

BEFORE THE SPECIAL EDUCATION HEARING OFFICER

In the Matter of the Due Process,)	
for)	
)	
K.D.)	Case No. 22 DP 259-001
)	
vs.)	
)	
USD 259, WICHITA PUBLIC)	
<u>SCHOOLS</u>)	

NOTICE OF HEARING OFFICER'S DECISION

NOW on this 15th day of July, 2022, this matter comes before the Special Education Due Process Hearing Officer for decision.

I. PROCEDURAL BACKGROUND

The following represents significant dates in the procedural history of this matter:

- A. September 9, 2021: Petitioner's J D and S Z, filed an extensive Due Process Complaint ("Complaint").
- B. September 20, 2021: Larry R. Rute received notice from the Kansas State Department of Education confirming that he had been appointed to serve as Due Process Hearing Officer.
- C. October 11, 2021: The Hearing Officer received information from the Kansas State Department of Education that an attempted mediation in this matter had ended in impasse.
- D. November 9, 2021: The parties participated in an initial Pre-Hearing telephone conference which established a hearing on the merits to be held on February 8, 9 and 10, 2022.
- E. December 2, 2021: The parties participated in a second Pre-Hearing Conference. For good cause shown, pre-hearing timelines were extended.

F. January 6, 2022: The parties participated in a third Pre-Hearing Scheduling Conference establishing deadlines for proposed Motion to Compel and Motion in Limine.

G. January 18, 2022: The Hearing Officer ordered that the parties meet and confer regarding the Districts' Responses to all supplemental discovery requests no later than Friday, January 21, 2022.

H. February 2, 2022: The Hearing Officer issued an order setting out the Standard of Review and established those issues permitted to be considered as evidence at the upcoming hearings.

I. February 4, 2022: The parties participated in a Status Conference regarding exhibits and joint requests for additional hearing dates.

J. February 8, 9, 10, 11 and March 7, 2022: A six (6) day due process hearing was held whereby both parties had the opportunity to present evidence and to examine and cross-examine witnesses.

K. April 12, 2022: The parties filed a Joint Motion to Extend the Deadlines for Exchange of Proposed Findings of Facts and Conclusions of Law to 5:00 p.m. on June 13, 2022. For good cause shown, the Hearing Officer granted the request.

L. June 2, 2022: The parties filed a Joint Motion to Extend the Deadline for submission of Proposed Findings of Facts and Conclusion of Law to July 6, 2022.

M. June 7, 2022: For good cause shown, the Hearing Officer extended the simultaneous filing of Proposed Findings of Facts and Conclusions of Law to July 6, 2022.

N. July 7, 2022: Upon receipt of the parties' Proposed Findings of Facts and Conclusions of Law, the hearing closed.

II. FINDINGS OF FACT.

The Hearing Officer acknowledges, with appreciation, the significant effort and professionalism on the part of counsel for the Complainant and the District to submit proposed Findings of Fact. The Hearing Officer has carefully reviewed the testimony and exhibit citations for accuracy and has set out below those proposed Findings of Fact that the Hearing Officer deems to be relevant to this proceeding.

Procedural History

1. K is a seventeen-year-old student of the District who currently attends Logan River Academy (hereinafter “LRA”) in Logan, Utah. Hearing Transcript (hereinafter “Transcript”) 17: 14-15, 18:6-13, 300:14-21.

2. Complainants are K’s father and stepmother; K’s biological mother passed away when K was 18-months old; K has two younger sisters, ages eight and three. The District is the Wichita Public School District, USD 259, and the Respondent in this matter. Transcript 14:12-13, 18:6-13, 19:13-17.

3. K has recently asked to be called by a different first name. Instead of K__ or K____, he has sometimes requested to be called A and, most recently, had asked to be called L. However, for the purposes of this hearing, K’s father agreed that it was fine to refer to K.D. as K-- or K____. (Transcript Vol. 1, at 17, ln. 20-18, ln. 5).

4. K has attended Logan River Academy since June 4, 2021. The Complainants argue that his individualized needs are not being met by the District and had not been met since the 2014- 2015 school year. *See* Exhibit 177; Transcript 278:22-25, 279:1-2, 825:12-13.

2014-2015 SCHOOL YEAR

5. Complainants enrolled K in the District in the 2014-2015 school year. *See* Transcript 18:18-24; 19:3.

6. K attended Seltzer Elementary School in the District during the 2014-2015 school year. *See* Transcript 18:22-25, 19:1-7.

7. K began to exhibit some behavioral issues and difficulties with academic achievement levels in fourth and fifth grade. *See* Transcript 21:19-25, 22:1-3.

8. For example, in fourth grade, during a meltdown that K was having in class, Complainants learned that a special education teacher stepped in and brought K to her classroom. A weighted blanket was placed on K in response to his meltdown. *See* Transcript 22:9-23.

9. The Hearing Officer does not find sufficient evidence that the District failed to conduct proper Child Find during the 2014-2015 school year.

2016-2018: MIDDLE SCHOOL YEARS

10. Complainants enrolled K in Blackbear Bosin Academy (“Blackbear”) within Jardine Middle Magnet during the 2016-2017 school year. *See* Transcript 23:6-11.

11. Complainants enrolled K in Blackbear because it was advertised as a “middle ground” between general and special education for middle school students. *See* Transcript 27:9-11.

12. On November 16, 2016, Complainants provided Bart Flickinger, a District employee, and an administrator at Blackbear, with K’s voluminous treatment records indicating diagnoses and treatment for conditions that satisfied the definition of exceptionality. *See* Exhibits 4 and 8; Transcript 23:19-25, 24:1-24, 942:2-25, 943:1-25, 944:1-25, 945:1-9.

