

BEFORE THE IOWA DEPARTMENT OF EDUCATION
(Cite as 28 D.o.E. App. Dec. 185)

In re [REDACTED], a child:)	
)	
[REDACTED] and)	
[REDACTED],)	Dept. Ed. Docket No. SE-459
)	DIA No. 18DOESE0004
Complainant,)	
)	
v.)	
)	
[REDACTED] COMMUNITY SCHOOL)	
DISTRICT and [REDACTED])	
AREA EDUCATION AGENCY,)	
)	DECISION
Respondents.)	
)	

On or about August 15, 2017, Complainants [REDACTED] and [REDACTED] filed a due process complaint against Respondents [REDACTED] Community School District (“LEA” or “district”) and [REDACTED] Area Education Agency (“AEA”) pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 et seq., as implemented by 281 Iowa Administrative Code chapter 41.

Hearing in this matter was held on April 2 through April 5, 2018 at the offices of the [REDACTED] Area Education Agency in [REDACTED], Iowa. Attorneys [REDACTED] and [REDACTED] represented the district and the AEA. [REDACTED] and [REDACTED] attended the hearing as representatives of the AEA. [REDACTED] and [REDACTED] attended the hearing as representatives of the district. Attorneys [REDACTED] and [REDACTED] represented Complainants, who attended the hearing.

The following witnesses testified at the hearing: [REDACTED]; [REDACTED]; [REDACTED], special education consultant for the AEA; [REDACTED], director of secondary education for the district; [REDACTED], director of special programs for the AEA; [REDACTED], in-home provider employed by [REDACTED]; [REDACTED], school administrative manager and intervention teacher at [REDACTED]; [REDACTED], former special education teacher at [REDACTED]; [REDACTED], former special education paraeducator at [REDACTED]; [REDACTED], associate principal and activities director employed by the district; and [REDACTED], school psychologist/team representative employed by the AEA. By prior agreement of the parties memorialized in an Order issued November 20, 2017, videotapes and transcripts of depositions taken of the following witnesses in [REDACTED] on December 7 and 8, 2017 were submitted in lieu of testimony at hearing: [REDACTED], administrator of special education at [REDACTED]; [REDACTED], program coordinator at [REDACTED]; [REDACTED], director of residential treatment at [REDACTED]; [REDACTED];

██████████, therapist/licensed clinical social worker at ██████████; ██████████
██████████, executive clinical director at ██████████; and ██████████, licensed psychologist.

Complainants' Exhibits 1-38, 41, 43-44, 62, 64, 67-68, 72, and 85-87 were admitted as evidence. Respondents' Exhibits B-K, M-O, S-U, W-CC, EE-LL, OO-RR, TT-ZZ, AAA, LLL, NNN, OOO, UUU, and AAAAA were admitted as evidence. Joint Exhibits 2001A-2006A and 2001B-2006B were also admitted as evidence. The joint exhibits are videotapes and transcripts of depositions taken of ██████████, ██████████, ██████████, ██████████, ██████████, and ██████████ prior to the hearing.

Both parties submitted trial briefs prior to the hearing, which are part of the record. Arrangements were made at hearing to hold the record open until April 20, 2018 in order for the parties to submit post-hearing briefs, which are limited to 25 pages. Complainants subsequently requested an extension of the deadline to submit post-hearing briefs in order to obtain the transcript of the proceedings. By order dated April 13, 2018, the deadline for the submission of post-hearing briefs was extended to May 18, 2018. On May 18, 2018, Complainants requested an extension of the deadline to May 22, 2018 due to attendance at a funeral. Respondents did not object to the request and the deadline was extended to May 22, 2018. Both parties submitted post-hearing briefs on May 22, 2018.

Pursuant to 34 C.F.R. § 300.515(a), a final decision must be reached in the hearing no later than 45 days after the expiration of the 30 day resolution period. This timeline had previously been extended at the request of the parties to accommodate the hearing schedule. At the conclusion of the hearing, the parties made a joint motion to extend the 45 day timeline until May 25, 2018 to accommodate the drafting of a decision in the case. When Complainants requested an extension of the post-hearing briefing deadline, detailed above, they also requested that the 45 day timeline be extended to accommodate the new briefing schedule. The April 13, 2018 order extending the briefing deadline extended the 45 day timeline to July 3, 2018 to accommodate drafting the decision.

ISSUES PRESENTED

Pursuant to 34 C.F.R. 300.511(d) and 281 Iowa Administrative Code 41.511(4), the issues in this hearing are limited to those issues raised in the Complaint. By order dated November 2, 2017, the following issues were identified to be addressed at hearing:

- Whether Respondents violated the IDEA and failed to provide ██████████ a free, appropriate public education (FAPE) by failing to implement the terms of the legally binding mediation agreement reached by the parties on February 8, 2016. The specific terms that Complainants allege have been violated are identified at paragraph 84 of the Complaint.
- Whether the IEP and BIP proposed by Respondent ██████████ Community School District several months after ██████████ started classes at ██████████ School constituted a denial of a free, appropriate public education (FAPE) to ██████████ and violated the IDEA.

- If a violation is proven, whether Complainants are entitled to the proposed remedies articulated in paragraphs 95 through 98 of the due process complaint.

The parties were given the opportunity to file a request to amend the statement of the issues if they believed it did not adequately capture the issues raised in the Complaint. Neither party filed any request to amend the statement of the issues articulated in the November 2, 2017 order.

IDENTIFICATION OF WITNESSES

In the interest of protecting the privacy of [REDACTED], [REDACTED] and the following individuals will be referred to by the following designations in this Decision:

[REDACTED]: Student

[REDACTED]: Mother

[REDACTED]: Father

[REDACTED]: Parents

[REDACTED]: AEA Director of Special Programs

[REDACTED]: Intervention Teacher

[REDACTED]: Special Education Teacher

[REDACTED]: Special Education Paraeducator

[REDACTED]: School Psychologist/AEA Team Representative

FINDINGS OF FACT

Background: At the time of the majority of the events underlying the current due process complaint, Student was [REDACTED] old and a resident of [REDACTED], Iowa in the [REDACTED] Community School District.¹ Student was adopted at approximately age two and one-half by Parents and experienced a great deal of early childhood trauma. Prior to the events at issue here, he had been diagnosed with reactive attachment disorder (RAD), anxiety, and cognitive delays. (Mother, [REDACTED] testimony; Exh. D-6).

During kindergarten through sixth grade, Student fell behind academically and was having behavioral problems in school which impacted his academic performance. Student's Parents were frustrated as he was not meeting the goals that were set forth in his IEPs and never enjoyed school, as he found it very difficult. (Mother testimony).

Student started [REDACTED] grade at [REDACTED] School in the [REDACTED] Community School District in a self-contained special education classroom during the 2014-15 school year. Mother identified that Student was having a number of behavioral issues at home that year. Due to Student's family situation and for the benefit of all of Student's family members, he was placed at [REDACTED], a psychiatric medical institution for children [REDACTED] in [REDACTED], Iowa from January through August 2015. (Mother testimony).

¹ Student's date of birth is [REDACTED]

2015-16 School Year: After returning from the [REDACTED] placement, Student re-entered [REDACTED] at the start of his [REDACTED] grade year. Typically, students returning from a residential placement would transition through [REDACTED], a special school facility operated by [REDACTED]. Parents requested, however, that Student reintegrate directly into [REDACTED], and the district honored Parents' request. A Functional Behavior Assessment (FBA) was conducted in August 2015 and a Behavior Intervention Plan (BIP) was implemented with input from [REDACTED], Parents, and school staff. The BIP was modified a number of times while Student was at [REDACTED] to include additional strategies based on Student's needs. (Exh. D-38-47, UUU-8).

During the start of the 2015-16 school year, [REDACTED] staff observed that Student's behaviors were unpredictable and that he would leave the classroom and the building without any obvious patterns or triggers. Staff also noted that Student was engaging in aggression, violence, threats directed at staff and himself, and mood swings throughout the day. Additionally, staff noted that Student frequently refused teacher requests to get his books out and engage in instruction, refused to listen, and refused to do assigned work. Student frequently told teachers, "I don't have to. I can do what I want." Staff observed that Student was better able to participate in settings where there were no academic expectations; for example, when Student was allowed to play on the computer or watch videos, he could remain in a setting without leaving. (Exh. UUU-9).

On October 30, 2015 police and Parents were called to [REDACTED] to deal with a situation where Student's behavior had escalated to the point of throwing books at school staff and blocking himself in a room alone; the escalation continued for a prolonged period of time even after intervention by trained staff. Student was handcuffed by police officers who responded. (Mother, [REDACTED] testimony; Exh. UUU).

Student was suspended after the October 30 incident. During the suspension, he was receiving one hour of instruction at the AEA office four days per week. Student's Parents decided that they did not want him to return to [REDACTED]. At some point in fall 2016, Student was placed at [REDACTED] School, also in the [REDACTED] Community School District. (Mother, Father testimony).

On December 16, 2015, a manifestation determination was made with regard to conduct that occurred December 11 at [REDACTED]. The determination indicates that Student was being verbally and physically aggressive with school staff, including threatening to harm or kill multiple individuals, acting as though he was going to harm himself or others with a paper cutter and pair of scissors, attempting to bite, hit, and kick school staff, not allowing staff to leave the room by physically blocking their way, knocking over and kicking stools, and upending a trash can on a staff member's head. The document states that Student has a history of significant behavior, including an incident of physical aggression at a prior school and multiple incidents of refusal to comply with directions or school expectations, disrespectful or disruptive communication with school staff, and leaving the school setting without permission. The determination also states that an FBA was completed showing an identified primary function of escaping undesirable environments, particularly when academic coursework was assigned. A secondary function of attention was also identified by the FBA. The determination states that Student "has learned to 'up the ante' in order to achieve his escape related function."

The document further states that multiple meetings and Individualized Education Program (IEP) revisions have been made in the prior months in an attempt to design a plan that will work with Student's identified needs, including completion of an FBA and BIP in August 2015. The individuals who participated in the manifestation determination meeting, including Parents, determined that the behavior was a manifestation of Student's disability. It was also determined that the identified behavioral supports and services currently being provided were insufficient to meet Student's needs. The document states that it is anticipated that the problematic behaviors will continue or intensify if changes are not made to Student's special education program. (Exh. 85).

The district moved Student to homebound instruction beginning January 28, 2016. The Prior Written Notice regarding the move states, "Given [Student's] lack of goal/academic progress and disruptive behaviors throughout the building, [Student] will now be served through the homebound model with 3 hours of homebound instruction per day Monday – Friday." At some point after that, the district proposed placing Student at [REDACTED]. (Exh. 32, 38).

2015 Due Process Complaint: On or about December 23, 2015, Parents filed a due process complaint against the district and AEA. The Complaint included allegations that the district and AEA violated the IDEA by, among other things, failing to evaluate Student properly to determine his unique needs, failing to develop appropriate IEPs to provide Student with a free appropriate public education (FAPE), and failing to appropriately implement Student's IEP and BIP. Parents argued that the district's proposed placement of Student at [REDACTED] violated Student's rights to be educated in the least restrictive environment. Parents also alleged several violations of the IDEA's procedural safeguards. Parents were represented in the due process proceeding by attorney [REDACTED]. (Exh. 32).

After the filing of the complaint, the parties engaged in a facilitated mediation process. As a result of that mediation, which occurred on February 8, 2016, the parties entered into a Legally Binding Mediation Agreement (LBMA) that resolved all of the claims contained in the 2015 due process complaint. (Exh. 33).

Legally Binding Mediation Agreement: The parties agreed in the LBMA that Student's placement would be at [REDACTED]. He was to be initially placed in the functional classroom with the expectation that he move to a typical [REDACTED] school classroom for academic work when emotionally ready. Additionally, the LBMA provided that Student would attend school for a full school day and would not receive any out-of-school suspension for non-dangerous behaviors. The parties agreed that monthly conferences would be scheduled with Parents to discuss the results of progress monitoring and Student's behavioral and academic progress. Parents were to be e-mailed progress monitoring of Student's goals every two weeks. (Exh. 33).

In total, the LBMA identifies 21 actions that the parties will undertake to resolve the pending issues raised in the 2015 due process complaint. The current action relates to provisions of the LBMA that Parents allege have been violated by the district. The provisions that Parents allege have been violated are the following:

Identify action to resolve issue[]	Person or agency responsible to initiate and complete an action	Timeline for action
<p>3. The primary focus of [Student's] education would be that he attend school willingly in order to develop living, learning and working skills that prepare him for postsecondary life. [Student's] education will include "soft skills" such as transition, 21st century skills (see Iowa Core), organization, etc.</p> <p>Did the parties designate how long this action is to occur?</p> <p><input type="checkbox"/> Not appropriate.</p> <p><input checked="" type="checkbox"/> Yes. Starting date 2/15/16.</p>	<p>██████████ Staff</p>	<p>██████████</p> <p>Start Date 2/15/16, ongoing</p>
<p>4. Academic instruction will be adapted to the maximum extent possible in order to present the curriculum in a way that is attractive to [Student]</p> <ul style="list-style-type: none"> ○ Attractive instruction for [Student] is: hands on science projects that involve creating or building, math that is applied to hands-on projects and politics in the area of social studies, etc. ○ The curriculum will be individualized to hold [Student's] interest and aligned to the Iowa Core. <p>Did the parties designate how long this action is to occur?</p> <p><input type="checkbox"/> Not appropriate.</p> <p><input checked="" type="checkbox"/> Yes. Starting Date 2/15/16</p>	<p>██████████ Staff</p>	<p>School start date 2/15/16 – ongoing</p>
<p>6. [██████████ Intervention Teacher] or other persons that [Student] identifies as safe or trusted will be designated as [Student's] contact who is primarily</p>	<p>██████████ Staff</p>	<p>Report to be completed by 2/15/16. IEP Meeting held</p>

<p>responsible for providing emotional support when [Student's] anxieties or fears are heightened.</p> <ul style="list-style-type: none"> ○ If [Student] does not attach to [REDACTED] Intervention Teacher], alternate adult(s) may be identified based on [Student's] preference. ○ Other individuals will be available to provide emotional support to [Student] in the event that his preferred individuals are not available. <p>Did the parties designate how long this action is to occur?</p> <p><input type="checkbox"/> Not appropriate.</p> <p><input checked="" type="checkbox"/> Yes. Starting date 2/15/16</p> <p>Ending date 3/31/16</p>		<p>by March 31st, 2016</p>
<p>7. The behavior intervention plan included in [Student's] current IEP will remain in place provided that [Student's] parents and the District or [REDACTED] Staff may agree to mutual modifications.</p> <ul style="list-style-type: none"> ○ When the report of the current Functional Behavioral Evaluation is complete, the IEP team will meet to discuss modifications to the Behavior Intervention Plan. ○ The current safety plan will be modified at the intake meeting (with full parent participation) before starting at [REDACTED]. ○ Modifications would include which behaviors can and cannot be ignored; identification of a safe place within the school grounds where [Student] can "escape" to; strategies to redirect [Student]; expectations for when it is acceptable for [Student] to leave school grounds; and a protocol for how [Student] can access individuals he feels safe with. 	<p>[REDACTED], AEA Behavior Resource Team (BRT), IEP Team</p>	<p>[REDACTED] Start Date 2/15/16, ongoing</p>

<ul style="list-style-type: none"> ○ AEA [] Team Rep [] will be a part of the BIP writing process. <p>Did the parties designate how long this action is to occur?</p> <p><input type="checkbox"/> Not appropriate.</p> <p><input checked="" type="checkbox"/> Yes. Starting date 2/15/16</p> <p>Ending date N/A</p>		
<p>8. [Student's] current IEP coping skills goal will be amended to include specific skills to calm [REDACTED] down when escalated and how to ask for a break when he needs it.</p> <ul style="list-style-type: none"> ○ A script with specific strategies and language needed to teach those strategies will be included in the IEP. ○ This amendment will be completed without a meeting but after parents have agreed to the language and have received the PWN regarding the changes. <p>Did the parties designate how long this action is to occur?</p> <p><input type="checkbox"/> Not appropriate.</p> <p><input checked="" type="checkbox"/> Yes. Starting date 2/29/16</p> <p>Ending date N/A</p>	<p>IEP Team</p>	<p>By 2/29/16</p>
<p>9. [REDACTED] will train paraeducators who work and interact with [Student] in RAD and the appropriate strategies for communicating with [Student] and responding to his unique needs.</p> <p>Parents will be notified in writing when training is provided and a summary or outline of what the training entailed.</p>	<p>[REDACTED] and AEA 267 Staff</p>	<p>By 2/29/16</p>

<p>Did the parties designate how long this action is to occur?</p> <p><input type="checkbox"/> Not appropriate.</p> <p><input checked="" type="checkbox"/> Yes. Starting date 2/29/16</p> <p>Ending date 2/29/16</p>		
<p>11. The district will pay for [REDACTED] therapy to provide weekly consultation with [REDACTED] Intervention Teacher] or his designee for up to 30 minutes weekly. The IEP team will consider additional time as need arises.</p> <p>Did the parties designate how long this action is to occur?</p> <p><input type="checkbox"/> Not appropriate.</p> <p><input checked="" type="checkbox"/> Yes. Starting date 2/22/16</p> <p>Ending date N/A</p>	<p>[REDACTED] Staff, [REDACTED] Staff, District Business Office</p>	<p>2/22/16</p>
<p>12. [Student] will have an opportunity for physical activity daily at [REDACTED] via PE or weight room. Weightlifting is a preferred activity for [Student].</p> <p>Did the parties designate how long this action is to occur?</p> <p><input type="checkbox"/> Not appropriate.</p> <p><input checked="" type="checkbox"/> Yes. Starting date 2/15/16</p> <p>Ending date N/A</p>	<p>[REDACTED] Staff</p>	<p>2/15/16</p>
<p>14. The IEP team will meet to review the behavior evaluation and discuss which executive functioning needs [Student] has per the BRIEF assessment.</p> <p>IEP team will use the book “Coaching Students with Executive Skills Deficits” by</p>	<p>IEP Team, [REDACTED] Staff, EA 267</p>	<p>By 3/31/16</p>

<p>██████████ and ██████████ as a reference to support [Student].</p> <p>Did the parties designate how long this action is to occur?</p> <p><input type="checkbox"/> Not appropriate.</p> <p><input checked="" type="checkbox"/> Yes. Starting date 3/31/16</p> <p>Ending date 3/31/16</p>		
<p>18. A method will be devised to enable [Student] to understand his goals and the progress he is making toward those goals.</p> <p>Did the parties designate how long this action is to occur?</p> <p><input type="checkbox"/> Not appropriate.</p> <p><input checked="" type="checkbox"/> Yes. Starting date 4/1/16</p> <p>Ending date N/A</p>	<p>██████████ Staff</p>	<p>4/1/16</p>
<p>20. [Student] will be provided with an extended school year program. The IEP team will meet to determine the content and location of this program by May 1st 2016.</p> <p>Did the parties designate how long this action is to occur?</p> <p><input type="checkbox"/> Not appropriate.</p> <p><input checked="" type="checkbox"/> Yes. Starting date 2/15/16</p> <p>Ending date N/A</p>	<p>IEP Team</p>	<p>By May 1st, 2016</p>

(Exh. 33).

