediation for reading, written expression, math and social skills; County Schools can elect to provide this compensatory education after school, on Saturdays or other non-school days, and/or as a dedicated summer program during the summer of 2020. All compensatory education awarded must be completed before Student starts his 2020-21 school year.

## **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: February 10, 2020



---

Anne Werum Lambright  
Impartial Due Process Hearing Officer