13. Some of the records reflected audiology tests, psychological records and psychological evaluations. *See* Transcript 34:12-17; Exhibit 8.

14. Included in this tranche were records from Dr. Valarie Kerschen, a primary care physician at KU Pediatrics, who saw K in January 2015, and who noted the following diagnostic impressions: “other developmental speech or language disorder, and Attention or concentration deficit.” *See* Exhibit 8 at pp. 259000407KD-259000408KD.

15. Dr. Kerschen referred K to Dr. Shelby Evans for a psychological evaluation. *Id.*

16. These records also included the report from that evaluation by Dr. Evans, a pediatric psychologist in Wichita. *See* Transcript 23:15-25, 24:1-25, 25:1-9, 34:22-25, 35:1-13; Exhibit 8 at pp. 259000421KD-259000427KD.

17. Dr. Evans conducted a full psychological evaluation of K. Exhibit 8 at pp. 259000421KD-259000427KD; Transcript 25:3-9.

18. Dr. Evans’ report discussed K’s behavioral issues, his struggle with processing speeds, and scores indicating that K fell in the very low range for processing speed indicating an impaired performance compared to same age peers. *See* Transcript 35:1-13; Exhibit 8 at pp. 259000421KD-259000427KD.

19. The records provided also reflected diagnoses of ADHD and Generalized Anxiety Disorder for K, *See* Exhibit 8 at pp. 259000426KD.

20. It is unclear from the evidence presented at the hearing what actions, if any, Mr. Flickinger took after receiving the documents and treatment records. *See* Transcript 28:24-24; 29:1-3.

21. On April 14, 2017, and June 17, 2017, near the end of K’s sixth-grade year and prior to the start of K’s seventh-grade year, respectively, Complainants received two letters from

the Principal at Blackbear warning Complainants that K would be removed from the school if things with K, including his effort and behavior, did not show significant improvement in the coming fall semester of 2017. *See* Exhibit 269; Transcript 28:10-17.

22. The Hearing Officer does not find sufficient evidence that the District failed to conduct a proper Child Find during the 2016-2017 school year.

2017-2018 MIDDLE SCHOOL YEAR

23. As K's behaviors continued escalating and as his academic performance continued deteriorating, on September 27, 2017, K's first 504 Plan was implemented. *See* Exhibit 11.

24. Complainant Ms. Z asked Mr. Flickinger at Blackbear whether they should look at an IEP or a 504 for K, and Mr. Flickinger replied that they should try a 504 Plan. *See* Transcript 30:18-25, 31:1-2.

25. In order to determine whether a 504 Plan was appropriate for K, multiple teachers filled out "Teacher Input for Section 504 Evaluation" forms. *See* Exhibit 6, Transcript 32:13-24, 33:5-22. Each of K's teachers expressed that K had meltdowns at school, that K had to be moved away from other students, and that K was not doing assignments in class and was not interested in schoolwork. *Id.*

26. Complainants also asked in the forms to create the 504 Plan for "one-on-one assistance from teachers and supplemental tutoring" for K. *See* Transcript 31:5-16; Exhibit 6.

27. In preparing the 504 Plan, Complainants provided the evaluations and treatment records for K to the District. *See* Transcript 31:17-21.

28. In the "Section 504 Eligibility Determination Guide" created by the District prior to K's first 504 Plan being created in Fall 2017, the District checked the boxes answering "yes" to the questions of whether the student has "a physical or mental impairment," whether the "physical or mental impairment affects one or major life activities, including major bodily functions, and whether the "physical or mental impairment substantially limit a major life activity." *See* Exhibit 10.

29. In addition, within this form, the District wrote that K had "anxiety and low processing abilities"; and that the major life activities affected were "learning, concentrating, thinking, communicating, and peer relationships. *Id.*

30. The first 504 Plan dated September 27, 2017, stated that “K has a diagnosed processing delay that intensifies anxiety related to school activities,” evidencing that the District was aware that K had an exceptionality as far back as at least 2017. *See* Exhibit 11.

31. The 504 Plan set forth various general education interventions for K, including extra time to complete assignments, access to a computer to complete certain assignments, preferred seating, teachers checking in on K during class, and K being paired with students with whom he had a positive relationship; additionally, it called for K to have “access” to certain adults at school “to help him regulate when experiencing high levels of anxiety,” and the Plan also included an Individual Crisis Plan that referenced intervention when K showed signs of “anxiety, repetitive speech, tapping, banging.” *See* Exhibit 11.

32. The 504 Plan was unsuccessful in improving K’s behavior or academic problems at Blackbear. *See* Transcript 39:1-3.

33. Prior to the implementation of the September 27, 2017, 504 Plan, K had only one disciplinary writeup during the Fall 2017 semester. *See* Exhibit 12.

34. Between September 2017 and the end of K’s eighth grade year, Spring 2019, K had 35 separate writeups, reflected in K’s Student Discipline Profile created by the District. *See* Exhibit 12; Transcript 42:21-25, 43:1. These writeups demonstrated that K was having problems with his peers, had inappropriate behavior in a normal school setting, not focusing in class, distracting other students, refusing to stay on task, storming out of class, physical contact with other students, insubordination, cussing at teachers and other students, ripping up his work in class while upset, and generally not doing what teachers asked him to do. *See* Exhibit 12; Transcript 43:2-22.

35. District personnel were aware of K’s behavioral problems as he met with them on multiple occasions to discuss the same, and K was subjected to similar punishments over and over. *See* Exhibit 12; Transcript 43:23-25, 44:1-12.