The LBMA further provided that AEA Director of Special Programs would be the shepherd of the agreement. His telephone number and e-mail address are included in the LBMA. The LBMA provides:

As [shepherd] he/she is the person who guides implementation of the agreement, and is the person any of those involved in this preappeal will contact with questions or concerns about the agreement being followed. If anyone involved believes that additional effort is needed to resolve differences that will be shared with the shepherd. One example would be a belief that the mediator should return.

(Exh. 33).

Parents, AEA Director of Special Programs as AEA representative, and a designated representative of the district signed the LBMA on February 8, 2016. Immediately preceding the signatures, the following text appears:

The undersigned parties agree:

1. All discussions that occurred in mediation are confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding.
2. This is a legally binding agreement enforceable in any state court of competent jurisdiction or in a district court of the United States.
3. This agreement is in force ~~for the duration of the current school year or for the period indicated under each agreement item~~ unless changed by the IEP team or by mutual written consent of the parties.

(Exh. 33).

██████████: At the time that the parties entered into the LBMA, ██████████ AEA ran ██████████, which is now called the ██████████.² ██████████ was the ██████████ principal in the 2015-16 school year. ██████████ is a special school facility that primarily serves students who have behavioral or mental disabilities. In spring 2016, ██████████ was serving between 50 and 60 students, all of whom had IEPs. A typical student in a school like ██████████ has tried numerous plans in his or her home school district. A special school is recommended if the plans are not successful and continue to get more restrictive. (██████████, AEA Director of Special Programs testimony).

² At present, the ██████████ school district is the fiscal agent for the ██████████; the school is no longer run by ██████████. Additionally, ██████████ underwent a name change in July 2017; prior to that date, it was known as ██████████. In some of the documents in the record, as well as testimony, ██████████ may be referred to as the ██████████; additionally, ██████████ AEA may be referred to as ██████████. (██████████, AEA Director of Special Programs testimony).

Prior to the LBMA, Parents were not supportive of Student's placement at ██████████.³ Parents' perception was that ██████████ was a special school for "mostly delinquent" students. They believed it to be a place that served "bad kids."⁴ Parents were concerned that Student would be negatively influenced by other students at the school. Parents believed that the provisions of the LBMA would allow Student to be somewhat separated from the delinquent students they believed attended ██████████. (Mother, Father testimony; Exh. B-59).

February 11, 2016 Intake Meeting: The parties agreed that an intake meeting would be held prior to Student's first day at ██████████, which was scheduled for February 16, 2016. Prior to the intake meeting, AEA Director of Special Programs reviewed the LBMA with ██████████ and ██████████ staff. The parties were aware that it would be necessary to have an IEP meeting shortly after the intake meeting to review the FBA regarding Student that had recently been conducted and to revise Student's IEP and BIP. (AEA Director of Special Programs testimony).

Participants at the intake meeting included Parents, AEA Director of Special Programs, School Psychologist/AEA Team Representative, Special Education Teacher, and Intervention Teacher. Prior to the intake meeting, ██████████ sent a copy of Student's most recent IEP to the school and AEA personnel who would be attending the meeting to familiarize them with Student and his needs. (Exh. D; AEA Director of Special Programs, Mother, School Psychologist/AEA Team Representative, Special Education Teacher, Intervention Teacher testimony).

Mother prepared a document that she distributed at the intake meeting in order to ensure that school personnel were informed about Student. Mother indicated that Student's interests included Minecraft, Legos, and Dr. Who. She also requested that the school "[l]et him do what he is doing if within reason. Example . . . putting his head down, not participating, pacing[.]" Mother noted that Student "is not handling things well right now. When he suspects things are changing he gets unregulated and anxious. So, when things actually do change his anxiety will be at an all-time high. He doesn't always know what to do with that. He cannot self-regulate so I (mom) am the one who usually helps regulate him." Mother also noted that Student "is a master manipulator!" Mother identified Student's coping skills in her document as deep breathing, using fidgets, listening to music, using a head massager, rocking, playing video games, and coloring. (Exh. C).

³ In a January 25, 2016 e-mail, Mother wrote, regarding visiting ██████████, "This is not what we want at all, but with the school giving that as our alternative, we have to try it or give up our rights..." (Exh. B-12).

⁴ In 2016, there were two programs operated on the ██████████ campus: a school program and a shelter program. The school program was the one that Student was enrolled in. Students were typically placed in the shelter program through the court system or the Department of Human Services. The ██████████ school program was separate from the ██████████ shelter program. If students in the shelter program had behavioral needs, they could be served by the ██████████ school program also. A student from the shelter program might attend the general education program at an area high school, however, if that program provided appropriate education under the student's IEP. (AEA Director of Special Programs testimony).

February 19, 2016 IEP Meeting: After the intake meeting and several days after Student began school at [REDACTED], the parties convened for an IEP meeting. Parents, Special Education Teacher, School Psychologist/AEA Team Representative, Intervention Teacher, [REDACTED], [REDACTED], the district's coordinator of student services for grades 7 through 12, and [REDACTED], a member of the AEA's challenging behavior team were present at the February 19, 2016 IEP team meeting. At the meeting, the parties reviewed the FBA that had been conducted in January and February 2016 and revised Student's IEP and BIP. The school did not prepare or circulate any draft IEP or BIP in advance of the IEP meeting. (Exh. 34; Exh. J; AEA Director of Special Programs testimony).

February 2016 Functional Behavior Assessment (FBA): School Psychologist/AEA Team Representative and two other individuals, including [REDACTED], conducted an FBA with Student in January and February 2016. A Functional Behavior Assessment Summary was prepared and included as part of Student's February 2016 IEP. The purpose of an FBA is to examine all of the factors that contribute to a student exhibiting challenging behaviors. The team attempts to objectively identify what the challenging behaviors are and conducts record review, interviews, observations, and sometimes testing to determine what the function of each behavior is. The behaviors of concern that had been identified for Student were: 1) elopement (leaving the classroom without permission from an adult or leaving the school building); and 2) aggression (hitting, kicking, biting, and scratching adults). (Exh. J-27; SP/AEA Team Rep testimony).

The FBA team observed Student on two different days at [REDACTED] School. The observations were conducted during a skills class and during a math class. Student mostly wandered through the school building without doing structured work during both of the observation periods. Student was, for the most part, allowed to go where he wanted as long as he did not create a disturbance. He was observed listening to an MP3 player, watching a movie, laying down on the floor, and assisting the custodian. (Exh. J-28-29).

At the request of the IEP team, the Behavioral Rating Inventory of Executive Function, Second Edition (BRIEF2) was conducted during the FBA. Teachers, Parents, and Student each completed ratings regarding behavior regulation, emotion regulation, and cognitive regulation. The responses indicated significant difficulties with all three indices. The Emotional Regulation Index was the highest, falling in the Clinically Significant range. The Global Executive Composite was also in the Clinically Significant range, suggesting Student has significant difficulties with all aspects of executive functioning. (Exh. J-32-33).

Behavior assessments were also conducted in order to determine possible behavior function and techniques to bias Student to engage in academic work in the school setting. A preference assessment was conducted to determine a hierarchy of Student's leisure preferences. The team also conducted a concurrent operant assessment to discover how they might bias Student's behavior to engage in work completion or appropriate behaviors. In this assessment, the team determined that they were able to bias Student to engage in the level of work expected of him if he was allowed access to a

tangible reward that was highly desired. (Exh. J-29-31; School Psychologist/AEA Team Representative testimony).

In summarizing the observations, record review, and testing, the FBA summary provides as follows:

SUMMARY POINTS – WHAT WE KNOW:

- Relationships matter and are important
- Clear, discrete expectations and guidelines – consistency across staff and setting
- [Student] will test the “limits”
- Use a matter-of-fact, firm, “broken-record approach”
- [Student] wants to choose what and when and where he will engage
- Escape of tasks is noted by school staff along with some staff noting gain for adult
- Behavior analysis results note a possible tangible function
- Within a choice assessment, BRT staff were able to bias [Student] to engage in quality work by use of high preferred tangible

(Exh. J-32-33).

Under the heading Problem Analysis, the FBA Summary states:

The elopement behavior is concerning due to the high frequency of this behavior observed when presented with an academic demand. A review of behavior logs indicate that [Student] was actively engaged in academic activities between 0% and 25% of his school day. He eloped from the classroom daily. This behavior increases rapidly as the novelty of his school setting wears off.

When [Student] wants to escape the immediate demand he will employ a variety of challenging behaviors in order to achieve his desired goal. These include getting up and leaving the classroom, making threatening comments toward staff, threatening self-harm, claiming illness to the point of vomiting, locking or blocking doors to seclude himself, and physical aggression. Calming strategies have shown limited success in getting [Student] back to the classroom environment, but any attempt to engage [Student] in an academic task will result in further elopement.

Aggressive behavior (physical contact with a staff member, throwing items toward adult) occurs less frequently than the elopement behavior, but occurs much more frequently compared to peers. This behavior occurred on average approximately once every two weeks.

(Exh. J-33).

The summary states the expectation that Student will develop and utilize the coping strategies necessary to be engaged in academic demands 80% of his school day,

compared with the current average of 12% of his school day.⁵ Based on the data collected, the team hypothesized that the function of Student's behaviors of elopement and aggression is to obtain an item or activity that is preferred when given academic tasks or activities that are not preferred. (Exh. J-34).

February 2016 IEP: Some parts of the IEP implemented in February 2016 were a carryover from Student's previous IEP. The main focus of the IEP process in February 2016 was on Student's behavioral goals, as Student's behaviors had been the driving force for the change in placement. There was some new information regarding reading fluency, occupational therapy, specialized transportation, physical education, and extended school year services added to the IEP. Additionally, a behavior goal was added to focus on decreasing incidents of physical aggression. (Exh. J; SP/AEA Team Rep testimony).

Regarding behavior, the IEP states:

Behavior – [Student] has had a history of struggling with emotional regulation across all environments, both home and school. [Student] has been diagnosed with anxiety, cognitive delays, and Reactive Attachment Disorder (RAD) by medical professionals. At school, [Student] has difficulty expressing his emotions and handling frustration in an age appropriate manner. He escalates quickly sometimes without identifiable triggers in a classroom that may cause him to be overwhelmed/anxious, which causes him to walk out of class and/or leave school. Identifiable triggers for [Student] include: academic tasks that [Student] perceives as being too difficult; too much work given in one setting (assignments must be broken into segments and not given all at once; and paper/pencil tasks. [Student] has difficulty initiating and maintaining friendships with same age peers.

Specifically, behaviors of concern at school include walking out of class without permission; leaving the school building without permission; becoming physically aggressive with school teachers/staff by attempting to bite and scratch them.

(Exh. J-6).

The IEP notes that Student's behavior impacts his ability to learn and progress within the general education setting as he will leave the area and refuse to complete his work. Additionally, he has engaged in aggressive behavior toward adults when they deny him what he wants. (Exh. J-6).

The February 2016 established two behavior goals. First, for Student to utilize identified coping strategies, including deep breathing, fidgets, music, head massager, rocking, video games, coloring, taking a walk, and chewing gum, to remain safely within the instructional environment throughout the day 80% of the available days per week for

⁵ The 12% figure was based upon data collected while Student was at [REDACTED].

four consecutive weeks. This goal states that Student's teacher will utilize scripted statements listed in the IEP to encourage the use of coping strategies. The scripted statements include scripts for prior to escalation, during escalation, in situations of anxiety and frustration, and when Student stops an inappropriate behavior. The purpose of the scripting was consistency, with the goal being for all adults working with Student to use the same phrasing. School Psychologist/AEA Team Representative felt this type of scripting and consistency would be beneficial to Student. The second goal was for Student to exhibit zero incidents of physical aggression or physical contact to peers or adults during a two-week period for four consecutive data points. This second goal was a new goal for Student. (Exh. J-11, J-18; School Psychologist/AEA Team Representative testimony).

In addition to the behavioral goals, the IEP identified one goal each in the areas of reading, writing, and math. Previous data showed Student was reading in the 8th percentile compared to ■■■ grade peers. The Kaufman Test of Educational Achievement, Third Edition (KTEA-3) was administered in February 2016 during the FBA at the IEP team's request. Six subtests regarding reading fluency were selected and four were completed. Student scored as follows: Word Recognition Fluency – average (16th percentile); Decoding Fluency – below average (7th percentile); Silent Reading – low (0.4 percentile); and Nonsense Word Decoding – average (39th percentile). Student began the Reading Comprehension subtest with 4th-5th grade materials but was unable to answer the first few questions correctly. He was then given 3rd grade materials and was able to successfully answer the beginning questions. He refused to return to complete the passages after a break. Student refused to attempt the final subtest. Regarding reading generally, the IEP indicates:

Overall, [Student] appears to have the building blocks of reading when in isolation such as phonics and word recognition skills but is unable to use those skills consistently in context. This impacts his fluency and comprehension. When [Student] perceives a task as being too difficult, such as reading passages, he refuses to complete the task, which will reduce his ability to improve his reading fluency and comprehension.

(Exh. J-5).

Regarding math, the IEP indicates that Student can add multi-digit numbers with regrouping with 94% accuracy, but struggles with subtraction that requires regrouping. He is able to multiply two and three digit numbers by one digit using a multiplication chart. He can identify coins by value and count them to \$1.00 with 42% accuracy. He can tell time to the quarter hour with 67% accuracy, but can only tell time to the minute with 33% accuracy. (Exh. J-5).

February 2016 Behavior Intervention Plan (BIP): The IEP team developed also developed a new BIP as part of the February 2016 IEP process. The behavior goals identified in the IEP and BIP are described above.

The implementation plan in order for Student to meet his first goal of utilizing identified coping strategies to remain safely within the instructional environment for 80% of the available days per week for four consecutive weeks included the following actions:

- Set clear expectations and boundaries before beginning each task and let him know expectations for work upfront. Do not negotiate with Student.
- Complete selection of leisure items/ activities each morning, allowing Student to “shop” the room for his preferred items for break.
- Work/break schedule: academic subjects should be chunked and at Student’s instructional level. Vary academic tasks during the work/break schedule. Student can use preferred items on break. Break time will be decreased as work time increases as Student is able to tolerate. Tasks should have a discrete beginning and end and not be time-based; once he completes the task, he earns the break.
- Student access to sours, gum, head massager, and fidgets throughout the day.
- Maintain a nurturing attitude toward Student with distinct boundaries between adult and Student.
- Provide specific, verbal praise.
- Choice is important to Student but access to choice items, such as tangibles and activities, will be under adult control.
- Visual timer to indicate when break time is over.

A point system was also implemented whereby Student earned points throughout the day for appropriate behaviors; he did not lose points for inappropriate behaviors. (Exh. J-23).

The BIP also lays out response strategies for teachers, parents, and caregivers, which include:

When [Student] engages in verbal threats to himself or others, no emotional reaction, do not engage in any verbal conversation. Communicate with other staff/parents that [Student] has made these statements through email to parents.

Allow [Student] to use de-escalation techniques when he is upset. He can have 30 seconds (count to 30 in head) to choose which technique to use and begin to use it. If he does not make a selection, move to alternate room. Give [Student] both time and space while in intervention or alternate room; do not talk to him during the process of de-escalation; step away from him; and handle the situation in a non-threatening manner.

If [Student] refuses to complete a task, the adult should count to 30 and then, if no change in behavior, he is removed to alternate classroom. The task should go with and he needs to complete it before returning to his classroom, with NO modifications. He will be given one warning per half day. If he is not in the classroom, he does not earn points and he can be reminded of this.

When [Student] completes his work, he will be given immediate access to his chosen leisure activities for his break. The visual timer may be used to provide a reminder of how much time has elapsed.

(Exh. J-24).

The BIP outlined a safety plan that would be used to ensure safety and de-escalation of behaviors in emergency situations. That plan provided that if Student eloped from the classroom and attempted to leave the building, assigned classroom staff would follow Student and contact Intervention Teacher or other trusted adults to prevent Student from leaving the building. Designated staff would offer Student two identified safe plan option locations where Student could choose to go to calm and de-escalate. The plan provides that if Student refuses to choose and proceed to the safe place option choices and continues to escalate physically with the staff, he will be physically escorted to the nearest safety room to prevent further physical escalation and potential injury to Student, staff, and other students. Room #19 and #28 are identified as the safe rooms utilized within the building when physical escalation and safety concerns are presented. Student will be made aware that the door to the safety room will remain open as long as he does not continue to become physical toward staff, attempt to leave the room, or attempt to engage in negotiation with presented options and compliance expectations. If physical escalation continues or Student is attempting to leave the safety room area, the door will be closed and secured. After a two-minute time period, with a visual timer for Student, staff will open the door and ask Student if he can remain safe so the door can stay open. After Student is quiet and calm for five minutes with the door open, he will be allowed to leave the intervention area. Student will need to complete the expectations for the behaviors that precipitated the incident prior to returning to class and proceeding with the schedule. The plan provides that if Student leaves the building, visual contact will occur by an adult. If he leaves school grounds, police and Parents will be notified. (Exh. J-25).

The team spent a great deal of time making sure the behavior plan was structured in a way that all team members were comfortable with. Two individuals from the AEA's behavior resource team were at the IEP meeting. At least equivalent, if not more, time was spent developing the behavior plan as the academic goals. The team talked with Parents about the two classrooms that Student would have access to and talked in detail about the safety room, including whether the door would be open or closed and what the process would look like when the safety room door had to be closed. (Special Education Teacher; School Psychologist/AEA Team Representative testimony).

██████████ Staff: Pursuant to the LBMA, Student was placed in the functional classroom at ██████████, which had fewer students and allowed for more flexible structure depending upon a student's needs. Students in that classroom had a need to work on independent and functional living skills. (AEA Director of Special Programs testimony).

Special Education Teacher, who had over 20 years of teaching experience in spring 2016, was assigned to be Student's teacher in the functional classroom. Another special

education teacher co-taught in that classroom with Special Education Teacher. Special Education Teacher had 17 years of experience at a facility for students with behavior issues who were unsuccessful in their home schools. She also spent three years at a school where she taught primarily middle school students with autism. Special Education Paraeducator, who became a licensed teacher in 2015 and had been working as a long-term substitute at [REDACTED], was assigned to work with Student as a paraeducator on a full-time basis. (Special Education Teacher, Special Education Paraeducator testimony).

Special Education Teacher had a suite of two rooms that served her students; the room connected to the main classroom, which staff called the life skills room, often just had Student and Special Education Paraeducator present. Special Education Teacher and the co-teacher in her classroom had a total of 11 students, including Student. Five paraprofessionals, including Special Education Paraeducator, served the students in the functional classroom. From time to time, Student would have the opportunity to interact with other students in the functional classroom who he got along with. The goal was to integrate Student into the main classroom as he became more comfortable. Student was offered the opportunity on many occasions to do his classwork in the main classroom. Additionally, he participated in certain activities with the students from the main classroom, including making and selling snacks to students, setting up the school store, shelving books in the library, and cooking for school events. (Intervention Teacher, Special Education Teacher, Special Education Paraeducator testimony).

Special Education Teacher spent a great deal of one-on-one time with Special Education Paraeducator to make sure that he understood Student's IEP and BIP. Special Education Paraeducator was with Student all day, including going with Student to PE, lunch, and art. Starting around mid-March a second student was paired up with Special Education Paraeducator as well. Special Education Paraeducator was in the life skills room with both students beginning at that point. (Special Education Teacher, Special Education Paraeducator testimony).

Intervention Teacher was identified in the LBMA as someone who would be designated as Student's contact to provide emotional support when Student's anxieties or fears were heightened. Mother knew Intervention Teacher prior to Student's placement at [REDACTED] and felt comfortable that he could be a safe adult who Student trusted. Intervention Teacher had worked as an educator for approximately 20 years and had worked with children with a RAD diagnosis for a minimum of six years prior to the 2015-16 school year. He had also worked with students with multiple comorbidities, such as autism, RAD, and conduct disorder. At [REDACTED], Intervention Teacher worked with many students with conduct disorder type behaviors, such as physical emotional, and verbal outbursts, students who had trouble with self-regulation, and students on the autism spectrum. (Intervention Teacher, Mother testimony).

School Psychologist/AEA Team Representative, who has a doctorate in school psychology from the University of Iowa and had 17 years of experience as a school psychologist, was also part of the team who served Student at [REDACTED]. She was a member of the AEA's behavioral resource team that works with students with challenging behaviors. (School Psychologist/AEA Team Representative testimony).

Planning at [REDACTED] Prior to Student's first day at [REDACTED] Special Education Teacher, Intervention Teacher, and the building principal talked about what Student's first day would look like, got his academic work together, developed a schedule for Student, figured out the physical space where Student would work, and briefed Special Education Paraeducator about the plan. They also met with the AEA's behavior resource team to make sure they understood the information that team had compiled in the FBA. (Special Education Teacher).

[REDACTED] staff felt it was important for Student to have academic success when he arrived at [REDACTED] in order to make him feel comfortable and build his self-confidence. As a new student builds self-confidence and loses some anxiety, he is better able to meet goals. Once a student is meeting a goal on a consistent basis, then the goal can be changed and expectations increased. Academic baselines for Student articulated in his IEP came from his previous educational environment. Prior to [REDACTED], Student was struggling to stay in the classroom and in school, which drastically interfered with his academic progress. One of the goals as Student began [REDACTED] was to help him achieve confidence so that he would stay in the classroom and concentrate on academics. (Special Education Teacher testimony).

[REDACTED] personnel established a schedule for Student that reflected what he would do from the time he arrived at school until the time he left to go home. The schedule chunked materials so that Student would be able to access educational content, but not be overwhelmed by any one subject. The schedule built in time for breaks and transitions. (Exh. CC; Special Education Paraeducator testimony).

In individualizing instruction for Student, Special Education Paraeducator attempted to tap into Student's interests and combine those with hands on learning; they built things such as bridges and Ironman's chest plate and engaged in outdoor exploration to study science. Special Education Paraeducator had conversations with Student about items of interest, such as historical events and figures, and Student chose research topics that interested him. One of the topics that Student chose to research and write about was George Washington. Student filled out K.W.L. (Know, Want to Know, Learned) charts to develop ideas about topics to research and to document learning. Special Education Paraeducator chose assignments that would have personal meaning to Student, including essay topics related to Student's dog and family. (Special Education Paraeducator testimony; Exh. FF-42-43, Exh. KK).

When Student began attending [REDACTED], he and Special Education Paraeducator, along with the building principal, designated safe areas where he could go if he wanted some space to de-escalate. The life skills room had a corner that was partitioned off where Student could go if he felt the need for some isolation. There was another room in the building that was designated as Student's safe spot when he was having difficulties like refusing to work. There was a smaller room within the safety room that was used as an intervention room for students who were being unsafe. If Student was not being unsafe, he would have a choice of rooms to go to. (Special Education Teacher, Special Education Paraeducator, Intervention Teacher).

Pursuant to the LBMA, the school tried to have at least three people identified who were preferred individuals for Student. Student quickly formed a bond with Special Education Paraeducator after starting at [REDACTED]. He and Intervention Teacher were people with whom student felt safe. The list also included School Psychologist/AEA Team Representative and [REDACTED] (Intervention Teacher, Mother testimony).

Monarch Therapy Training for [REDACTED] Staff: Beginning in approximately January 2013, [REDACTED] of Monarch Therapy Services provided Behavioral Health Intervention Services (BHIS) to Student. [REDACTED] provided in-home skill development with student until April 2016. [REDACTED] met with Student at least once a week and more as needed. Additionally, she talked with Student and Parents by telephone as needed. Between February and April 2016, while Student was at [REDACTED], [REDACTED] was the only mental health provider that Student saw on a regular basis, apart from a psychiatrist who managed his medications. (Eddy testimony; Exh. B).

The LBMA provided that [REDACTED] would train paraeducators who work and interact with Student in RAD and appropriate strategies for communicating with Student and responding to his needs. On February 19, Mother spoke with principal during Student's IEP meeting about [REDACTED] of Monarch Therapy Services coming in to train the staff; [REDACTED], [REDACTED] of Monarch Therapy Services and a licensed play therapist. After Student began at [REDACTED], [REDACTED] provided a training with school staff regarding RAD. [REDACTED] updated Parents on March 10 in a session regarding this training. Intervention Teacher, Special Education Teacher, Special Education Paraeducator, the building principal, and another teacher and paraeducator attended the training. Parents did not receive any written communication from the school regarding the training; they knew it had occurred because of Mother's conversation with [REDACTED] (Exh. B-3; Mother, Intervention Teacher, [REDACTED] testimony).

Student's Experience at Bremwood: Student was excited to go to [REDACTED] on his first day; Mother sent Intervention Teacher a text message indicated that his day "started off better than ever." At the end of the day, Mother texted Intervention Teacher that Student reported the day was "great." (Exh. EE-8-9; Mother testimony).

During the first day Student was at Bremwood, Intervention Teacher spent multiple hours with Student. During the first week, Intervention Teacher spent approximately a period's worth of time each day talking to Student. After the first week, the amount of time that Intervention Teacher spent with Student varied. Intervention Teacher had other duties with intervention and as the school administrative manager, but he went out of his way to see Student when he had time. If Student was struggling, Intervention Teacher would ask Student to go for a walk with him. He would also offer Student suggestions regarding coping skills, including skills that were identified at the intake meeting, such as using fidgets or sour gums. If Student asked for Intervention Teacher and he was in the building and not addressing an emergent concern, Intervention Teacher made himself available. During the time Student was at [REDACTED], he was at the top of Intervention Teacher's priority list whenever possible. There were only a handful of times when Student asked for Intervention Teacher that Intervention Teacher was not available. In developing a relationship with Student, Intervention

Teacher focused on finding common ground, letting him talk, and listening to what made Student tick and what was of interest to him. (Intervention Teacher testimony).

When Student started at [REDACTED] Special Education Paraeducator observed him to be happy to be at [REDACTED] and generally compliant. Student attached to Special Education Paraeducator and Intervention Teacher, enjoyed their company, and sought their approval. (Special Education Paraeducator testimony).

Mother expressed some concerns beginning in late February that Student was somewhat resistant to going to school. On February 22, Mother sent Intervention Teacher the following text:

[W]e have had some resistance about school. It started last night as he said he doesn't want to go because it's not safe there. [wink emoji] This morning he said he was not going but I got him moving and on the bus. I know today will be a tough day as he will fight against the rules but we will just keep plugging away at his resistance.

(Exh. EE-12-13).

Despite noting some difficulties, Parents appeared to be pleased with Student's progress in staying in the academic environment at [REDACTED] during his first weeks there. Mother sent an e-mail to [REDACTED] on February 23 that stated, "[Student] started his 2nd week at [REDACTED] and has stayed in school all day every day!! I can honestly say we are shocked and thrilled. He does, however, visit the escalation room daily but we are making progress." In a March 11 Clinical Assessment and Training Plan completed by Monarch, it was noted that the family had seen "a big improvement" since Student began at [REDACTED]. The report states, "Before, [Student] struggled with [REDACTED] schools and was unable to attend regular classes. Family reports [Student] learning new coping skills to help him de escalate faster since [REDACTED]." (Exh. B-9, B-21).

As of March 21, BHIS notes from [REDACTED] indicated, "[Student] has been getting up in the morning and going to school. This has been such a huge hurdle for [Student] and his parents. [Student] has had mini meltdowns in the past week, but has been able to get himself back on track within 15 minutes." (Exh. B-46).

Parent Communication and Progress Reports: There were multiple systems in place for Parents to communicate with [REDACTED] staff regarding Student. Informally, if Mother had questions about Student's day, she was able to communicate with Intervention Teacher or Special Education Paraeducator via text. Special Education Paraeducator typically communicated by text multiple times per week with Mother regarding what Student was doing well and areas where he needed improvement. Mother also wrote notes back and forth in Student's folder with Special Education Paraeducator. He responded to her notes in a timely fashion, typically the same day. The majority of Mother's communication with Special Education Teacher was through e-mail or at meetings. Special Education Teacher was responsive to e-mails and Mother had no complaints about her communication. (Mother, Special Education Paraeducator testimony).

Point sheets and comment sheets were also filled out daily and sent home with Student by either Special Education Paraeducator or Special Education Teacher. The point sheets conveyed information about successes and difficulties during the day. (Special Education Teacher, Special Education Paraeducator testimony).

Additionally, pursuant to the LBMA, monthly conferences were to be scheduled to discuss the results of progress monitoring and Student's behavioral and academic progress.⁶ These conferences were held on March 18 and April 22. During the March monthly progress meeting, Mother expressed that things were going well at home. The April 22 meeting will be discussed in more detail below. (Mother, School Psychologist/AEA Team Representative testimony).

Academic Progress at [REDACTED]: In addition to other methods of instruction, Student worked on two computer-based programs, IXL and Moby Max, where instruction increased in difficulty as Student demonstrated mastery of skills. With IXL, Student started out at the baseline level identified in his IEP. With Moby Max, Student completed an assessment with the program to develop his starting level. When Student arrived at [REDACTED], he was below grade level with lots of gaps in his learning. Staff chose these programs to fill in the gaps in Student's learning, as the instructional level would increase as Student demonstrated mastery. (Special Education Paraeducator).

Special Education Paraeducator would review goals and progress with Student, including providing charts showing his progress. Additionally, some of the computer-based learning programs, including IXL, provided immediate feedback regarding skills mastery. (Special Education Paraeducator testimony).

Parents received progress reports, which included progress toward academic goals, regularly while Student was at [REDACTED]. An IEP report card from March 18, 2016 showed Student making progress after having been at [REDACTED] for approximately one month. The two data points on his vocabulary goal showed 100% and 90% accuracy. The two data points on his writing task showed 70% and 80% accuracy. The two data points on his math goal showed 67% and 93% accuracy. On his behavior goal, the report card indicates that Student has shown great improvement in the amount of time in class since attending [REDACTED], with two data points showing 93% of time in class and 97% of time in class. Another summary of Student's progress shows that the next two data points, collected on March 23 and April 6 showed 100% accuracy on spelling skills, 100% and 95% accuracy on math (counting money), and good accuracy on writing tasks. (Exh. N, T, W, AAAAA).

Progress monitoring logs with data points from April 8 and April 22 reflect the following accuracy percentages: 100% and 100% (vocabulary); 96% and 80% (writing); 95% and 67% (math); and 81% and 82% (behavior goal one – elopement). With regard to Student's aggression behavior goal, progress monitoring in April showed 5 incidents of physical aggression during the first two-week period and one incident of physical

⁶ Parents do not allege in their due process complaint that this portion of the LBMA was violated.

aggression during the second two-week period. Prior to April, only three total incidents of physical aggression were noted in February and March. (Exh. W-7-11).

With regard to the data points regarding math, as Student was getting more proficient the computer-based programs he was using increased the difficulty of his tasks; as an example, he increased from counting money up to \$5 to counting money up to \$10. So while a data point may show a slight dip, that does not necessarily reflect a decline in progress. It can also reflect that the difficulty of the work Student was doing was increasing. As Student started off so well on his academic goals, difficulty was increased. (Special Education Paraeducator testimony).

One of the main areas of improvement that Special Education Paraeducator saw in Student was stamina to stay with a task and not needing as many breaks. Special Education Paraeducator attributed this progress to the consistent routine that had been established and building relationships with staff. (Special Education Paraeducator testimony).

During monthly progress meetings, Parents did not have questions or concerns about Student's academic goals. At hearing, Mother testified that academic progress monitoring was not as important to her as Student's behavior goals. Mother's primary concern as Student started [REDACTED] was that he attend school every day; this had been very inconsistent prior to [REDACTED] owing to behavioral concerns. (School Psychologist/AEA Team Representative, Mother testimony).

Physical Activity: Pursuant to the LBMA, Student was to have an opportunity for physical activity daily at [REDACTED]. It was important to Parents that Student have physical activity on a daily basis to help regulate his emotions. Parents did not want physical activity to be used as a privilege and taken away as a consequence for inappropriate behaviors. (Mother testimony).

Intervention Teacher sometimes took Student out of the school building to do weightlifting. The weightlifting facility was at the [REDACTED] school, approximately 200 yards from [REDACTED] across a field. The only times that Student did not do weightlifting was if there was a safety concern on a particular day and staff was concerned with elopement. On days when Student could not do weightlifting, he walked with Special Education Paraeducator, or did other activities, such as throwing a ball or playing basketball. Student engaged in physical activity on a daily basis. (Intervention Teacher, Special Education Paraeducator testimony).

[REDACTED] *Therapy Services Consultation:* Intervention Teacher received the training from [REDACTED] Therapy Services regarding RAD when Student began attending Bremwood. He was aware that he could contact Monarch as needed with regard to Student, but did not feel the need to do so at any point. Intervention Teacher testified that he left that communication to Student's teachers or the building principal. School Psychologist/AEA Team Representative testified that she believed that Intervention Teacher was in contact with Eddy. Additionally, she felt confident that Bremwood was on the right track with Student and did not feel the need for weekly consultations with

Monarch. (Intervention Teacher, School Psychologist/AEA Team Representative testimony).

Parent Concerns: At some point, around March 29, 2016, Student reported to Mother that he was hit at school. Mother reached out to Intervention Teacher about this issue, who indicated via text that they would sit down with Student the following morning and go over procedures to clarify the intervention process. Mother responded via text, “He was just so upset. I was hoping if I called you and he could listen that he would adjust his memory and what happened. He is so adamant that someone hit him and I couldn’t get him to move on.” The next morning, Mother texted Intervention Teacher that she “barely” got Student on the bus and he “still swear[s] someone hurt him[.]” On March 30, Intervention Teacher texted Mother, “I got through my investigation of things give me a call when you get a chance and we can talk.” (Exh. EE-29-31).

Around the same time frame, Student’s medications were changed by his doctor. Mother talked to ██████ on March 29 about the fact that stopping one of Student’s medications on that date had created “a great deal of paranoia.” Mother notified ██████ staff of changes that were made on March 25 and March 28. Mother sent the following text to Intervention Teacher and Special Education Paraeducator on March 29:

This morning did not go well however we did get [Student] on the bus. He was not coming to school because in his mind he does not want to get hit or hurt.