36. The evidence in this case establishes that the District communicated several misrepresentations to Complainants regarding the effectiveness of the 504 Plans, beginning during K’s middle school years.

37. On April 4, 2018, Complainants emailed Mr. Flickinger, Amy Ines and Joshua Wilbert, administrators at Blackbear, and expressed concern with K’s grades and their fear that he would have to repeat seventh grade; Complainants’ email stated that they thought “there’s room for more intervention to try to avoid that if possible,” with Complainants stating that the District was just

wanting to pass K through the seventh grade rather than actually address his educational needs. Complainants email also stated “when we do get his homework, some days he just flat out refuses to do it. Some of this, we think, is just K but we feel like in the proper school environment he would be doing better. His performance is reflected in the most recent report card we got which features a dazzling array of grades: A, B, B, C, D, F, F, F. Not encouraging.” *See* Exhibit 15 at 3; Transcript 47: 23-25, 48:1-13.

38. The same email stated the following: “We’d like to hear your recommendations on what more can be done. Looking at his grades, it seems like the 504 Plan we started hasn’t been as effective as we hoped. I don’t know if that means we need to adjust the [504] plan itself or move up to a full IEP[.]...We’re hoping you can continue to be our eyes and ears and we’re once again asking for your expertise and advice. Please let us know how we should proceed from here” *See* Exhibit 15; Transcript 48:15-20; 49:1-3 (emphasis added).

39. Complainants did not receive a reply to this email for nearly two weeks. *See* Exhibit 15; Transcript 49:8-15.

40. In response to Complainant’s specific inquiry into getting an IEP for K, Mr. Flickinger, a school administrator, stated on April 17, 2018 “He will also receive a progress report today...Though not perfect, I think it will show a move in a better direction. Since K has moved to a different science class, we have seen social and behavioral improvements as well. He seems to be engaging in the new class in a much fuller way. These are good things. I believe that if we compared the K we knew a year ago to the K we know now, we would see comparatively remarkable improvements. Even though we still see challenges for him here at times, I feel the big picture is better. I know he doesn’t like doing homework at home and that is a challenge too. However, he has been turning in more homework late...I think when we meet to update and review his 504 at the beginning of the next school year, we might want to have more conversation about what we learn between now and then about accommodations that K may require. As I don’t think that any of us feel that K has a learning issue, he probably would not qualify for an IEP. But certainly, we can continue to adjust his 504 if need be.” *See* Exhibit 15; Transcript 50:1-25, 51:1-4 (emphasis added).

41. Mr. Flickinger’s statement that K did not have “a learning issue” is contradicted by the 504 Plan development materials and the 504 Plan itself, which referenced a “diagnosed processing delay that intensifies anxiety related to school activities,” and by K’s academic and behavioral performance at school. *See* Exhibits 8, 10, 11, 12, and 13; Transcript 51:9-21.

42. Mr. D regarded this email from Mr. Flickinger as telling him that the problems with K were being fixed. *See* Transcript 51:22-25.

43. As School Administrator, Mr. Flickinger, had access to academic records, behavioral profiles, the 504 Plan and teacher progress reports. Rather than inquiring further, when K's father requested an IEP, it appears that this School Administrator chose to "bury his head in the sand," and choose to make no examination of K's academic or behavioral status. The Hearing Officer finds that the failure to refer K for a Special Education Evaluation after receiving Complainants' request regarding an IEP in April 2018 was a material error. This, coupled with the frequency of K's disciplinary write-ups, his poor grades and behavioral problems triggered the District's Child Find responsibilities. *See* Transcript 51:6-21.

44. Mr. Flickinger had the responsibility of treating seriously Complainants email asking about an IEP for K. *See* Exhibit 15; Transcript 305:17-20.

45. The Hearing Officer finds that the failure to refer K for a special education evaluation after receiving Complainants' request regarding an IEP in April 2018 was a material error. Further, coupled with the frequency of K's disciplinary write-ups and his poor grades, triggered the District's Child Find responsibilities.

46. Following Mr. Flickinger's April 2018 email denying an IEP and even a special education evaluation for K, and stating that K's academic performance was improving, during K's eighth-grade year, K's grades deteriorated dramatically, and he finished the 2018-2019 school year by receiving grades of straight F's and one C. *See* Exhibit 13, Transcript 56:13.

47. Following Mr. Flickinger's April 2018 email denying an IEP and even a special education evaluation for K, and stating that K's behavioral performance was improving, K had twenty-nine (29) separate disciplinary write-ups from the date of that email through the end of K's eighth-grade year. *See* Exhibit 12; Transcript 46:3-15, 52:3-16.

48. The record reveals that no special education evaluation was suggested for K by District personnel nor was a special education evaluation initiated or requested by District personnel during K's time in middle school. *See* Transcript 46:16-18, 47:3-4.

SOUTHEAST HIGH SCHOOL (2019-2020 SCHOOL YEAR)

49. Despite K's failing grades to close out his eighth-grade year, he was passed to ninth grade at Southeast High School ("Southeast") within the District. *See* Transcript 52:20-22.

50. K began ninth grade at Southeast in the Fall semester of 2019. *See* Transcript 53:2-3.

51. Prior to K beginning ninth grade, Complainants notified Dr. Loren Hatfield, an administrator at Southeast, that K would need some special treatment and accommodations to be successful, given K's problems at Blackbear. *See* Exhibit 23; Transcript 53:23-25, 54:1-17, 815:23-25, 816:1-6.

52. Dr. Hatfield testified that she met with K prior to him beginning his ninth-grade year at Southeast and that the start of their relationship was different from other kids due to this fact. *See* Transcript 1000:21-25, 1001:1-3.