Talked to the doctor and we put him back on his risperidone last night. He tends to get paranoid when we make med changes and it was obvious after yesterday.

It would be nice not to have an intervention today however I know that’s in his hands. If possible, please do a hands-off policy today. Although I know he would still come home and tell me that he was hit.

(Exh. B-45, M, EE-49-51).

Intervention Teacher looked into the concerns about Student reporting being hit at school, including talking to Student about these concerns. Intervention Teacher asked Student questions about his concerns, including who was involved and where it was happening, but could never fully pinpoint – even after talking with Student – what exactly he was alleging. Intervention Teacher reported back to Mother regarding the results of his inquiries. (Intervention Teacher testimony).

Mother raised the issue again with Intervention Teacher on April 6 via the following text:

We probably need to talk tomorrow. [Father] & I don’t know how to get around this story [Student] will NOT let go which he says that he is getting physically hurt at school. I just got off the phone with ██████ [██████] and hope she can just help me with the words to say to him. Is it possible for somebody to start videoing when he has to be removed so he could watch

it at some point and see what actually happened? It breaks my heart to listen to him and see how he actually believes this is happening.

(Exh. EE-36-37).

Parents also expressed concerns at hearing that Student was being carried to the intervention room. Mother believed that once Student began to be forced into the room, it was no longer a safe space for him. It was important to her that Student be allowed to escape to a safe place to de-escalate on his own without being escorted there by staff. Mother also expressed concerns at hearing about the amount of time Student was spending in the intervention room at [REDACTED]. (Mother testimony).

Attendance at [REDACTED] and April Parent Trip: Student began attending school at [REDACTED] on February 16 and did not miss any days when school was in session from February 16 through April 6.⁷ [REDACTED] staff never called Parents to come get Student early; he stayed in school all day. From April 7 through April 26, Student missed six days of school. (Exh. AAAA, Mother testimony).

On approximately April 7, 2016, Parents went on a trip to Mexico; they were gone from April 7 to April 14. Father's sister and her husband, who live in [REDACTED], Iowa, came to stay with Student at the family home while Parents were gone. Approximately one week before the trip, Parents began preparing Student for the trip, including making a countdown calendar of when they would be gone. On April 7, Mother texted Intervention Teacher and Special Education Paraeducator indicating that they could not get Student on the bus to go to school. Mother reported that this had not happened in the past and that she believed the problem was tied to Parents leaving.⁸ Student did not attend school on April 7, 8, 12, or 14. (Mother testimony; Exh. EE-54-55, 57-58).

Mother informed school personnel around mid-March that Parents were planning to be out of town during the first part of April. Mother expressed that Parents were planning a trip because things were working so well for Student at [REDACTED]. School Psychologist/AEA Team Representative was concerned that Student had only been at [REDACTED] for a brief amount of time and it was difficult to assess whether things would continue to go well after the honeymoon period. School Psychologist/AEA Team Representative and Intervention Teacher began discussions about how best to support Student at school while Parents were gone. They had concerns that Student's structure and consistency at home would be different while Parents were gone and concerns that this change in structure at home would impact Student at school as well. Being left by

⁷ Exh. AAAA shows a daily attendance record for the time Student was at [REDACTED]. Preprinted Xs are located in dates where school was not in session; for example, February 26 and April 24, 25, and 28. Handwritten Xs show the dates that Student did not attend while school was in session.

⁸ In an April 8 text to Intervention Teacher and Special Education Paraeducator, Mother wrote, "This not getting on the bus will become a new bad habit!!! I hate it but don't know what to do!!! Please help [aunt] with another idea. I can't have him home all next week while I am gone or I will never get him back to school!!! Guess I shouldnt [sic] have left!! I would NEVER have gone had I known this could happen!!" Mother noted in another text on the same date that Student is a creature of habit and "now he once again wants to be at home!!!" (Exh. EE-59-62).

people to whom they are attached is one of the biggest concerns that children with RAD have, therefore school staff anticipated difficulties.⁹ (School Psychologist/AEA Team Representative, Special Education Teacher, Intervention Teacher testimony).

Intervention Teacher was aware of Parents' plans and expected to see some struggles for Student during that time period, including an uptick of inappropriate behaviors and anxiety. This is in fact what school staff observed during the time Parents were gone. Intervention Teacher did not advise Parents not to go on vacation as he understands and appreciates the toll that caring for a child with a diagnosis of RAD can take on a family and the need for parents to have a few days away. Intervention Teacher talked with Mother about things that they could do at school to support Student while Parents were gone, including allowing Student to communicate with Parents during the school day as a reward for things going well at school. Additionally, school staff worked on brainstorming ways to make school more interesting while Parents were gone. (Intervention Teacher testimony; Exh. EE-57-61).

Student's aunt and uncle were in frequent contact with ██████ during Parents' trip. They initially felt they would be able to manage Student and his behaviors, but when things escalated they contacted ██████ ██████ stopped by the school during Student's lunch time on April 11 at the request of Student's aunt and uncle. As soon as Student saw ██████, he demanded that she take him home. ██████ attempted to review coping tools to reduce anxiety and frustration and role modeled the skills. Student refused to put the skills in practice and refused to go to intervention. ██████ believes that Student believed he could escape school because she was there and that it created more anxiety in him for her to be there. While ██████ was at ██████, Student attempted to elope from school and struggled when staff asked Student to go back to his classroom. Staff had to carry Student to an intervention room for his safety. ██████ expressed to Special Education Paraeducator at the time that she believed the school's actions on that date were in Student's best interest. She testified that she believes she should have thought out her visit to the school a little better as she believed she contributed to Student's behaviors on that date. ██████ wrote in her notes, "Will advise [Student's] parents that today's behaviors appeared manipulative and not related to any medication issues." (Exh. B-42, GG-8; Eddy, Special Education Paraeducator testimony).

██████ had contact with Student and his aunt and uncle later that day as well. Student had thrown dishes at his aunt and was threatening his aunt and uncle with not going to school the next day and with running away. ██████ discussed with Student's aunt and uncle the possibility of needing to take him to the hospital or calling police if he left without permission. (Exh. B-41).

In addition to acting out and refusing to go to school, Student also took the family car on April 14 without permission while Parents were in Mexico. Student refused to go to

⁹ One at least one occasion, Student shared with staff from ██████ that he was sometimes afraid to go to school because he believed his mother would not be home when he got back. The struggle to understand permanency with regard to attachment remained an ongoing issue for Student in spring of 2016 and ██████ expected Student to react adversely when the most important person in his life, his mother, was absent. (Exh. B-21; ██████ testimony).

school on the date in question and aunt and uncle left him home alone while they were out. Student, who was [REDACTED] years old and did not have a driver's license, drove the car to [REDACTED], approximately 20 miles away. [REDACTED], who lives in [REDACTED], picked up Student, who stayed with a respite provider in [REDACTED] that night and was transported to school by [REDACTED] the next morning. (Mother, Eddy testimony; Exh. B-38).

Student previously took the family car without permission on March 30. Mother was giving Student space to de-escalate in the car after a therapy appointment when Student drove off in the car. As a result of that incident, Mother stopped leaving the keys in the car. She testified that because of Student's disability he could not understand cause and effect well and therefore they could not punish Student for taking the car. She felt it was her fault Student took the car as she left the keys in there. (Mother testimony).

On April 18, after Parents came home from Mexico, they discussed with [REDACTED] options for Student, including out of home placement. The notes from that visit state, "With the recent behaviors that [Student] displayed along with the ongoing issues of leaving without permission or any knowledge of his whereabouts, noncompliance in every environment (school home community). The recent unsafe situations: driving a car 20 miles, leaving the home for hours, refusal to attend school and the need for constant supervision are creating more conversations about an out of home placement." (Exh. B-36).

Behavior and Interventions: [REDACTED] completed two different sets of documentation regarding interventions. Medicaid monitoring logs reflected interventions that did not escalate to the point of Student needing a physical escort to the intervention room. These logs reflect interventions where Student elected to go on his own to a safe space or otherwise take time to de-escalate. Documentation is completed so that goals on Student's IEP and BIP can be tracked. The location of the intervention is not tracked on these logs; Student may have been in the classroom during these interventions or in another safe room. (AEA Director of Special Programs, Intervention Teacher, Special Education Paraeducator testimony).

Separate documentation was completed by [REDACTED] if an intervention involved restraint or seclusion. Restraint includes redirecting or impeding the free movement of a student in the building and includes any touch to redirect or move a student in a direction that he or she does not wish to go. When documentation regarding restraint or seclusion is completed, parents receive a phone call and the documentation is sent to parents by mail within three business days. (Intervention Teacher, Special Education Teacher testimony).

The evidence in the record reflects that not all of the intervention documentation that was completed while Student was at [REDACTED] was able to be located by Respondents after Parents filed their due process complaint in August 2017. In the transition from [REDACTED] being operated by the AEA to being operated by the [REDACTED] school district, some documents were destroyed. As Student was no longer attending [REDACTED] at that time, there is a high likelihood that records related to him may have been destroyed during the transition. (Intervention Teacher testimony).

The restraint/seclusion intervention documentation provided reflects the following interactions:

- On March 14, Student refused to complete Iowa Assessments and was taken by two officers to room 19. Prior to utilizing the intervention, Student was given the option of a break/cool down time. He was also given time to make a choice.
- On March 15, Student refused to complete Iowa Assessments and was taken by two officers to room 19. Prior to utilizing the intervention, Student was given the option of a break/cool down time and given time to make a choice.
- On March 16, Student refused to work on Iowa Assessments and was taken to the intervention room by an officer. Prior to utilizing the intervention, Student was given choice time of 30 seconds and reminded about breaks.
- On March 21, Student was carried by one officer and one interventionist to room 19. Student was carried because he went limp during the intervention and would not walk to the room on his own. Prior to utilizing the intervention, staff allowed Student to call his mother and gave him the option to go to room 19 by himself.
- On March 29, Student refused to do any work and refused to leave the room and walk to room 19 on his own. Student refused to walk with officers to room 19 and started trying to hit, kick, and bite officers. The officers controlled his arms and walked him to room 19. Prior to the intervention, staff used verbal strategies to encourage compliance.
- Also on March 29, Student refused to give Special Education Paraeducator his cell phone. Intervention was called to retrieve the phone. Student tried to kick, punch, and bite staff while this occurred. Prior to utilizing intervention, staff attempted to reason with Student and used “coupling statements” for 10 minutes and gave him multiple chances to comply.
- On April 1, Student laid on the floor in his classroom and refused to get up. Special Education Paraeducator and Intervention Teacher attempted for approximately 10 minutes to try to get Student back on track prior to the intervention. Student struggled while being escorted to room 19, therefore he was carried to the room.
- On April 5, Student refused to do what was expected in the classroom and told staff he did not have to do anything they wanted. He refused to walk to room 19 and had to be escorted part of the way there until he agreed to walk on his own.
- On April 6, Student walked out of the classroom with his iPad and went into the safety room. When asked for the iPad, Student refused to give it up. Student attempted to kick intervention staff who took the iPad from him. Student got under a table and attempted to kick, hit, and bite staff when staff attempted to get him out from under the table.
- On April 11, Student left room 19 and tried to walk out of the school. Staff tried to block Student at the front door and asked him to go back with Special Education Paraeducator. Student started to struggle, including kicking, punching, and attempted biting. Staff carried Student to room 28 for his own and staff’s safety. As staff tried to exit room 28, Student tried to attack staff.

(Exh. GG, AAAAA).

As of March 18, a progress report reflected that Student had shown great improvement on the amount of time he was spending in class since starting at [REDACTED], with two data points showing 93% of time in class and 97% of time in class. Progress monitoring reports with data points from March 23, April 8 and April 22 reflect that Student was spending 92%, 81%, and 82% of time in class, respectively. (Exh. W-10, AAAAA).

Physical aggression spiked a bit for Student after spring break. This was around the time that Student's medication changed and that his parents took a trip. The April 8 data point regarding physical aggression, showing five incidents during the two-week reporting period, reflected a significant amount of change in Student's life during the time period. Prior to that data point, Student had only had three total incidents of physical aggression since starting at [REDACTED] (Special Education Teacher; Exh. T-17).

Special Education Teacher and Special Education Paraeducator consulted on a daily basis regarding Student, including about his behavior. Intervention Teacher and building principal were included in these discussions and they worked as a team to support Student. They recognized that students with behavior issues can do really well then slip. (Special Education Teacher testimony).

Autism Diagnosis: On April 21, 2016, Mother took Student to [REDACTED], a licensed psychologist, to get an IQ test. She did this because she had been attempting to get Student placed in residential programs that would not take him because of his IQ. [REDACTED] recommended that Parents take Student for updated IQ testing as she suspected that previous test results were not indicative of his actual cognitive abilities. (Mother testimony; Exh. 35).

[REDACTED] report, dated April 22, 2016, indicates that Student has been diagnosed with Reactive Attachment Disorder, ADHD, Oppositional Defiant Disorder, and has significant anxiety. Additionally, [REDACTED] noted that Student takes "a lot" of medication. (Exh. 35).

The IQ testing conducted by [REDACTED] placed Student near the 50th percentile, which was significantly discrepant from a score at the 1st percentile on a similar subtest in August 2015. The report opines that Student's low score on the August testing may have been due to Student not being able to respond to the demand of working quickly on the timed tasks required on the previous test. (Exh. 35).

The report also states that Student has distinct traits of Asperger's Syndrome, on the autism spectrum.

He has deep and narrow interests in science, technology and inventing. His thinking is quite concrete and he has difficulty taking others' perspective. He has a strong need for routine and predictability. Therefore, when something unexpected happens, it causes a spike in anxiety that often manifests itself in anger. When he gets angry, he will fight, yell, hit, and throw things. This often occurs when he is asked to do something he doesn't want to do, or when he has to stop a preferred

activity and do something that he doesn't like. He gets in his mind that he will be doing a certain thing, like play video games, and when that is interrupted, it causes this anxiety spike. The resulting behavior appears to be purely oppositional, but it probably has a component of him not being able to manage change.

...

Given the combination of symptoms and traits, I believe that using Asperger's Syndrome is the best way to categorize [Student's] cognitive and social functioning. IQ tests were developed and normed on typically-developing children and do not often reflect an autistic person's true intellectual ability. When talking with [Student], especially about a topic in which he is interested, it quickly becomes clear that his vocabulary is quite good, if not advanced. However, his scores on Verbal portions of IQ test describe him as having very poor verbal skills. Unfortunately, for children on the autism spectrum, the typical public school setting relies heavily on the verbal abilities measured by IQ tests. So, even though the IQ test does not accurately measure his innate verbal and cognitive abilities, his results are representative of how he performs when compared to neuro-typical children.

If he requires residential placement again, using the low IQ scores obtained using the WISCs to determine the best fit for him is completely inappropriate. His struggles arise from a combination of high anxiety that comes from fear of being over-stimulated, either through sensory input or social input, not from intellectual disability.

(Exh. 35).

After obtaining this information and report from [REDACTED], Parents contacted [REDACTED], a private educational consultant.¹⁰ They had been unsuccessful at finding a residential placement that would accept Student, but believed this information might allow them to find an institution that would accept him. Parents entered into a contract with [REDACTED] on April 22, 2016 and paid her \$4,000 to review Student's records and attempt to find a suitable residential school placement for Student. (Mother testimony; Exh. 37).

April 22 Progress Meeting: On April 22, a monthly progress meeting was held at [REDACTED] with Mother. Participants at the meeting included Mother, [REDACTED], School Psychologist/AEA Team Representative, and Intervention Teacher. Mother had just received the autism diagnosis on April 22 and described herself as "shocked." Mother

¹⁰ The exact timing of Parents' initial contact with [REDACTED] is unclear from the record. Mother testified that Parents contacted [REDACTED] after receiving [REDACTED] report. The report, however, is dated April 22, 2016 and Parents' contract with [REDACTED] is also dated April 22, 2016. While theoretically possible that Parents located, contacted, and signed a contract with [REDACTED] in the span of one day, it may be that their initial contact with her was earlier than April 22.

shared the information with school personnel who, according to Mother, were not surprised and stated that they thought Student was autistic based on their work with children on the autism spectrum. Mother did not make any request for the IEP team to convene and discuss the autism diagnosis or changes in Student's IEP. Eddy's notes from the meeting state, in part, "[Student] has a very specialized IEP and the school staff is making every attempt to follow it." (Mother testimony, Exh. B-35).

During the meeting, School Psychologist/AEA Team Representative shared that many of the strategies currently in place for Student were also appropriate for a student with an autism diagnosis. Typical in a behavior plan for students with autism would be a structure with schedules and visual cues, very specific language to praise and redirect, a work/break schedule, a point sheet with the possibility of earning points for positive behaviors, and working on development of social skills. These were all strategies that were being employed with Student at [REDACTED]. Prior to April 22, Special Education Teacher was not aware that Student had any diagnosis of autism, but she had observed some behaviors consistent with students with autism, including difficulty finding words and difficulty with social skills. Had Student had a formal diagnosis of autism during his February IEP meeting, the IEP team may have considered additional changes with regard to, for example, processing time. (School Psychologist/AEA Team Representative, Special Education Teacher testimony).

Mother discussed the possibility of finding an out of state residential placement in the April 22 progress meeting. She mentioned a wilderness program that she was looking at and stated that she was struggling to find a residential placement that would accept Student because of his IQ. She stated that she was going to hire or had hired someone from Chicago to help her with the placement process. Mother did not ask for input from school personnel about the idea of residential placement. She also did not state that she was unhappy with [REDACTED] or that she wanted to discuss changes in Student's IEP or BIP. (School Psychologist/AEA Team Representative testimony).

Mother also shared during the April meeting that things were not going well at home. Parents were having a hard time getting Student on the bus in the mornings to come to school. School staff expressed that they had seen some increases in challenging behaviors by Student, but were attempting to work through those. (School Psychologist/AEA Team Representative testimony).

Extended School Year (ESY) Services: On April 12, 2016, the [REDACTED] principal sent an e-mail to [REDACTED] the district's director of special programs, regarding ESY programming for [REDACTED]. The e-mail indicates that the program will run from June 27 through July 21, Mondays through Thursdays, from 8:30 AM to 11:30 AM. The e-mail indicates that Student and another student, whose name has been redacted, will be recommended and attend. While most school districts have a designated calendar for ESY programming so that staffing can be arranged, the general calendar may not meet a particular student's needs. In such a case, the IEP team comes to a consensus about the best way to meet a student's needs. (Exh. S-1-2; AEA Director of Special Programs testimony).

During the April 22 progress meeting, Mother asked what Student's ESY services would look like. School Psychologist/AEA Team Representative informed Mother that they would have to discuss that issue with the building principal. At that time, they scheduled a meeting to discuss ESY services for April 29. After the meeting on April 22, the building principal sent a message to [REDACTED]s that stated, "Given our meeting today with [Mother], would you be able to phone conference with us this upcoming Friday (4-29-2016) @ 9:00 am to finalize [Student's] extended year service plans?" As of the April 22 meeting, the only information that School Psychologist/AEA Team Representative had received regarding ESY services for [REDACTED] students was that ESY would occur at [REDACTED]; the building principal gave School Psychologist/AEA Team Representative this information on April 22 during a conversation in the hallway. (School Psychologist/AEA Team Representative testimony; Exh. U).

During a phone call on April 26, School Psychologist/AEA Team Representative asked Mother whether Student would be back in Iowa for summer programming and Mother responded that he would not. On May 4, 2016, School Psychologist/AEA Team Representative sent an e-mail to Mother attaching a Prior Written Notice (PWN) regarding ESY services. The PWN indicates:

A meeting was scheduled for 4-29-16 to finalize plans for [Student] for Extended School Year Services. [Mother] and [REDACTED] were planning on attending via phone. [Mother] notified [REDACTED] on Tuesday, 4-26-16, that [Student] was now in [REDACTED], attending a facility to address his behavioral concerns. She and her husband had made the decision based on [Student's] behavior at home. A phone call between [REDACTED], [Intervention Teacher], [School Psychologist/AEA Team Representative], with input from [Special Education Paraeducator], was made on Friday, April 29, 2016 to cancel the meeting and make [REDACTED] aware that [Student] was not attending the [REDACTED] at this time. [Mother] did not attend since [Student] will not be attending the remaining weeks of school.

(Exh. X-1, X-8).

Additional Communication regarding Residential Placement: Mother mentioned to Intervention Teacher at some point that she was working with an agency that searched for residential placements. Intervention Teacher was aware that Mother was looking into potential residential placements, but was not aware that the family decided on a placement for Student until a few days before Student left [REDACTED]. Intervention Teacher understood that Parents were getting frustrated with Student not wanting to get on the bus; Mother had shared the family's struggles in getting Student ready for school and to school and he also knew that there had been incidents when Student would get upset and leave home. Mother did not tell Intervention Teacher that the family was placing Student in a residential placement because of any dissatisfaction with Student's IEP or because she believed the LBMA had been violated. Mother expressed to Intervention Teacher that she had not had a good relationship with the district. Intervention Teacher had told Mother that if she was leaving the district, she should

inform them. Mother indicated that she was not planning to call the district. (Intervention Teacher testimony).

Intervention Teacher responded in a supportive fashion when Mother advised him she was seeking a residential placement. Typically when families give him information like this, he responds that he understands and hopes the family can find the right situation for their student. He is not privy to everything happening in the home environment, so he does not feel it is his place to tell a family what they should or should not do regarding residential placement of a child. (Intervention Teacher testimony).

At Parents' request, ██████ had a telephonic meeting with ██████, the residential placement being considered for Student, and offered them a history and personal assessment of Student's situation on April 25, 2018. Parents did not involve any ██████ personnel in the planning process with ██████. At the point at which ██████ had this conversation, Parents had already made the decision to place Student at ██████. (Eddy testimony; Exh. B-34).

At hearing, Mother testified that Parents decided to remove Student from ██████ because they did not believe he wanted to be at school and believed he was scared. It was very important to Parents that Student go to school willingly; it had become difficult to get him to school in the morning without a fight. Parents believed Student was spending a great deal of time in the intervention room. Special Education Paraeducator had taken on another student, in addition to Student, and Mother did not believe he was getting the attention he needed. Essentially, Parents had lost trust in ██████ and the district. (Mother testimony).

Parents removed Student from ██████ on April 26. On April 26, Intervention Teacher was the person who Mother informed that Student was being removed from Bremwood and being taken to a residential placement in ██████. Mother testified that April 26 was the first date she informed anyone at ██████ that Student was leaving. Mother did not tell anyone about the residential placement at ██████ at the April 22 progress meeting because, according to her, she did not know that the family would place Student at ██████ on April 22. (Mother testimony; Exh. Z).

Parents did not communicate their dissatisfaction in any fashion with AEA Director of Special Programs, who was the shepherd of the LBMA, prior to removing Student from ██████. Parents never had any contact with AEA Director of Special Programs after the LBMA was signed. They did not communicate to him any concern about the LBMA not being followed. AEA Director of Special Programs was not informed that Student had been removed from the district until after April 26. (Mother, AEA Director of Special Programs testimony).

During the time that Student was at ██████, Intervention Teacher had a great deal of communication with Mother regarding Student's progress at ██████. She communicated when she believed things were getting better and when she thought things were going downhill. The ██████ staff expected ups and downs; their expectation was not that Student's behavior would change immediately upon arrival. They spent time thinking about what the trends looked like and whether Student was

“honeymooning.” Intervention Teacher tried to focus in his conversations with Mother on what was going well and things that they could build on. (Intervention Teacher testimony).

At hearing, Intervention Teacher offered the opinion that Student did make behavioral progress while at ██████████ and would likely have continued to make progress at ██████████. In situations like Student’s, progress is not linear; there are ups and downs, but for Student the trend was going in the right direction. He believed that Student had successes at ██████████ and had the ability to continue to improve. There were isolated incidents where Student had problems, which was to be expected. Intervention Teacher was aware that at the time Parents started talking about residential placement there had been significant problems at home, such as Student taking the family car and driving 20 miles while Parents were out of the country. Intervention Teacher could see that there were problems in the home setting, but the same problems were not happening in the school setting. (Intervention Teacher testimony).

Intervention Teacher was not of the opinion that Student was not attending school willingly. There were days that Student was happy to be at ██████████ and Intervention Teacher observed Student on many occasions appearing to feel quite safe. (Intervention Teacher testimony).

Special Education Paraeducator observed that Student enjoyed being at school, but identified that he did not know if Student liked the idea of being at school. Special Education Paraeducator was surprised that Student was going to a residential placement as he felt like things were going well and Student was making progress. There had been a rough week prior to Student’s removal from ██████████ when Parents were on vacation, but overall things were going in the right direction. (Special Education Paraeducator testimony).

Special Education Teacher testified at hearing that the academic progress graphs from Student’s time at ██████████ show that Student’s behavior prior to his placement at ██████████ was greatly interfering with his educational progress. It was her opinion that with additional progress on behavior, ██████████ would have been able to increase expectations and goals for Student. (Special Education Teacher testimony).

After Student left ██████████, Mother sent e-mails to Special Education Teacher and School Psychologist/AEA Team Representative expressing her appreciation for what they did for Student. To Special Education Teacher, Mother wrote, “[T]hanks for everything you did for [Student]. It was so wonderful and comforting to know we had a teacher that understood him and helped him be the best he could be!” To School Psychologist/AEA Team Representative, Mother wrote, “You were one of the bright positive people in support of [Student]! We appreciate your care and concern for him!!” (Exh. Z, Exh. BB).

██████████: Student was placed at ██████████, a mid-length residential treatment center in ██████████, by Parents on April 28, 2016. When Student was admitted, ██████████ conducted an evaluation of Student and produced a 69 page document entitled ██████████ Multidisciplinary Evaluation. The assessment is undated, but references Student

behaviors and performance since arriving at [REDACTED], so presumably was not completed immediately upon arrival. The evaluation lists reasons Parents have decided to place Student at [REDACTED] and focuses heavily on Student's behaviors at home, including the incidents of taking the family car and driving without a license, having outbursts when asked to do anything, including daily tasks like showering, and refusing to go to school. (Mother, Day testimony; Exh. 30, p. 2).

Student was at [REDACTED] from April 28, 2016 through until September 2016. The assessment reflects that Student was completing math with great accuracy when he came to [REDACTED], but would react aggressively when presented with difficult issues. After several weeks, however, Student's behavior surrounding academics was improving and at the end of his stay he no longer stormed out of class when presented with difficult work. (Exh. 30, p. 7; Day testimony).

The evaluation indicates that Student would become escalated when he wanted to get out of something, storm out of the room, and attempt to leave the building. Initially it could take staff up to 45 minutes to get Student back to class, but this time period decreased over time. The evaluation also indicates that Student required therapeutic holds on an almost daily basis when he arrived at [REDACTED]. Despite the high level of structure there, the evaluation states that Student still has considerable behavioral difficulties and needs support and structure. (Exh. 30, pp. 9, 14)

The report states that Student needs a well-structured therapeutic environment with a high level of individual support and one on one coaching and mentoring. Specifically, the report provides, "Given the level of psychological distress he has experienced and the level of agitation seen when he arrived, he appears to be very vulnerable to emotional distress. His safety would be at risk if he were to return home to attend a public school. A very high level of residential, therapeutic and academic support is needed." The evaluation indicates that Student would benefit from individual, family, and group therapy, speech and language services, and intense educational support. (Exh. 30, p. 14-15).

In conjunction with Student's stay at [REDACTED], a Neuropsychological Assessment was conducted by [REDACTED] from May 6 through June 29, 2016. The recommendations of the assessment included substantial therapeutic assistance in developing good coping skills, identity development, and social/emotional growth found in a well-structured residential treatment facility. The report states that Student does not possess the coping skills and resilience to function without the kind of significant structure and therapeutic assistance present at a residential facility. [REDACTED] testified at hearing that Student needed residential therapeutic support in order to succeed academically. (Park testimony; Exh. 2006A, p. 43).

Neither the evaluation nor the neuropsychological assessment documents reflect that anyone involved in the evaluation process spoke with any [REDACTED] staff or reviewed any progress documentation related to Student's placement at [REDACTED]. [REDACTED] testified at hearing that he could not recall whether he had ever seen Student's IEP or any school records from [REDACTED]. (Exh. 23, 30).

██████████ is the executive clinical director at ██████████. ██████████ understanding, based on communications with ██████████ was that prior to placement at ██████████ Student was having a hard time, especially with behaviors at school and was acting out and refusing to participate in academics. ██████████ understood that Student was not really benefiting from instruction based upon these behaviors. There is no evidence that ██████████ reviewed any records from ██████████ or communicated with any of Student's teachers or other staff from ██████████ (██████████ testimony; Exh. 2005A, p. 23).

██████████ testified that if Student did not have a high level of therapeutic support he would not be able to participate in academics; a traditional classroom environment would be too overwhelming for him. He believed it was necessary for Student to have a high level of supervision, structure, and support, including individual one-on-one assistance away from the group and the ability to take breaks with trusted adults to help him get regulated then return to academic participation. At the time Student transitioned from ██████████ to ██████████ in September 2016, Day believed that Student still needed a residential program to deliver this program effectively. (Day testimony; Exh. 2005A, pp. 49-51).

With the assistance of ██████████, Parents made the decision to transition Student from ██████████ to ██████████, a community-based therapeutic boarding school also in ██████████, in September 2016.

September 2016 IEP: On August 26, 2016, Parents' previous attorney sent a letter to the district stating that Parents have concluded that ██████████ is "the only place in the United States where [Student] can receive an appropriate education." The letter states that Student will not be returning to Iowa to his placement at ██████████ and asks the district to reimburse them for the cost of his education. (Exh. 43).

An IEP meeting was held over two separate days in September 2016, beginning on September 7, 2016. Parents, their previous attorney, AEA Director of Special Programs, Intervention Teacher, School Psychologist/AEA Team Representative, ██████████, other district and AEA representatives, and staff from ██████████ and ██████████ ██████████, including ██████████ and ██████████, were present. ██████████ presented information about his assessment of Student, including his assessment that Student has an atypical presentation of autism with some attachment disorder symptoms. A teacher from ██████████ discussed what a typical day would look like for Student there. A ██████████ staff member discussed strategies they used to implement the behavior and math portions of Student's IEP, including hands on activities, teaching Student to take a break instead of shutting down; and allowing Student 10 minutes of recoup time in order to get back to work. She stated that Student had worked up to reading 30 minutes before needing a break. ██████████ offered her opinion that one of Student's greatest educational challenges is going to and staying in class. The dialogue was interactive, with district and AEA personnel asking questions about Student's experiences at ██████████. (Exh. OO, TT, WW).

Parents provided a six page document to the district and AEA in advance of the September IEP meetings entitled “Parents’ Paraphrase of [REDACTED] Evaluation Report.” The document indicates the belief that Student will need “substantial therapeutic assistance in developing good coping skills, identity development, and social/emotional growth found in a well-structured residential treatment facility. Only with this form of support can he work towards his academic capacity. [Student] does not currently possess the coping skills and resilience to function without this kind of significant structure, academic support, and therapeutic assistance.” District and AEA personnel involved in the September 2016 IEP process reviewed this document. (Exh. UU-6; School Psychologist/AEA Team Representative testimony).

Parents also provided [REDACTED] report, written recommendations from a [REDACTED] speech/language pathologist, a written report from a [REDACTED] classroom teacher, and a draft of an auditory processing disorder evaluation summary prepared August 26, 2016. These were also reviewed by district and AEA personnel involved in the September 2016 IEP process. (Exh. VV, YY; School Psychologist/AEA Team Representative testimony).

The [REDACTED] classroom teacher report provides that Student “can present some pretty escalated behaviors when he wants to get out of something,” including storming out of the classroom and trying to leave the building. Staff block the exits, but do not give him attention and continuously give him the directive to go back to class. De-escalation can take up to 45 minutes, but has significantly decreased since Student arrived. She reported that Student also blows up when asked to do work that is challenging. Staff “hold[s] a firm boundary and helps him through the problem solving.” This takes a lot of one on one attention and coaching to get Student to try things that are “perceptively challenging.” The teacher reported that Student “needs tons of positive reinforcement” and is more confident and happy when he gets praise for trying even if he fails to reach the right answer. (Exh. VV; SP/AEA Team Representative testimony).

In addition, Mother and Parents’ previous attorney prepared a document entitled “Goals, Accommodations and Related Services for New IEP/September 4, 2016 Version.” Under the heading therapeutic goals/emotional regulation, the document provides that Student should attend school each day for a full day, be present in the classroom for the entire class period for each class, not sleep during class, exhibit appropriate classroom behavior, have goals in the areas of managing emotions, social skills development, and healthy relationship skills, reduce refusals to engage in activities as directed by staff, reduce de-escalation time to five minutes, improve ability to ignore misinformation provided by peers by learning to recognize teasing, and reduce dependence on breaks for reducing anxiety by tracking the number and length of breaks. (Exh. 54).

The resulting IEP proposed by the district added new goals in writing, employability skills, reading, financial literacy, and behavior. Additionally, it provided for School Psychologist to provide up to 120 minutes per month working with Student and his teacher to address appropriate coping skills, help Student learn to identify his emotions

and deal with frustrations, and explore behavioral strategies. Additionally, this time would include teaching anger management to Student and his teacher. (Exh. TT).

Additionally, the IEP provided for Student to receive up to 30 minutes per day from a special education teacher in the areas of learning executive skills such as planning, executing a plan, and reflecting on the plan; chunking tasks into smaller, manageable tasks; verbal mediation; and self-advocacy. (Exh. TT).

The IEP also provided for Student to receive weekly mental health supports through collaboration with the district's mental health therapists and an AEA mental health committee member. Student would receive individual services at least once a week and group therapy with other students with autism to work on peer relationships at least two times per week. (Exh. TT-19).

At the time of the September 2016 IEP process, Parents believed based on evaluations that Student had in [REDACTED] and his experiences there that he needed a residential program. Parents' previous attorney expressed his opinion that what [REDACTED] lacked that Student needed was a therapist to work with him. (Mother testimony; Exh. OO-18).

March 2017 IEP: The district conducted another reevaluation of Student's IEP in February and March 2017. The district requested and considered documentation from Parents in this process. By this time, even after obtaining the information requested from Parents and Student's then-current educational placement, the district did not have some of the baseline information needed to develop specific IEP goals, therefore there were some gaps in specific academic measures. Where the team lacked needed information, the proposed IEP indicated that information would be gathered once Student was back in Iowa. (School Psychologist/AEA Team Representative testimony).

The proposed IEP for March 2017 is similar to the one proposed in September 2016. One addition, however, is that at Parents' request the district agreed to conduct evaluations for speech services, assistive technology, and occupational therapy once Student returned to Iowa. (Exh. LLL-43).

Current Status: As of the date of hearing, Student remained in residential placement at [REDACTED]. Parents have no plans at present to bring Student back to Iowa. (Mother testimony).