53. Mr. Flickinger from Blackbear also accompanied K and Complainants to meet with Dr. Hatfield at Southeast. *See* Transcript 53:19-25, 54:1-4.

54. Despite having access to K's student discipline profile in Exhibit 12, Dr. Hatfield testified that she did not review K's past discipline record nor his transcript. *See* Transcript 1026:16-17, 1027:4, 1027:24-25. Dr. Hatfield also testified that 50 writeups for a student coming out of middle school is "pretty high." *See* Transcript 1027:9.

55. Joe Nelson, former assistant principal at Southeast High School and K's 504 case manager, Nelson testified that he reviewed K's student discipline profile and that a student having approximately 50 different writeups in middle school would "absolutely" be a high number. *See* Transcript 726:11-25, 727:1-4.

56. Mr. Nelson also testified that a student with straight F's and one C at the end of the eighth-grade year, like K, would be a kid that is "not really achieving as expected." *See* Transcript 727:16-19.

57. Complainants emailed K's algebra teacher, Dr. Hatfield, and Mr. Flickinger on August 21, 2019, to state that K is going to need to a tutor to get up to speed in Algebra, and that K did not know how to do the work in the class but also was not doing well reading and following instructions. *See* Exhibit 26.

58. In response, Dr. Hatfield suggested four options for algebra tutoring to Complainants for K, including some options through the District. *See* Exhibit 26; Transcript 305:22-25, 306:1-4.

59. Later on August 21, 2019, which was during K's first week of high school, his algebra teacher, Marybeth Bano-Rizzo, emailed Complainants, copying Dr. Hatfield, to notify them that K was not working on schoolwork in class, that she was "starting to get concerned," and

K “refused to get into groups or even with a partner”; these were the same issues as K exhibited at Blackbear. *See* Exhibit 26; Transcript 57:9-15, 19-20.

60. Ms. Bano-Rizzo also suggested Sylvan as a private math tutor for K *See* Exhibit 26; Transcript 57:4-15, 19-20.

61. On August 21, 2019, Dr. Hatfield responded to an email from the parents regarding options for K to receive assistance with Algebra I with four different options: (1) after school tutoring on Wednesday nights; (2) tutoring during seminar and lunch with AVID tutors; (3) to go with Mrs. Bano-Rizzo (Algebra teacher) for help during seminar; and (4) Mathnasium. Exhibit 26 at 3. In addition, Ms. Bano-Rizzo also provided the options of Seven Learning Center and Kumon Math (id).

62. Complainants made K aware of the options for tutoring through the District, but K declined to take advantage of the in-District tutoring options as he was already refusing to complete his work during actual school hours. *See* Transcript 306:12-17.

63. Dr. Hatfield testified that as far as she was aware, K had not taken advantage of seminar times for tutoring, lunch tutoring times, or after school tutoring times, but that he might have attended those events without her knowing. *See* Transcript 1013:22-25, 1014:1-3.

64. K began receiving private, out-of-school tutoring for math during his first semester at Southeast; a fact of which the District was contemporaneously aware. *See* Transcript 58:6-13, 306:18-21, 818:4-15; Exhibit 27.

65. Dr. Hatfield confirmed that the District was aware that K was receiving private tutoring in math. *See* Transcript 852:11-25, 853:1-6, 1044:2-13.

66. There were multiple occasions during the early portion of K’s ninth-grade year in which teachers reached out to Complainants to ask for suggestions on how to keep K focused and on task, as he was refusing to pay attention and do his schoolwork. *See* Exhibits 28, 30; Transcript 59:9-25, 60:1-16.

67. Despite these concerns by K’s teachers, no special education evaluation was requested, suggested, or conducted by District personnel.

68. Unfortunately, Dr. Hatfield, the school assistant principal to whom K was assigned because of the first letter of his last name, did not receive the emails from K’s teachers expressing difficulties with K shortly after ninth grade began. *See* Exhibit 30, 34, 35, 37, 41; Transcript 1030:20-24, 1034:18-25, 1035:1-8, 1035:16-24, 1036:4-12, 1042:19-23. 1043:3-8.

69. On September 4, 2019, Ms. Bano-Rizzo had K go “semi one-on-one” with one of her colleagues, and in response to this email, Complainants confirmed they were taking K to Sylvan. *See Exhibit 31; Transcript 61:8-9.*

70. K’s 504 Plan did not include regular planned one-on-one work with teachers, paraprofessionals, or tutors, nor was there any other formal plan for consistent regular one-on-one work with K by Southeast teachers or support staff, making Ms. Bano-Rizzo’s decision to utilize semi-one-on-one work became a harbinger regarding the level of attention K required to be able to make any progress at school. *See Transcript 62:4-22.*

71. K’s first 504 Plan at Southeast is dated September 10, 2019. *See Exhibit 33/Dist. Exhibit 303.*

72. Testimony during the hearing established that this 504 Plan was substantively identical to the 504 Plan from Blackbear dated September 27, 2017, with a few names of Blackbear personnel changed to reflect Southeast personnel. *See Transcript 63:3-25, 64:1-25, 64:1-18, 816:19-24, 817:1-5.*

73. In the few weeks after the September 10, 2019, 504 Plan was put in writing and distributed, K’s teachers continued frequently contacting Complainants to express their concerns about K’s academic and behavioral performance, including notifying K’s parents that he was not doing his schoolwork, not listening, misusing his computer during class, that K’s grade was in trouble, and to ask for suggestions. *See Exhibits 34, 35, 38, 39, 40, 41; Transcript 65:19-25, 66:1-25, 67:1-13.*

74. In one of these teacher concerns, K’s French teacher, Ms. Gomez, stated in an email to Assistant Principal Dr. Hatfield and another Southeast administrator, “I am at a complete loss in how to get him to do anything...He ignores all directives to get his work out or find vocabulary sheets. I have been in almost contact with parents, but nothing is changing. He is not disruptive; he just will not do anything that is required in the class.” *See Exhibit 40.*

75. In response, rather than refer K for a special education evaluation or request such an evaluation, Dr. Hatfield, the Assistant Principal and a member of the Southeast Child Study Team at that time, stated “Mr. Nelson and I will also talk about if we need to look at his 504 and make adjustments. Unfortunately, lack of motivation isn’t a disciplinary issue so I can’t do much more than have a conversation.” *Id.*

76. The Child Study Team at Southeast determined who is eligible for special education. *See Transcript 583:17-25, 584:1-4, 589:9-12, 634:23-25, 635:1.*

77. The District did not suggest or make any changes to K's 504 Plan of their own volition in response to these teacher concerns, and nobody at Southeast suggested an IEP for K. *See* Transcript 78:6-12

78. Complainants did their best to help these teachers resolve these issues with K, including forwarding some of these teacher concern emails to K's 504 Plan coordinator Mr. Nelson, but the problems continued. *See* Exhibits 34, 35, 38, 39, 40, 41; Transcript 67:9-25, 68:1-13.

79. In response to yet another concern email from French teacher Ms. Gomez in the Fall 2019 term, Complainants wrote, "S and I are considering what to do with him as regular school does not seem to be working for him and hasn't been for quite some time"; nobody at Southeast reached out to Complainants about this email. *See* Exhibit 41; Transcript 78:19-25, 79:1-23.

80. Despite the frequent teacher complaints and concerns expressed about K, at that time in August-October 2019, no one with the District adjusted K's 504 Plan accommodations or suggested that K be evaluated for special education. *See* Transcript 78:10-18.

81. On October 7, 2019, Complainants reached out to Mr. Nelson, K's 504 administrator at Southeast High School, to request getting K access to a one-on-one para and to completely remove K from the "D and F" list. *See* Exhibit 37; Transcript 69:17-18.

82. Complainants requested a one-on-one para because they had "seen historically results when [K] has one-on-one help in environments. Where otherwise his performance was not good, we had seen improvements when he got one-on-one assistance." *See* Transcript 308:7-11.

83. Complainants' request for a para was an attempt to "use the 504 Plan as a tool to put as many accommodations as we could as we felt were appropriate in place for our kid, and so when we asked for a para, it was just us continuing to try to find answers, ways to help him be effective and successful in class." *See* Transcript 311:9-10, 18-24.

84. This request from Complainants for a para for K was forwarded to Regan Carlstrom, Southeast school nurse, and Antoine Agnew, Southeast school counselor, both of whom informed Mr. Nelson that they disagreed with Complainants' request. *See* Exhibit 37; Transcript 70:18-23, 71:11-25, 72:1-12.

85. Ms. Carlstrom responded to the requests from Complainants, in an email sent only to Southeast personnel and not to Complainants, by stating that "504 is to provide equal playing field. These accommodations are giving him more than all his peers. I do not agree at all with this." *See* Exhibit 37.

86. Mr. Agnew further responded to only Southeast personnel, stating, “I do believe due to his processing disorder and the stated accommodation for more time and so forth that he should not be penalized... The outside therapist can definitely provide suggestions but does not have the ability to dictate how we function in the school setting. We do welcome all suggestions so we can better assist the student. RE: the para: I believe there are a lot of resources to assist the student be successful and those supports are noted in the current 504 Plan. The student is not doing the work. There are many missing assignments noted in Synergy. I encourage the parents to help him do more homework to get better grades. The student has accommodations to allow him to have equal access so he can achieve but effort and work is still a major factor.” *Id.*

87. Ms. Carlstrom testified that taking K off of the D and F list would be giving him “more” any other student in the school. *See* Transcript 541:8-14.

88. Despite acknowledging that K has a disability in this email, there is no evidence that Mr. Agnew or anyone else at Southeast ever contacted K’s providers before drawing these conclusions about K, and Ms. Carlstrom testified at the hearing that she did not consult with any of K’s providers, such as his psychologists, psychiatrists, or therapists, to make the determination that Complainant’s requested accommodations were giving K “more” than all his peers. *See* Transcript 570:5-13, 598:1-13.

89. Additionally, Ms. Carlstrom made this determination but does not have training in the field of emotional dysregulation nor any formal training or certification in the field of neurodevelopmental disorders in students. *See* Transcript 598:14-19.

90. A para was never provided for K despite Complainants’ request, there is no evidence that anyone at Southeast ever responded to Complainants about their request for a para, and no one at Southeast High School reached out to Complainants to suggest that K should be evaluated for special education. *See* Transcript 73:2-13.

91. Ms. Carlstrom testified that it would be “very rare to have a one-on-one para unless it’s for some of the very high needs students in some of our very advanced special needs classrooms,” with Ms. Carlstrom defining “high needs” as “students that have extreme disability—like physical disabilities where they cannot verbalize, or they have seizures[.]” *See* Transcript 542:5-8.

92. Without providing any evidence to support his assertion, Mr. Nelson testified that there was not even “necessarily a decision” by Southeast to not provide a para to K because Southeast “just didn’t have the resources” to provide K with a one-on-one para, and that since those

resources were apparently not available, it was not worth even discussing giving K a one-on-one para, regardless of whether K needed a one-on-one para. *See* Transcript 731:15-25, 732:1-4.