CONCLUSIONS OF LAW

IDEA Overview: One of the principal purposes of the Individuals with Disabilities Education Act (IDEA) is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living."¹¹ The IDEA offers states federal funding to assist in educating children with disabilities and, in exchange for acceptance of such funding,

¹¹ 20 U.S.C. § 1400(d)(1)(A).

the state must agree to, among other things, provide a free appropriate public education to all children with disabilities residing in the state between the ages of 3 and 21.¹²

Free appropriate public education (FAPE), as defined by the IDEA, means special education and related services that:

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.¹³

Special education is defined as specially designed instruction to meet the unique needs of a child with a disability across a range of settings, including in the classroom, in the home, in hospitals and institutions, and in other settings.¹⁴ Related services are defined as:

[T]ransportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education[.]¹⁵

Under the IDEA framework, special education and related services are provided in conformity with the student's individualized education program, or IEP.¹⁶ "The IEP is the means by which special education and related services are 'tailored to the unique needs' of a particular child."¹⁷ The IEP is developed by an IEP team, which includes the child's parents, at least one regular education teacher if the child participates in the

¹² 20 U.S.C. § 1412(a)(1)(A).

¹³ 20 U.S.C. § 1401(9).

¹⁴ 20 U.S.C. § 1401(28).

¹⁵ 20 U.S.C. § 1401(26)(A).

¹⁶ 20 U.S.C. § 1401(9)(D).

¹⁷ *Andrew F. ex rel. Joseph F. v. Douglas County School Dist. RE-1*, 137 S.Ct. 988, 994 (2017) (citing *Board of Educ. Of Hendrick Hudson Central School Dist., Westchester County v. Rowley*, 102 S.Ct. 3034, 458 U.S. at 181 (1982)).

regular education environment, at least one special education teacher or provider, a representative of the local educational agency, an individual who can interpret the instructional implications of evaluation results, other individuals who have knowledge or special expertise regarding the child, and, where appropriate, the child.¹⁸

Under the IDEA, a parent or public agency may file a due process complaint relating to the identification, evaluation, or educational placement of a child with a disability, or the provision of a free appropriate public education (FAPE) to the child.¹⁹ The burden of proof in an administrative hearing challenging an IEP is on the party seeking relief.²⁰ Complainants, therefore, bear the burden of proof in this proceeding.

Impact of February 2016 LBMA on Current Due Process Proceeding: The LBMA whose implementation is at the center of this case was entered into by the parties in the context of the prior due process complaint filed by Parents in 2015. The IDEA requires that each state establish and implement procedures so that parties may resolve disputes through a voluntary mediation process.²¹ Iowa's rules, which mirror the IDEA regulations, are codified at 281 Iowa Administrative Code section 41.506. Under those rules, if the parties resolve a dispute through the mediation process, they must execute a legally binding agreement signed by both the parent and a representative of the agency that sets forth the resolution and states that all discussions that occurred during the mediation process will remain confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding.²² A written, signed mediation agreement pursuant to the federal and state rules is enforceable in any state court of competent jurisdiction or in a district court of the United States.²³ In addition, the DE's rules permit the filing of a state complaint alleging that a public agency has failed to comply with a mediation agreement. If such a complaint is substantiated, the state shall grant appropriate relief.²⁴

Complainants argue that following the execution of the LBMA in the prior case, Respondents failed to comply with its material provisions. They further argue that such failure to comply constitutes a denial of FAPE to Student.²⁵ Further, Complainants argue that Respondents' failure to abide by the LBMA left Complainants with no choice but to find and arrange for an appropriate out of district placement to meet Student's unique needs for an appropriate education.

Respondents dispute Complainants' assertion that they failed to comply with the LBMA. Further, Respondents assert that even if there was noncompliance with the LBMA,

¹⁸ 20 U.S.C. § 1414(d)(1)(B).

¹⁹ 34 C.F.R. § 300.507(a); 281 Iowa Administrative Code (IAC) 41.507(1)..

²⁰ *Sneitzer v. Iowa Dep't of Educ.*, 796 F.3d 942, 948 (2015) (citing *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 61-62, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005)).

²¹ 34 C.F.R. § 300.506(a).

²² 281 IAC 41.506(2)(f); 34 C.F.R. § 300.506(b)(6).

²³ 281 IAC 41.506(2)(g); 34 C.F.R. § 300.506(b)(7).

²⁴ 281 IAC 41.153(5).

²⁵ See Complainants' Trial Brief, pp. 3-4; Complainant's Closing Argument, pp. 1, 3.

Complainants must still establish that any noncompliance proven constituted a denial of FAPE to Student.

Both parties, then, agree that the critical first questions to answer are: 1) whether the LBMA was violated; and 2) whether Student was denied FAPE as a result of any violations. Complainants' argument essentially collapses the questions; they assert that any violation of the LBMA is effectively a per se denial of FAPE and no further inquiry need be conducted. Complainants proceed directly from arguing the LBMA was violated to discussing what remedies they may be entitled to for the alleged violation. Under Respondents' view, a violation of the LBMA triggers an analysis of whether the violations constituted a denial of FAPE under the principles articulated in the long line of case law interpreting the requirements of FAPE.

Despite the fact that the resolution and mediation processes embodied in the IDEA have been part of the framework since its inception in the 1970s, the "actual law controlling special education settlement remains an under-studied field."²⁶ The plain text of the IDEA provides for direct enforcement of a mediation agreement in state or federal court; there is no indication in the statute itself, or the implementing regulation, that there is any requirement for exhaustion in an administrative proceeding prior to exercising the right of direct enforcement provided for in the statute. Several cases are instructive in teasing out what standard to apply in a case such as this, where: 1) enforcement has not been sought through either of the mechanisms specified in the IDEA; and 2) one of the parties to the agreement argues that the agreement has been violated and seeks remedial action through a due process complaint.

In *E.D. ex rel. Dukes v. Enterprise City Board of Education*, the district court similarly addressed the question of what standard to apply to an allegation by a parent in a due process complaint that the school district breached a settlement agreement that had resolved a previous due process complaint.²⁷ As in this case, the plaintiffs in *E.D.* identified a denial of FAPE as the damage stemming from the breach of the settlement agreement.²⁸ The hearing officer informed the parties that the standards applicable to contempt proceedings were applicable to the challenge the settlement agreement. The plaintiffs, however, argued that the standard was somewhat uncertain; they argued either for a breach of contract standard, or a standard which determines whether FAPE has been denied. They further argued that "once a school board has agreed to do something, it cannot avoid liability for failing to do so because it contends there was no harm to the student, so that any violation of the Settlement Agreement can be the basis for liability without a showing that there was a denial of a FAPE."²⁹ This is essentially

²⁶ Weber, *Settling Individuals with Disabilities Education Act Cases: Making Up Is Hard to Do*, 43 Loy. L.A. L. Rev. 641, 641-42 (2010) ("[E]ven though IDEA, the federal law governing special education, has been around since the 1970s, litigants are still without clear guidance about how the mechanisms of settlement should work, what the settlement agreement ought to look like, and what to do if either side of the dispute fails to live up to its agreement.").

²⁷ 273 F.Supp.2d 1252 (M.D. Alabama 2003).

²⁸ *Id.* at 1259.

²⁹ *Id.* at 1259-60.

the argument that Complainants make in this case: violation of any term of a settlement agreement is a per se denial of FAPE.

In rejecting the plaintiffs' position, as well as the hearing officer's application of the contempt standard, the district court held:

While the court finds the Plaintiffs' position to have some appeal, it is not a standard which has been adopted by the Eleventh Circuit and, in fact, appears counter to a standard which has been adopted. The Eleventh Circuit has rejected a rule that a procedural violation under IDEA entitles a plaintiff to relief. In the Eleventh Circuit, the procedural violation must be shown to have harmed the student to entitle the plaintiff to relief. The court must conclude, therefore, that the Eleventh Circuit similarly would not adopt a per se rule with regard to settlement agreements. Accordingly, the court will first determine whether a specific Settlement Agreement provision has been complied with, and then, if there is a violation, determine whether the violation resulted in a loss of a FAPE.³⁰

The district court faced a similar question in *Board of Education of Township High School District No. 211 v. Michael R.*³¹ There, parents filed a due process complaint due to disagreement about a placement decision for their daughter and asserted that they would exercise the "stay put" provision under the IDEA in order for her to remain in the status quo placement while the complaint was resolved. The district, which believed the student required a self-contained special education placement, filed suit to enjoin the parents from invoking the stay put provision. After the complaint was filed and a temporary injunction granted, the parties executed a settlement agreement. The settlement agreement provided for the establishment of a panel of experts to reach consensus about when the student should return to the school she had previously attended. Approximately a year later, the panel had stopped actively participating in the student's case and could not reach consensus as to what placement was best for her. The district changed the student's placement in accordance with the opinion of two of the three panel members and the parents filed another request for due process hearing.³²

The parents argued that a breach of the settlement agreement equaled a denial of FAPE, citing in part the *E.D.* case.³³ In rejecting that standard, the court discussed the *E.D.* case at some length and ultimately agreed with the rationale articulated there:

[*E.D.*] says something altogether different: breach of a settlement agreement regarding special education entitles the non-breaching party to relief only if the breach results in a denial of FAPE. *Id.* at 1260. In so ruling, the court analogized a breach of a settlement agreement to a procedural violation of the IDEA. *Id.* In the Eleventh Circuit, a procedural

³⁰ *Id.* at 1260.

³¹ 2005 WL 2008919 (N.D. Ill. 2005).

³² *Id.* at *4-6.

³³ *Id.* at *21.

violation entitles a plaintiff to relief only if resulted in harm. *Id.* (citing *Doe v. Alabama State Dept. of Educ.*, 915 F.2d 651, 663 (11th Cir. 1990)). Thus, the court in *E.D.* found that the Eleventh Circuit would similarly find that a violation of a settlement agreement results in a violation of FAPE only if it results in harm to the student. The Court believes the approach taken in *E.D.* is the appropriate one in this case, particularly in light of the fact that the Seventh Circuit, like the Eleventh Circuit, has held that a plaintiff is entitled to relief for procedural violations of the IDEA “that result in the loss of educational opportunity.” *Michael M.*, 346 F.3d at 804 (7th Cir. 2004). The primary purpose of the settlement agreement was to put the parties’ past disputes behind them and to put in place a process for ensuring that Lindsey received a FAPE. Under these circumstances, as was the case in *E.D.*, the Court does not believe that a breach of the settlement agreement, without some showing of harm consisting of loss of a FAPE, entitles the defendants to relief.³⁴

The *Michael R.* court concluded that, “though the District may not have carried out certain provisions of the settlement agreement to the letter,” the student was not harmed and was not denied a FAPE as a result of the failures in implementation. The court concluded that the parents were not entitled to relief based on their claim that the settlement agreement was breached.³⁵

Complainants argue in support of their position that the parties are in agreement that a settlement agreement voluntarily and willingly entered into by the parties should be binding and enforced as written. The case that both parties cited for this proposition, *Miksis v. Evanston Township High School District #202*, is distinguishable from the present case.³⁶ In *Miksis*, the parents of a student receiving special education services filed an administrative due process complaint in 2004. A decision was issued on that complaint which was subsequently appealed by the parents to federal district court. That case went to the Seventh Circuit and was subsequently remanded to the district court. A mootness issue arose and the parties were still addressing that issue in 2009, when they reached an agreement and entered into a settlement of the lawsuit. Under the terms of the settlement agreement, the parents agreed to release the school district from their claims in the lawsuit in return for an agreement to provide certain special education services during the student’s first year of IDEA eligibility after his senior year of high school.³⁷ After disputes arose regarding implementation of the settlement agreement, the parents filed a “Complaint for Breach of Contract” against the district in state court. The parents sought damages for their “out-of-pocket losses,” which they asserted included paying for tuition at a community college. The case was removed to federal court at the district’s request; the district argued that the parents’ claim for breach of contract arose under federal law because of the “the interrelationship between the Settlement Agreement and the IDEA.” When summary judgment motions were filed

³⁴ *Id.*

³⁵ *Id.* at *22.

³⁶ 235 F.Supp.2d 960 (N.D. Ill 2017).

³⁷ *Id.* at 967-71.

more than a year after removal of the case, the federal district court addressed the issue of subject matter jurisdiction.³⁸

The *Miksis* court bifurcated its analysis into two parts: 1) whether the district violated the settlement agreement; and 2) whether the district denied the student FAPE. The quoted language regarding a settlement agreement being binding and enforced as written was part of the discussion regarding the state law breach of contract claim. The court specifically noted that the settlement agreement at issue in *Miksis* was not reached through a mediation or a resolution session, as those terms are defined under the IDEA, and held that the IDEA does not confer federal subject matter jurisdiction over the claim for breach of the settlement agreement where that agreement was not entered into as a result of an IDEA mediation or resolution meeting.³⁹ The *Miksis* court did not conclude that failure to comply with the provisions of a mediation agreement formulated under the IDEA framework was a per se denial of FAPE; rather, the court concluded, in making a determination about whether the district's removal of the case to federal court was appropriate, that the parents raised claims under the IDEA as well. The passage cited by the parties to this case, however, deals squarely with the parents' claim for enforcement of the settlement agreement.⁴⁰

In this case, Complainants have not filed an action to enforce the settlement agreement that resolved the prior due process complaint; rather, they seek damages under the IDEA for a denial of FAPE premised on the argument that breach of the settlement agreement equals a denial of FAPE.⁴¹ This was not the situation that the district court was addressing in *Miksis* when it used the language that both parties cite here. As discussed in some detail above, enforcement of the settlement agreement is provided for in state or federal court or through the state complaint process; there is no provision for enforcement of the settlement agreement through a due process hearing. While *Miksis* supports the conclusion that the parties to an agreement resolving a dispute about special education can agree to more or less than what the IDEA defines as FAPE, *Miksis* does not support the conclusion that – for purposes of IDEA claims brought through a due process hearing – the parties can define FAPE differently than the IDEA and surrounding case law.

The *E.D.* and *Michael R.* cases provide a more direct parallel to the circumstances here. As in the Seventh and Eleventh Circuits, the Eighth Circuit has also followed a rule requiring that plaintiffs demonstrate some harm in order to be entitled to relief for procedural violations under IDEA. The appropriate standard in this case, then, is the one advanced by Respondents. In order to show that any breach of the LBMA gives rise

³⁸ *Id.* at 976-78.

³⁹ *Id.* at 979-81.

⁴⁰ It is worth noting as well that the settlement agreement at issue in *Miksis* was an agreement entered into outside of the IDEA framework; the parties agreed to settle a lawsuit filed in federal court following a decision by a hearing officer regarding a previous due process complaint.

⁴¹ Paragraph 84 of Complainants' due process complaint states that the district and the AEA have violated the LBMA and contains 11 specific subparagraphs delineating the alleged violations. Paragraph 85 of the due process complaint provides, "As a result of the above failures, [REDACTED] has been denied a Free Appropriate Public Education under Iowa Code Section 256.12."

to a remedy, Complainants must show that the breach constituted a denial of FAPE; it is not enough to show simply that the breach occurred.

Applying this standard makes sense as well because the primary remedy sought by Complainants here is reimbursement for private school placement. Under the IDEA, a district is not required to pay for the cost of special education and related services for a child with a disability at a private school or facility if the district made FAPE available to the child and the parents elected to place the child in a private school or facility.⁴² Requiring a district to pay for private school placement only upon a showing that an IDEA mediation agreement was violated, without requiring any showing that the underlying violation caused any educational harm, is inconsistent with the scheme established by the IDEA.

Alleged Violations of the LBMA: As discussed above in the Findings of Fact section, Complainants allege that Respondents violated 11 separate provisions of the LBMA. In order to move forward in analyzing whether any violations constituted a denial of FAPE, it is first necessary to determine whether Complainants have proven that Respondents violated the asserted provisions of the LBMA.

- Provision #3: Failure to ensure the primary focus of Student's education would be that he attend school willingly in order to develop living, learning, and working skills that prepare him for post-secondary life

While Parents expressed understandable frustration at hearing regarding their difficulties at times in getting Student out the door in the morning to go to school, the record does not demonstrate that Respondents violated this provision of the LBMA. ██████████ staff was aware when Student was placed there that he had experienced great difficulties in his previous placements with staying in the classroom and engaging in academic work. In the FBA team's observations at ██████████, it appeared that Student was not made to complete any activities that he did not wish to do; rather, he appeared to wander throughout the school building with permission to do what he wanted as long as he did not create a disturbance.

Student's team at ██████████ understood that in order to get Student to approach school and the academic environment in a more positive way, Student would need to experience some success to build his self-confidence. Student's program, as required by provision #3 of the LBMA, included "soft skills" such as transition, 21st century skills, and organization. Parents testified that they were very frustrated in Student's previous placements as he never met any of the academic goals set forth in his IEP. The academic goals in Student's February 2016 IEP were formulated with baseline information gathered in Student's prior placements and reflected what the IEP team felt would be realistic goals that would allow Student to experience success. In fact, when Student started at ██████████ and was spending more time in the academic environment with clear expectations and a plan for what happened when expectations were not met, Student began performing with much more success academically than he had at any

⁴² 34 C.F.R. 300.148(a), (c); 281 IAC 41.148(1), (3).

point previously. His progress monitoring reflected that he was outperforming what the IEP team had expected of him immediately.

Respondents rightly point out in their post-hearing brief that the school district and school personnel cannot control a student's subjective beliefs about or desire to attend school. What Respondents can control is the structure of the academic environment, which appears to be what provision #3 of the LBMA demands, when read in context. Respondents focused Student's IEP on "soft skills" and set his goals in such a way that Student experienced early success that was designed to motivate him to continue engaging in academics and build his self-confidence. Respondents complied with this provision.

- Provision #4: Failure to ensure that academic instruction is adapted to the maximum extent possible in order to present the curriculum in a way that is attractive to Student

The evidence does not demonstrate that Respondents violated this provision of the LBMA. Student received one-on-one instruction at [REDACTED] from Special Education Paraeducator. Special Education Paraeducator was a licensed teacher and spent time developing a relationship with Student that allowed him to adapt Student's curriculum in a way that was attractive to him. As dictated by the LBMA, Special Education Paraeducator engaged Student in hands on building projects related to items of interest. Special Education Paraeducator engaged Student in discussions regarding historical events and figures and allowed Student to choose research and writing topics. Special Education Paraeducator created flyers on Fridays that highlighted an activity that he believed Student would find engaging for Monday in an attempt to get Student excited about attending school again on Monday after being home for the weekend.