93. In fact, at the due process hearing, Mr. Nelson compared K having access to a para to Mr. Nelson having a “yacht the size of Jeff Bezos” bought for him in order to relieve his anxiety; in making this comparison, Mr. Nelson stated as to whether a para would have been appropriate for K, “it’s really not even worth discussing because me or whoever is discussing this don’t have the means to get that yacht so let’s move on to the next – the next thing. That’s more so how I took it at the meeting. It wasn’t about whether he needed it or not. It was just like, there’s no money for 504 for whomever to provide a one-on-one para, it’s not in the budget or whatever.” *Id.*

94. Expenditures for 504 Plans come out of the general fund or “intervention at-risk money”; Dr. Hatfield testified that funding for special education comes from a different “funding stream” than funding for implementation of 504 Plans. *See* Transcript 1002:21-1003:10.

95. The District presented no evidence supporting Mr. Nelson’s assertion that there were no resources available to provide K with a one-on-one para, or whether such resources could have been available had K been evaluated for exceptionalities and an IEP put into place for him, and in any event, Mr. Nelson indeed confirmed that providing a para to K was never seriously explored by the District. *See* Transcript 731:15-25, 732:1-23, 1003:7-10.

96. However, later testimony at the hearing established that if a 504 Team finds that a one-on-one para is necessary, the funds must be found; additionally, had the District moved forward and actually evaluated K for special education in November 2019 and found K eligible for special education, any funding for a para for K would have come from a different funding stream. *See* Transcript 1002:21-1003:10, 1022:20-21.

97. Complainant Mr. D called K’s 504 Plan case manager at Southeast, Mr. Nelson, and told him “once or twice” that “regular school was not working for K.” *See* Transcript 734:4-9.

98. On November 4, 2019, because of the ongoing significant problems K was having at school, Complainants emailed Dr. Hatfield as follows: “As I mentioned during our last phone call, K is not finding success in his current school situation. He's got Fs in everything but Photography, P.E., and Seminar. He is having much more success in his private one on one tutoring at Sylvan, so we don't think it's a matter of him not being able to understand the material. We think it's environmental for him. We think it might be time for an IEP and would like to start looking into that. We are also

considering whether Southeast (or any mainstream school) is the right environment for him, and we'd like to look into what our other options are.” *See* Exhibit 42; Transcript 79:24-25, 80:1-25, 81:1-16.

99. This was a request by Complainants for an IEP and special education evaluation for K. *See* Exhibit 42/Joint Exhibit K.

100. On November 4, 2019, Dr. Hatfield confirmed with Complainants that their e-mail was to serve as their formal request to explore special education services (an IEP) for K. *See* Exhibit 42; Transcript 81:20-4, 82:3-5.

101. Complainants confirmed that they formally wanted to request exploring special education and an IEP for K; this was Complainants formally requesting an IEP for K and for K to be evaluated for special education. *See* Exhibit 42; Transcript. 82:13-16.

102. On November 7, 2019, the 504 team, including Complainants, convened to discuss K’s 504 Plan and any modifications that could be made, despite Complainants having requested an IEP only a few days prior. *See* Transcript 818:23-25, 819:1-18; Exhibit 42.

103. This meeting had already been scheduled at the time of Complainants’ November 4, 2019, request for an IEP for K, as reflected in Complainants’ November 4, 2019, email, which stated, “we will already be there at Southeast on Thursday morning at 10 to meet with Mr. Nelson and a few other people regarding some modifications to K's 504 accommodations.” *See* Transcript 818:23-25, 819:1-18; Exhibit 42.

104. During the November 7, 2019, 504 team meeting, District members of the team discussed seeing how 504 revisions would pan out. *See* Transcript 819:22-25, 820:1-6.

105. The 504 Plan dated November 7, 2019 had only one major modification: “K[en] will work weekly with his 504 case manager, counselor and seminar teacher to work towards progress on grades. If he has D’s and/or F’s will work towards increasing by 3% each week.” *See* Exhibit 44; Transcript 581:17-25, 582:1.

106. Seminar is akin to study hall at Southeast and is not a substantive class. *See* Transcript 87:20-25, 88:1-5.

107. Regardless of the 504 Plan providing that K would work weekly with his seminar teacher, there were anywhere between twenty (20) and twenty-five (25) other students in K’s seminar class, making this accommodation more of a statement about what all students in seminar are already permitted to do. *See* Transcript 737:5-20.

108. Mr. Nelson (K's 504 case manager) also testified that despite the November 2019 504 Plan stating that K would work weekly with his 504-case manager, this provision in the 504 Plan was not satisfied, as Mr. Nelson did not have these weekly meetings with K. *See* Transcript 737:21-25, 738:1-3.

109. Mr. Nelson testified that his experience with K is that K would not turn in work, did not connect with classmates, refused to do work in class, and was unable to be motivated by teachers. *See* Transcript 742:6-15.

110. Other minor modifications to the 504 Plan in November 2019 included comments regarding developing a good relationship between teacher and student, allowing K to have preferential seating near the front of the class (preferential seating was already an accommodation in prior 504 Plans), and allowing K to have access to support services. *See* Exhibits 11, 33 and 44; Transcript 320:22-25, 321:1-15 (emphasis added). These changes were minor and inconsequential.

111. Through Ms. Carlstrom's testimony, it became clear that the changes from the September 2017 and November 2019 504 Plans were negligible. *See* Transcript 561:2-22, 562:1-18, 563:4-25, 564:1-6, 564:16-25, 565:1-25, 566:1-25, 567:1-25, 568:1-12.

112. The District's witness Ms. Carlstrom agreed that the November 7, 2019, 504 Plan was virtually identical to the prior 504 Plan, with the exception of a single addition regarding K working weekly with his 504 case manager, counselor, and seminar teacher to work toward progress on his grades, and if K had Ds and Fs, he would work toward increasing by 3% each week. *See* Transcript 580:5-25, 581:1-25, 582:1, 585:18-25, 586:1-4; *see also* Exhibit 44.

113. The evidence establishes that in response to Complainants' request for an IEP for K, the District made very minor adjustments to a 504 Plan that was clearly not working for K, and then the District did not even bother to follow the most significant of these minor adjustments— K working weekly with a few Southeast personnel, including Mr. Nelson—as confirmed by Mr. Nelson, with the District expressly refusing to conduct a special education evaluation for K in November 2019 because of these recent “updates” to the inadequate 504 Plan.

114. Unbeknownst to Complainants, in response to their November 4, 2019, request for an IEP for K, on November 5, 2019, the District, through Dan Luebbe, Southeast School Psychologist, requested that K's teachers provide information regarding K's classroom functioning, including commentary regarding “K's attention, effort, work production, interest in subject matter, motivation, and participation level. Please list any specific concerns you might have.

How well does K perform relative to his peers? Does he engage in collaborative work? Does he attend tutoring? Make good use of seminar time? Please take some time to thoughtfully reflect on K's functioning. I would like this information by end of the day Friday (11-8-19)." *See* Exhibit 46; Transcript 86:14-17.

115. K's teachers reported significant and serious problems with K at school consistent with the problems that have been present and obvious in K since at least 2014. *See* Exhibits 46, 48, 49, 50, 51; Transcript 86:22-25; 87:1-25, 88:1-25, 89:1-25; 90:1-25; 91:1-20.

116. Ms. Gomez, K's French teacher, responded to Mr. Luebbe to state as follows: "K has a difficult time focusing in class. He would rather read his book or draw. I have tried unsuccessfully to get him motivated and involved in class discussions; however, he ignores most everything I say to him and avoids eye contact with me when I am asking him to get back on task. He does not turn in his work, even when given extra time to do it. In group work, he is typically the one not doing anything to help others. He often announces that he does not understand what is going on in class because he doesn't pay attention. He has not asked for a seminar pass for help with what we are learning. He simply does not show any interest in improving his grade in the class." *See* Exhibit 46.

117. K's World History teacher stated as follows: " K pays attention in class about 10% of the time. His effort is extremely low. He has completed 1-2 assignments this whole semester. Lately he just sits in class and does nothing. Last time he was playing with a yo-yo and banging it on the desk. Before that he would play games and doodle on his laptop. His attendance is great, he is always here. He has some interest in the subject matter because he occasionally makes a comment about Columbus or the Bubonic Plague. He created a very detailed presentation over the Plague a couple months ago. His motivation and participation level are extremely low. I am very concerned about his behavior in class and his risk of huge outbursts. A few weeks ago, I had asked Mr. Nelson how to handle K not using his special laptop for school purposes. He told me to treat it like a cell phone and take it if he was not using it for its intended purpose. I asked for his laptop a couple class periods later because he was doodling on it and not using it for the assignment. He completely blew up, throwing a fit, and punching his laptop. The whole class had to be removed from the room and security called. The same thing happened last week when there was a sub. Yesterday when I was teaching, he was banging his yo-yo on the desk, and he refused to stop or hand it over. I did not want to send him out of the room because I anticipated another blow up. So, Mr. Ruder, the Para, went and found Mrs. Buckley and she came in to observe, then quietly talked K into leaving the classroom. I don't know

what to do the next time something like that happens though. I can't send for a counselor every class period." *See* Exhibit 49.

118. K's PE teacher stated in response to Mr. Luebbe's request for information: "K gets easily off task while in my class. He sometimes will shout out random statements that do not pertain to our subject matter and needs to be redirected. I have noticed his effort level decrease as the semester has progressed. I try my best to keep him on task, however, at times (specifically in the classroom units) he tries to do activities other than what is asked of him. He does not seem very motivated while he is in my class which has affected his participation level while attending my class." *See* Exhibit 50.

119. K's Creative Photography teacher responded to Mr. Luebbe's request for information as follows: "K is behind in class assignments. He uses a classroom computer to work on all his assignments however, he often isn't working on them. He is polite and when I work with him, he will often say he knows how already and appears to get agitated if I press him. So, I allow him to work on it independently. He often contributes to classroom discussion and is observant about artists and methods. K is behind the majority of his peers. His attention is not consistent. He doesn't typically engage with other students anymore. He seems to like the subject matter yet doesn't care to do the background work. I hope when we shoot our next project coming up, he will be more involved." *See* Exhibit 51.

120. The teacher reports were compiled into a set of notes for the "Child Study Team," the team at Southeast that determined which students are eligible for special education, to review as to Complainants' request for an IEP for K. *See* Exhibit U; Transcript 954:16-24.

121. Complainants were never provided with copies of the above emails from K's teachers until receiving them through discovery in this due process hearing; this request for information by Mr. Luebbe was not discussed by District personnel at the November 7, 2019, 504 Plan "revision" meeting, despite this email having been sent out by Mr. Luebbe two days prior. *See* Transcript 92:15-16.

122. Dr. Hatfield, as a member of the Child Study Team tasked with determining whether or not K should be evaluated for special education, also did not receive the teacher reports sent to Mr. Luebbe, nor did she review the document containing all of the teacher reports combined. *See* Transcript 1046:23-25, 1047:10-12, 1047:19-22, 1048:7-10, 1048:22-24, 1049:3-5, 1050:8-19.

123. Ms. Carlstrom, a member of the Child Study Team at Southeast during 2019-2020, also testified that she had not received the emails from K's teachers sent to Mr. Luebbe, but they would have been of interest to her. *See* Transcript 588:10-18, 589:3-14, 590:14-24, 591:23-25, 592:1-7.