At hearing, Mother testified that her belief that the curriculum was not attractive to Student came from the difficulty that Parents had getting Student to go to school in the morning. The record shows a long history of Student having difficulty with attending and staying in school and complying with requests to participate in academic work prior to attending [REDACTED]. The fact that Student still balked at attending school some days is not, on its own, evidence that Respondents did not comply with their obligations under this provision of the LBMA.

- Provision #6: Failure to ensure that Intervention Teacher and other individuals identified as safe and trusted were designated as primary contacts for providing emotional support when Student's anxieties or fears are heightened

The evidence does not demonstrate that Respondents violated this provision of the LBMA. Intervention Teacher, who Parents selected for this task under the LBMA because of their prior knowledge of him, was available for Student on a consistent basis. While Complainants allege that Intervention Teacher's duties kept him so busy that he could not interact with Student sufficiently, the evidence does not bear out this assertion. Intervention Teacher spent a great deal of time with Student when he began at [REDACTED] and prioritized Student during the two months he attended [REDACTED] whenever possible.

Additionally, the undisputed evidence demonstrates that Student identified Special Education Paraeducator as a safe and trusted person. Special Education Paraeducator was available to Student at all times during Student's tenure at [REDACTED]. They spent all day together, including lunch time. Even when Special Education Paraeducator had another student assigned to him, he was still in the presence of Student 100% of the time during the day.

- Provision #7: Failure to meet and agree to mutual modifications of the BIP, failure to provide an appropriate safe place within the school grounds where Student can escape, failure to provide appropriate strategies to redirect Student, and failure to provide a protocol for how Student can access individuals with whom he feels safe

The evidence does not demonstrate that Respondents violated this provision of the LBMA. The IEP team met on February 19 and engaged in an extensive discussion regarding the FBA that was conducted in January and February 2016 and how to modify the BIP to incorporate the FBA findings. One of the individuals who conducted the FBA was present, as was School Psychologist/AEA Team Representative, both of whom are members of the AEA's challenging behaviors team. The evidence reflects that the BIP and Student's challenging behaviors were the major focus of the February IEP team meeting. A page that included scripts to redirect Student before he escalated and to direct him to utilize and catalog his coping skills in situations of anxiety or escalation was included in the IEP. The resulting IEP and BIP incorporated the information from the FBA. There is no evidence that Parents expressed dissatisfaction or disagreement at the IEP team meeting with regard to the strategies and goals developed for the IEP and BIP.

With regard to implementation of the BIP, Student – along with Special Education Paraeducator and others – identified safe spaces immediately upon Student starting at [REDACTED]. Student had access at all times to the life skills classroom, where he and Special Education Paraeducator were often the only people present. Additionally, there were other safe rooms identified for Student. Student's Mother had concerns that because the rooms designated as safe spaces also had smaller rooms within used for interventions when there were safety concerns, this rendered the space unsafe for Student. The undersigned does not find that the fact that the intervention space and the designated safe room for Student were in such close proximity violated Respondents' obligations under this provision of the LBMA.

With regard to protocol for accessing safe and trusted individuals, Student had access to Special Education Paraeducator 100% of the time. Additionally, he was able to request contact with Intervention Teacher, who prioritized these requests whenever possible.

- Provision #8: Failure to provide an appropriate script of specific strategies and language to allow Student to calm himself down when escalated

The evidence does not demonstrate that Respondents violated this provision of the LBMA. As discussed immediately above, the IEP created in February 2016 contains a

script with specific strategies to use to assist Student in calming down when escalated. The specific coping strategies that the IEP provides for track very closely with the strategies that Mother provided at the February 11 intake meeting. Respondents were responsive when Parents identified ideas that they thought were useful and incorporated those ideas into Student's IEP.

- Provision #9: Failure to appropriately train paraeducators who interact with Student in RAD and appropriate strategies for communicating with Student and responding to his unique needs and to provide notification and a summary of the training in writing

The evidence does not demonstrate that Respondents violated the training portion of this provision of the LBMA. At the suggestion of Mother, Respondents engaged [REDACTED] from [REDACTED] to provide training to [REDACTED] staff who worked with Student; in addition to Special Education Paraeducator and another paraeducator, who Respondents were required to provide training to under the LBMA, Intervention Teacher, Special Education Teacher, and the building principal also participated in the training.

In addition to this formal training, Special Education Teacher, who had more than 20 years' experience in special education and with students who exhibited challenging behaviors and had diagnoses similar to Student's, spent significant one-on-one time with Special Education Paraeducator in implementing Student's IEP.

While Respondents appropriately trained paraeducators, and additional staff members who were not required to receive the training, it is accurate that Respondents did not provide Complainants with a written notification or summary of the training. Complainants were aware that the training took place as [REDACTED], the trainer, notified them.

- Provision #11: Failure to provide weekly consultation with [REDACTED]

This provision requires Respondents to "pay for [REDACTED] to provide weekly consultation with [Intervention Teacher] or his designee for up to 30 minutes weekly." The evidence demonstrates that Respondents did not seek out any consultation from [REDACTED], other than the training referenced in the paragraph above, during Student's tenure at [REDACTED].

There is no dispute that weekly consultations with [REDACTED] did not take place during Student's tenure at [REDACTED]. [REDACTED] had some contact with [REDACTED] staff during the relevant time period, such as when she came to the school to see Student on April 11 and when she attended the April 22 progress meeting, but there were no formal weekly consultation sessions. Intervention Teacher and School Psychologist/AEA Team Representative both testified that they did not think such consultations were necessary and they believed they were equipped to handle Student at [REDACTED]. It appeared from some testimony that there was some confusion on Respondents' part as to who precisely was to initiate these sessions. Nevertheless, they did not occur.

Respondents have argued that the agreement does not provide that these sessions have to take place, only that if they do the district will pay for up to 30 minutes per week and more if a need is shown. This might be a more persuasive argument if Respondents utilized the sessions with some frequency. Given the evidence that these consultations did not occur, Complainants have proven that Respondents did not comply with this provision of the LBMA.

- Provision #12: Failure to Provide Student with an appropriate opportunity for physical activity daily

The evidence does not demonstrate that Respondents violated this provision of the LBMA. Student had the opportunity for physical activity at [REDACTED] daily, which included walks, throwing a ball, playing basketball, and weightlifting. Mother testified as to her belief that physical activity was being withheld from Student as a consequence for negative behaviors, but there is no persuasive evidence that this was the case. While weightlifting was occasionally not possible if there were safety concerns, as the weightlifting facilities were located at a different building, alternate physical activity was offered on a daily basis.

- Provision #14: Failure to appropriately meet to review the behavioral evaluation and discuss which executive functioning needs Student has per the BRIEF assessment

The evidence does not demonstrate that Respondents violated this provision of the LBMA. At the request of the IEP team, the team that conducted the FBA administered the BRIEF assessment. The results reflected that Student has significant difficulties with all aspects of executive functioning. Two of the individuals who conducted the FBA were present at the IEP team meeting, where the results of the FBA, including the BRIEF assessment, were extensively discussed. Student's IEP and BIP have a significant focus on executive functioning; some of Student's greatest identified challenges were in the areas of initiating tasks and staying focused and regulating his emotions. Complainants have not presented any specific evidence regarding their belief that Respondents failed to comply with this provision.

- Provision #18: Failure to devise an appropriate method to enable Student to understand his goals and the progress he is making toward his goals

The evidence does not demonstrate that Respondents violated this provision of the LBMA. Special Education Paraeducator personally reviewed Student's progress with him over the two months that he was at [REDACTED]. Additionally, the computer-based programs that Student utilized for both reading and math skills provided instant feedback regarding skills mastery.

- Provision #20: Failure to provide Student with an extended school year program, including content and location, by May 1, 2016

The evidence does not demonstrate that Respondents violated this provision of the LBMA. Mother had a progress meeting with [REDACTED] staff on April 22 where ESY services were discussed. A meeting was set for April 29 for further discussion. While the district had made a preliminary determination about time frame and location of ESY services for [REDACTED] students generally, that determination was subject to discussion with Parents. Parents took Student out of [REDACTED] on April 26, therefore the meeting could not be held.

Complainants have argued that because Respondents did not provide them notice of a meeting to discuss ESY at least ten days prior to May 1 this provision was violated. Complainants provided an online resource published by the Iowa Department of Education entitled Due Process Considerations for IEP Teams.⁴³ That document indicates that a meeting notice should be sent to all IEP team members at least 10 days prior to the meeting date. There is no regulation that requires such notice, however. The state regulation provides that notice shall be given to Parents “early enough to ensure that they will have an opportunity to attend” and should provide for a meeting at a mutually agreed-upon time and place.⁴⁴ While Mother testified that she could not recall anyone discussing ESY services at the April 22 progress meeting, School Psychologist/AEA Team Representative credibly testified that Mother did inquire about ESY services during that meeting and a meeting time was arranged. This testimony was supported by an e-mail sent from building principal to the district’s director of special program the same day inquiring about her availability at the date and time selected.

While Complainants have argued that Respondents had already determined the dates and location of the services, most districts have a designated calendar for ESY programming so that staffing can be arranged. If the dates and location arranged do not meet a student’s needs, the IEP team can discuss that and come to a consensus about the best way to meet those needs. Under these circumstances, Respondents did not fail to provide the ESY programming agreed to in the LBMA; Student was taken out of his district placement by Parents prior to May 1.

In summary, Complainants have proven that Respondents violated provisions 9 and 11 of the LBMA by failing to provide written notification to Parents of paraeducator training and by failing to engage in weekly consultations with [REDACTED] Services.

Denial of FAPE: Having examined, provision by provision, whether Respondents complied with the LBMA, it is now necessary to determine whether the violations summarized above constitute a denial of FAPE. Prior to 2017, the United States Supreme Court had only addressed the FAPE requirement in one case, *Board of Educ. Of Hendrick Hudson Central School Dist., Westchester County v. Rowley*,⁴⁵ which was decided in 1982. The Court in *Rowley* declined to adopt either of the standards for evaluating whether FAPE had been provided proposed by the parties, instead charting a “middle path” where a child has received FAPE if the child’s IEP sets out an educational

⁴³ See Exh. 86.

⁴⁴ 281 IAC 41.322(2)(a).

⁴⁵ 102 S.Ct. 3034 (1982).

program that is “reasonably calculated to enable the child to receive educational benefits.”⁴⁶ Amy Rowley was a student who was receiving instruction in the general classroom and was making excellent progress with a “substantial’ suite of specialized instruction and services offered in her IEP[.]” For a child such as Amy, who was receiving instruction in the regular classroom, the Court concluded that an educational program reasonably calculated to enable the child to receive educational benefits would generally require an IEP that was reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.⁴⁷

Re-examining that standard 35 years later, the Supreme Court in *Endrew F. v. Douglas County School Dist. RE-1* held:

To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.

The “reasonably calculated” qualification reflects a recognition that crafting an appropriate program of education requires a prospective judgment by school officials. The Act contemplates that this fact-intensive exercise will be informed not only by the expertise of school officials, but also by the input of the child’s parents or guardians. Any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal.

The IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement. This reflects the broad purpose of the IDEA, an “ambitious” piece of legislation enacted “in response to Congress’ perception that a majority of handicapped children in the United States “were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to “drop out.”⁴⁸

For the purpose of determining what FAPE looks like, the *Endrew F.* Court essentially divided children eligible for special education into two separate cohorts: 1) those who are fully integrated in the regular classroom; and 2) those who are not fully integrated in the regular classroom and not able to achieve on grade level. For the first cohort, which includes students like Amy Rowley, an IEP should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.⁴⁹ For the second cohort of students who are not fully integrated into the regular classroom, the Court held that the

⁴⁶ *Endrew F.*, 137 S.Ct. at 994 (citing *Rowley*, 458 U.S. at 207).

⁴⁷ *Id.* at 996 (citing *Rowley*, 458 U.S. at 202-204).

⁴⁸ *Id.* at 999 (citations omitted) (emphasis in original).

⁴⁹ *Id.* at 999-1000 (“The IEP provisions reflect Rowley’s expectation that, for most children, a FAPE will involve integration in the regular classroom and individualized special education calculated to achieve advancement from grade to grade.”)

educational program must be appropriately ambitious in light of [the student's] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives.

Of course this describes a general standard, not a formula. But whatever else can be said about it, this standard is markedly more demanding than the “merely more than *de minimis*” test applied by the Tenth Circuit. It cannot be the case that the Act typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than *de minimis* progress for those who cannot.⁵⁰

Student is unquestionably within the second cohort. The question here, then, is whether Student's educational program was appropriately ambitious in light of his circumstances and whether he was offered the opportunity to meet challenging objectives. Under the circumstances presented, the answer is yes to both questions.

Prior to Student's placement at [REDACTED], significant behavioral issues were identified that created substantial barriers to Student participating in academic work at school and making academic progress. Most notable was Student's propensity to attempt to escape academic work and expectations via inappropriate behaviors, which ranged from very low-level disruptions to physical aggression, threats, and extreme mood swings. Prior to starting at [REDACTED], the most recent data showed that Student was spending only 12% of his time at school in academic instruction. As Parents noted, this resulted in Student having significant gaps in his learning as he progressed into the middle school years. Teasing out Student's actual knowledge level was sometimes difficult due to his resistance in completing probes and assessments designed to establish baseline levels or determine goals.

The IEP team established Student's academic goals based on information and testing from Student's prior placements and the FBA. At hearing, Parents expressed frustration that Student never met his academic IEP goals prior to placement at [REDACTED]. The focus as Student entered [REDACTED] was on establishing realistic goals that would allow Student to experience success and develop self-confidence, which the team believed would help in his transition. The parties agreed during the LBMA process that Student would be placed in the functional classroom at [REDACTED], where the structure could be more easily adapted to meet his needs.

Student's BIP and the behavior goals in his IEP were customized based on both the LBMA and the results of the FBA. As Student had figured out ways to escape from the academic demands of school so frequently in the past, a focus of the February 2016 IEP was on establishing and communicating clear and concrete expectations to Student that were not up for negotiation. In order to induce Student to comply with the expectations set out for him, the IEP provided for Student to earn access to preferred tangible

⁵⁰ *Id.* at 1000-01.

rewards and leisure activities, which he could select, through successful completion of work. Additionally, the IEP provided for a work/break schedule where Student earned breaks based upon successful completion of work. Student's BIP provided for teachers to prompt Student to utilize his preferred coping strategies and provided scripts for redirection and deescalation, as well as scripting to handle the aftermath of an incident where Student was not successfully in deescalating without intervention.

Student started out very successfully at [REDACTED]. He attended school every day that it was in session until his parents' trip out of the country and progress monitoring data showed that he was spending upward of 90% of his time at school in class, a significant improvement over the 12% of time Student was spending in class prior to placement at Bremwood. The increased time that Student was spending in class was translating into academic success as well, with Student performing well on his academic goals right from the start. This was a distinct difference from previous placements, where Parents complained Student went from year to year without meeting any of his academic IEP goals.⁵¹ While Student did require intervention and redirection, this was contemplated by his BIP and the Bremwood staff felt that they were well-equipped to deal with Student and were seeing real progress.

The evidence in the record demonstrates that Parents were initially pleased with Student's performance at [REDACTED] as well, expressing surprise and delight that things appeared to be going so well. Mother did express concerns, especially centered in late March, that Student had reported being hit at [REDACTED]. In reviewing the communications that Mother had with [REDACTED] staff about this concern, it does not appear that Mother necessarily believed Student; her concern, rather, seemed to be that Student's subjective belief this was occurring was causing him anxiety. At one point, Mother communicated to Intervention Teacher that she knew even if Student had no interventions on a particular day he would come home and say that he had been hit. The tenor of her communications on this issue reflected a desire that staff take steps to persuade Student that he was safe, rather than a belief that Student had actually been abused at school.

The evidence does not support the conclusion that, as Student claimed to Mother, he was hit at school. Intervention Teacher, who was a trusted person to Student, talked with Student to try to determine what he meant when he said he was being hit and could not get additional information. Mother did not provide any greater level of detail at hearing than that Student stated he was hit or being hurt and did not feel safe at school.

⁵¹ While Father testified at hearing that Parents did not believe Student's IEP goals were appropriately rigorous, there is no evidence that Parents ever raised this concern during the development of the February IEP or during the time Student attended [REDACTED]. To the contrary, Parents repeatedly expressed both during the relevant time period and at hearing that Student had significant gaps in his learning and had not met academic goals in the past. Additionally, Parents expressly stated during the IEP development process and at hearing that their primary focus when Student was placed at [REDACTED] was on getting his behaviors under control and his emotions regulated; his academic performance was, at that time, secondary to them. This is not to indicate that Respondents treated Student's academic performance as a secondary matter, only to indicate that this was not a concern that was raised by Parents while Student was at [REDACTED].

These reports were made right around the time period of Student's medication change and increased paranoia and when Parents were preparing to leave for their trip. While Mother wished that interventions would not happen so often and would not be "hands-on" so frequently, Student's BIP expressly provided that Student would be removed to an alternate classroom if he refused to complete a task after having time to make a choice to comply with academic expectations. This was part of the system of consistency that was established in order to deal with Student's propensity to try to escape academic tasks through avoidant behaviors.

Upon review of the record as a whole, Parents' testimony at hearing regarding their dissatisfaction with the [REDACTED] placement does not entirely square with the contemporaneous documentation in the record. While Parents articulated some concerns while Student was actually at [REDACTED], much of the negativity regarding various aspects of the placement simply was not present while Student was there. It is clear that by the point of hearing, Parents had lost all trust in the district and felt that Student had to have a residential placement in order to make progress. Parents were not as uniformly negative during the actual placement however. They communicated to school staff and with [REDACTED] that the placement was going well and that they were pleased with Student's progress.

The record reflects that Student's struggles with attendance began at the point at which Parents took a trip out of town and Student was at home with his aunt and uncle. Student refused to go to school, and his aunt and uncle were unsuccessful in getting him to school. Student also engaged in other troubling behaviors at home during this time, including throwing dishes at his aunt and taking the family car without permission and without a driver's license. While Parents have expressed a list of concerns about alleged violations of the LBMA, a global view of the record reflects that this was the precipitating event for Parents' search for a residential placement. Parents expressed to [REDACTED] almost immediately upon return that they were going to look for residential placements and signed a contract with [REDACTED] to assist in securing a residential placement one week after their return. Just 12 days after Parents returned from their trip they removed Student from [REDACTED] and took him to a residential placement in [REDACTED].

Complainants' overarching argument in this case is that Student could not receive an appropriate education at [REDACTED] because he required a therapeutic residential placement. There has been no assertion by Complainants that if the district had strictly complied with the LBMA in all of its terms that Student could have stayed at [REDACTED] successfully; rather, Complainants want Student in a residential placement.

The IDEA reflects a preference to educate children close to their home; residential placements are resorted to only if placements close to home "fail or are plainly untenable."⁵² The Eighth Circuit has established a two-pronged approach with regard to whether residential placements are necessary for students with behavioral problems that also manifest in troubling behavior outside of the school setting: 1) does the

⁵² *Evans v. District No. 17 of Douglas County, Neb.*, 841 F.2d 824, 832 (8th Cir. 1988) (citation omitted).

problem need to be addressed in order for the child to learn?; and 2) if so, can the student reasonably be expected to make academic progress outside a residential program?⁵³

There does not seem to be disagreement between the parties with regard to the first prong: Student's behavioral problems impeded his ability to learn in prior academic placements and must be addressed in order for Student to learn. It is with regard to the second prong that the parties disagree. Complainants argue, citing professionals and educators who evaluated Student only after he left the district, that Student cannot reasonably be expected to make academic progress outside a residential program with therapeutic support. Respondents argue that not only is this a reasonable expectation, but Student can and did make academic progress in the [REDACTED] placement.

Respondents' argument here is the more persuasive. As described in detail above, Student's educational program at [REDACTED] was a major improvement over his prior placements, with Student staying in the classroom and participating in academic tasks substantially more time than he had previously. This improvement in behavior resulted in Student meeting and even exceeding his academic IEP goals, which had never happened. Those goals would have been increased to reflect Student's improved performance if parents had not removed Student from the district. Special Education Teacher and Intervention Teacher, who had extensive experience in special education and with students who had challenges similar to Student's, were pleased with his progress and believed the trend with Student was going in the right direction, despite some behavioral setbacks during and after the point when Parents were gone. While Parents had hoped that Student would attend school more willingly, the evidence demonstrates that Parents were able to get him to school and Student stayed at school all day from the time he began at [REDACTED] until the first day of Parents' trip.

Things changed at this point. There is no suggestion by Respondents that Parents should not have taken the trip, nor does the undersigned make any suggestion that this is the case. What is true, however, is that there was virtually no time for Respondents to assist Student in course correction after the trip, as everyone recognized was required. Parents expressed to [REDACTED] almost immediately upon return that they were going to look for residential placements and signed a contract with [REDACTED] to assist in securing a residential placement one week after their return. Just 12 days after Parents returned from their trip they removed Student from [REDACTED] and took him to [REDACTED] in [REDACTED].

Complainants have failed to show, on this record, that Student could not reasonably be expected to make academic progress outside of a residential environment. The evidence reflects that Student made academic and behavioral progress at [REDACTED] during the two months that he was there. The special school environment, with one to one support from Special Education Paraeducator, clear structure and expectations, consistency from teachers, and focus on employing coping strategies and providing time and space for deescalation, appeared to be working well for Student in the school environment. His time in the classroom increased dramatically; by all accounts, this had been the

⁵³ *Independent School Dist. No 284 v. A.C.*, 258 F.3d 769, 777 (8th Cir. 2001).

major factor in his lack of academic progress until the point of his placement at [REDACTED]. This finding that Student could make academic progress that was appropriately ambitious outside of a residential setting is made with due consideration of the testimony Complainants presented at hearing from [REDACTED] and [REDACTED] to the contrary, as well as the evaluations that were introduced into evidence from [REDACTED]. There is no evidence that any of the educators or other professionals, including [REDACTED] or [REDACTED], who have interacted with Student since he has been in [REDACTED] undertook any meaningful review of records regarding Student's educational and behavioral progress at [REDACTED] or spoke with any of the staff who worked primarily with Student at [REDACTED]. Under these circumstances, their opinions as to whether that placement allowed Student to make progress are not given a great deal of weight.⁵⁴

It is noteworthy as well that the information that [REDACTED] and [REDACTED] had about Student and his educational progress at [REDACTED] all came from [REDACTED] and [REDACTED]. [REDACTED] specifically noted his understanding, based on conversations with [REDACTED], that Student's behaviors at [REDACTED] were especially difficult and that he was refusing to participate in academics to the point where he was not benefiting from instruction. This is inaccurate, as discussed in detail above. Where the building blocks of an opinion about placement are flawed, the subsequent opinion has less reliability.

Examining the opinions of [REDACTED] and [REDACTED] Day, as well as the evaluations and conclusions that were made once Student had been removed from the district and placed in [REDACTED] raises another important issue under the IDEA framework: notice. One of the hallmarks of the IDEA is the collaborative process it establishes between parents and school districts in developing an educational program for students with disabilities.⁵⁵

In this case, the parties had already engaged in a mediation process which resulted in the execution of the LBMA in February 2016. Parents, along with the district and the AEA, agreed during that process to placement of Student at [REDACTED], along with a host of other provisions. The parties agreed that the agreement would be in force unless changed by the IEP team or by mutual written consent of the parties. The LBMA established a shepherd of the agreement, who would guide implementation of the agreement and serve as a contact point for questions or concerns about the agreement being followed. Parents were represented by counsel during the mediation process and presumably advised about the impact of the agreement. Parents, along with the rest of the IEP team, drafted an IEP and BIP that reflected the findings of the FBA and the requirements of the LBMA. Parents provided no notice during that process that they disagreed with the IEP or BIP that were implemented for Student. The LBMA required

⁵⁴ See *Sneitzer*, 796 F.3d at 950 (court did not give great weight to expert witnesses who opined about potential harm to student in returning to educational placement where those witnesses had not communicated with school district personnel who observed student in that setting most recently).

⁵⁵ See 20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. §300.321; see also *C.G. ex. rel. A.S. v. Five Town Community School Dist.*, 513 F.3d 279, 288 (1st Cir. 2008) ("Congress deliberately fashioned an interactive process for the development of IEPs.").

regular progress meetings between Parents and Respondents, which were held monthly while Student was at [REDACTED]. Mother was in frequent contact with [REDACTED] staff.

Despite this framework, at no point prior to taking Student out of [REDACTED] on April 26 and placing him in a residential facility in [REDACTED] did Parents contact AEA Director of Special Programs, the shepherd of the LBMA, to express any concerns about the agreement or to state any belief that the agreement was not being followed by the district. Parents at no point made any request – to AEA Director of Special Programs or to anyone else affiliated with the district or AEA – to convene an IEP team meeting to discuss a change in placement for Student. Mother mentioned to Bremwood staff at the April 22 progress meeting that the family was considering residential placement options. She did not ask for input regarding this decision at this point or at any point prior to finalizing plans to remove Student from the district and place him in [REDACTED]. In fact, it was only four days from the time Mother first mentioned this possibility at the April 22 meeting to the date that Parents removed Student from [REDACTED].

In the IDEA context, reimbursement for private placement is appropriate only when public school placement under an IEP violates the IDEA because a child's needs are not met. In a case where the school district is denied an opportunity to formulate a plan to meet a child's needs, it cannot be shown that the district's plan was inadequate under the IDEA.⁵⁶ This is precisely the case here. Parents unilaterally determined that private placement of a residential facility was required and withdrew Student from his placement at [REDACTED] without giving the district the opportunity to meaningfully respond.

Complainants have emphasized the fact that no one at [REDACTED], when told that Parents were thinking about a residential placement for Student, told them not to place Student residentially. Many of Respondents' witnesses who worked most closely with Student and his family credibly testified that they were aware of the struggles that Parents had been experiencing with Student at home. Additionally, these witnesses were mindful of their boundaries; if Parents wished to place Student in a residential placement, it was Parents' right to do so. There had been no request at this point by Parents to the district to pay for the cost of this residential placement. It was reasonable for the [REDACTED] staff to make general expressions of support to the family and to Student. These general well wishes did not in any way translate to Respondents' consent to the residential placement or an admission that [REDACTED] could not provide appropriate education to Student.

Additionally, the subsequent information presented by Parents with regard to Student's alleged need for residential placement to make academic progress was nowhere in evidence at the time Parents removed Student from [REDACTED]. The undersigned is aware of no evidence that any professional who interacted with Student from February through April 2016 when he was placed at [REDACTED] recommended a more intensive therapeutic environment or residential placement; if such evidence exists, it does not

⁵⁶ *Schoenfeld v. Parkway School Dist.*, 138 F.3d 379, 382 (8th Cir. 1998); *Fort Zumwalt School Dist. v. Clynes*, 119 F.3d 607, 614-15 (8th Cir. 1997); *Evans v. District No. 17 of Douglas County, Neb.*, 841 F.2d 824, 831-32 (8th Cir. 1988).

appear that the district was made aware of it. The only mental health support Student was receiving during this time were BHIS services from [REDACTED] and psychiatric medication management. It does not appear that Parents had sought more intensive therapeutic interventions in the home or school environment prior to residential placement.

Complainants have also raised the new diagnosis of autism in support of residential placement. This implicates notice as well. Conditt's evaluation took place on April 21 and Conditt's report, the first indication of any autism diagnosis, is dated April 22. While Mother raised this issue at the April 22 meeting, there is no evidence that she asked for the IEP team to convene to consider the information and change Student's IEP or BIP if necessary. In any event, Student was removed from [REDACTED] four days later.

Another important point in evaluating whether Complainants have proven that Respondents denied Student FAPE is the disconnect between what Complainants allege and the remedy they seek. Complainants argue that Student was denied FAPE based on violations by Respondents of the LBMA. The LBMA did not contemplate residential placement of Student. It is clear from the record that Complainants were initially skeptical of Student's placement at [REDACTED]. They agreed to that placement, however. Not until April 22 did Complainants take any steps to make Respondents aware that they felt placement at [REDACTED] was no longer appropriate for Student. Even at that point, Complainants did not seek to engage in any interactive process with Respondents. Complainants moved forward unilaterally; within four days Student was out of [REDACTED] and within six days he was placed at a residential facility in [REDACTED].

It appears that Complainants' August 2016 letter to Respondents requesting payment for Student's placement at [REDACTED] may have been an attempt to cure their failure to provide the district notice prior to unilaterally placing Student at [REDACTED]. As is evident from both common sense and the cases discussing notice, the relevant time period for notice is before a student is removed from the district. Changing Student from one out-of-district private placement to another does not reset the clock with regard to notice. This request for payment, coming as it did four months after Student had already left the district for a private placement, did not provide adequate notice for Respondents to address Complainants' arguments for residential placement prior to Student being removed from the district.⁵⁷

There was a constellation of items present around the end of April 2016 that may have required further collaboration between Complainants and Respondents: the autism diagnosis; Student's extreme reaction to Parents' absence and what impacts that had on Student's education; and Parents' increasing belief that residential placement might be required. For all of the reasons discussed above, the evidence does not reflect that Respondents denied FAPE during Student's placement at [REDACTED]. Respondents had implemented an IEP that was appropriately ambitious in light of his circumstances and

⁵⁷ Where a denial of FAPE occurs, there can be additional limitations on reimbursement for a private placement based upon whether parents provided notice to the IEP team or district within prescribed time periods. See 34 C.F.R. § 300.148(d). It is unnecessary to reach this point here as no denial of FAPE has been proven.

the evidence reflects that Student was making progress under the IEP. To the extent Parents had the belief, however, that Student's placement was inadequate or flawed, their actions did not allow for any meaningful input by Respondents on these issues prior to Student's removal from the district.

Subsequent IEPs after Unilateral Placement: Parents also argue that the subsequent IEPs developed by Respondents in September 2016 and March 2017 denied Student FAPE. Student had already been unilaterally removed by Parents from the district at that point in time.

As has been discussed in great detail above, the district's placement of Student at [REDACTED] pursuant to the LBMA and with the educational program extensively detailed, did not deny Student FAPE. In the relatively short time he was there, Student made meaningful progress on both behavioral and academic goals in light of his unique circumstances. As also discussed, the opinions of the psychologists and education professionals who have evaluated and interacted with Student in [REDACTED] were formulated without reviewing records or engaging in discussions regarding Student's educational program and progress at [REDACTED]. As such, the evidence does not support the conclusion that Student requires a residential program to make academic progress appropriate to his unique circumstances. This is Complainants' principal argument with regard to the subsequent IEPs proposed by Respondents in September 2016 and March 2017. An IEP that proposed anything short of residential placement for Student at those time periods was not acceptable to Complainants.

There is ample evidence that Respondents provided opportunities for those individuals who had evaluated and interacted with Student in his residential placements in [REDACTED] to present information to the IEP team and that this information was considered in drafting the subsequent IEPs. While Complainants have argued that these IEPs were "generic," a review of the IEPs themselves as well as the exhibits related to their development and drafting, does not support this characterization. The subsequent IEPs added new goals based upon information received from Parents and others in [REDACTED]. Additionally, and in response to the information provided by Parents that Student would benefit from a more structured therapeutic environment, Respondents proposed adding 120 minutes per month for a school psychologist to work with Student to address appropriate coping skills and to help Student learn to identify emotions and deal with frustrations and behavioral strategies. The IEPs also provided for Student to receive weekly mental health supports through collaboration with district therapists and an AEA mental health committee member to include once weekly individual therapy and twice weekly group therapy in the context of peers with autism.

This finding does not ignore the evidence that Student has been making some behavioral and academic progress in his environment in [REDACTED]. A finding that a student is making progress in one academic environment does not prove the converse; that is, that a student will not make progress in an alternate academic environment. This is not a theoretical question in this case; there is actual evidence regarding the behavioral and

academic progress that Student made at ██████████.⁵⁸ It is entirely possible for two different environments that have many common threads to both result in academic progress for a student.⁵⁹

Under these circumstances, Complainants have not proven that the subsequent IEPs proposed by Respondents in September 2016 and March 2017 after Student had been removed from the district constituted a denial of FAPE.

Summary: While the evidence here reflects a breakdown of trust between Parents and the district, the IDEA nevertheless requires a collaborative process in designing and implementing educational programs for students. While Respondents failed to carry out some of their responsibilities under the LBMA, as detailed above, Complainants did not make any attempt to remedy these issues prior to removing Student from the district.

The educational program memorialized in the February 2016 IEP, the framework of which was established by the parties in the LBMA, was allowing Student to make progress at ██████████ with regard to his challenging behaviors. The additional time that Student was spending in the classroom, rather than attempting to escape academic work, was paying off in the form of Student meeting previously unattainable academic benchmarks set out by the IEP team. The team of professionals serving Student at ██████████ had significant experience and put a great deal of time and effort into developing an ambitious program for Student that would allow him to develop self-confidence and to meet subsequently more challenging goals.

To the extent that Complainants believed Student should have been served differently or in a different academic placement, Complainants failed to make any attempt to apprise Respondents of this before unilaterally placing Student in a private residential

⁵⁸ It is noteworthy that Student has now been out of the district for more than two years; at the time of hearing, he had been out of the district for just under two years. Student was at ██████████ for slightly over two months. Comparing Student's progress at the residential placements in ██████████ over a span of years to Student's progress at ██████████ in a span of two months is an apples to oranges comparison. It is unnecessary to directly compare progress in the two placements; it is enough that Respondents provided FAPE at ██████████

⁵⁹ It is unnecessary in this case to engage in an extensive discussion of Student's academic and residential programs in ██████████ as no denial of FAPE by Respondents has been proven. In cases where tuition reimbursement for private placement is sought, it is only after a finding that FAPE has been deprived that the tribunal progresses to a determination of whether the private placement was an appropriate placement for a student. *Sneitzer*, 796 F.3d at 948 (citing *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 242-43 n. 9, 129 S.Ct. 2484, 174 L.Ed.2d 168 (2009)); *Sch. Comm. of the Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 369, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985)). The undersigned has reviewed and considered all the evidence presented by Complainants on this point, however, and it is clear from reviewing this evidence that the structure and framework in place in Student's academic placement at ██████████ shares many commonalities with the framework that was established for Student at ██████████. The main difference, of course, is that ██████████ was not a residential placement and did not provide 24/7 therapeutic wraparound services.

placement out of state. Under these circumstances, no denial of FAPE has been shown by Complainants and their requested relief is denied.

It is important to note in this case that Parents have every right to independently determine what academic and/or residential placement they believe to be most beneficial for their child. The district is only obligated to pay for that placement, however, when certain conditions are met. It was clear from Parents' testimony at hearing that they are committed to Student and to maximizing his potential and well-being. This decision does not purport to answer the question of whether Parents have acted in Student's best interests; rather, it only addresses whether Parents have been able to demonstrate that Respondents' actions constituted a denial of FAPE to Student, which is an entirely different question.

DECISION

Complainants have not proven that Respondents denied Student a free appropriate public education as alleged in the due process complaint. Complainants' requested relief is therefore denied and the due process complaint is dismissed.

Dated this 3rd day of July, 2018.



Laura E. Lockard
Administrative Law Judge

cc: Michael Schwartz and Brandon Schwartz, Attorneys for Complainants (via first class and electronic mail)
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