124. Heather Maddux, school social worker at Southeast, and a member of the school's Child Study Team, testified that the Team would have reviewed the teacher reports that Mr. Luebbe requested after Complainant's request for special education evaluation, a statement echoed by Ms. Carlstrom. *See* Transcript 591:1-10, 592:14-21, 951:7-11, 953:3-4, 954:2-9.

125. The Child Study Team at Southeast met on Tuesdays of each week. 591:13-18.

126. No minutes of the November 2019 Child Study Team meeting at Southeast were provided by the District; instead, the Child Study Team only compiled teacher reports that the Child Study Team reviewed. *See* Transcript 961:3-963:10, 963:3-9, 1008:9-12, 1051:5-6, 1076:2-18; *see also* Joint Exhibit U.

127. Ms. Carlstrom was tasked with providing the Child Study Team with information about K's 504 Plan, which is especially concerning considering her callous emails regarding K to other administrators. *See* Transcript 957:18-23; Exhibits 37, 55, 56.

128. Ms. Carlstrom also testified that K's 504 administrator, Mr. Nelson, did not discuss K's discipline profile with her, despite Ms. Carlstrom also having been a member of K's 504 team. *See* Transcript 572:15-25, 573:1-4. This was another piece of critical evidence not reviewed by a member of K's 504 Plan or Child Study teams.

129. The Child Study Team at Southeast in November 2019 did not request information or records from any of K's providers and relied on the information that K's 504 team (namely, Ms. Carlstrom) provided. *See* Transcript 964:8-965:13.

130. No records from K's therapists, psychiatrists, or psychologists, were requested by, provided to, or reviewed by, the Child Study Team at Southeast in November 2019 when deciding whether to evaluate K for special education. *See* Transcript 965:14-19.

131. Despite certain records regarding K being available in the District's "Synergy" program, the Child Study Team failed to access these records when they were considering whether to conduct an evaluation of K for special education. *See* Transcript 1072:20-23, 1080:24-25, 1081:1-3.

132. On November 13, 2019, the District sent a PWN refusing the request for a special education evaluation. The rationale for the refusal was that K's Section 504 Plan had just been revised and the Team wanted to see if those revisions would meet his needs in the least restrictive environment. The Team also wanted to see K utilizing general education interventions that were available to him, such as tutoring and seminar. Dist. Exhibit 306/Joint Exhibit M.

133. While Ms. Maddux, the Southeast social worker who ultimately signed the Prior Written Notice dated November 13, 2019 refusing to evaluate K for special education, testified that she was aware that K was working "with a therapist," she could not recall the name of that therapist, and though she initially testified that K's 504 Plan team at Southeast was working with K's therapist, when presented with Exhibit 37, she changed her testimony to state "I just remember there being recommendations from his therapist." *See* Transcript 965:20-967:3; Exhibit 45.

134. Furthermore, Ms. Maddux testified that sometimes Mr. Luebbe would request information from parents of a child requesting an IEP for that child, but that in this case involving K, she did not remember reviewing any information provided by Complainants. *See* Transcript 967:24-25, 968:1-6.

135. As part of the Child Study Team, Dr. Hatfield testified that to her knowledge, the Team never ordered an evaluation of K for emotional disturbance. *See* Transcript 1025:4-11.

136. There is no evidence in existence suggesting that the District ever ordered, or requested parental consent to, conduct an evaluation of K for emotional disturbance prior to June 2021.

137. Despite testimony from Dr. Hatfield that the Southeast Child Study Team's "normal procedure" in responding to a request for a special education evaluation was for the Team to "get information from the teachers prior to the Child Study Team discussion as well as pull academic records, behavior records...kind of just the bulk of the history of the student for context prior to having that discussion," there is no evidence the Child Study Team took each of these steps in response to Complainants' November 4, 2019 request for an IEP for K. *See* Transcript 1005:20-1006:12.

138. Dr. Hatfield further testified that in deciding whether to evaluate a child for special education or not, the Southeast Child Study Team looked "at the teacher reports, previous assessment scores for College Pathway, low risk, some risk, high risk. If the student had previously been assessed, been through an evaluation and was denied. Current grades, current behavior trends as well as trying to

look at if there's other factors that might be contributing to those grades and behavior trends." *See* Transcript 1066:21-1067:7.

139. The Hearing Officer finds that the "teacher reports" generated in response to Complainants' request for an IEP for K in November 4, 2019 were alarming and expressed serious concerns regarding K, his academic and behavioral performance, and his social and emotional state; the Hearing Officer further finds that K's grades in the Fall 2019 term were abysmal; the Hearing Officer further finds that K's parents had previously requested an IEP for K in 2018 and been denied by the District, and there is no evidence that any of these facts had any impact on the Southeast Child Study Team when it chose not to even evaluate K for special education in November 2019.

140. On November 13, 2019, Complainants received "Prior Written Notice" that the District "refuse[d] to conduct an evaluation," approximately nine days after Complainants requested the special education evaluation. *See* Exhibit 45; Transcript 83:18-19.

141. The District provided the following rationale for denying Complainants' request for a special education evaluation: "K just recently had his 504 Plan updated on 11/07/19, we feel it is important to give this new 504 Plan time to further develop to see it can meet his needs in his least restrictive environment. We would also like to see K utilize general education interventions such as tutoring and seminar that are being offered to K in his current academic setting." *See* Exhibit 45; Transcript 84:12-20.

142. Mr. Nelson testified that the reason for this refusal by the District to evaluate K for special education was because the District had not had enough time for the 504 Plan to be observed, monitored, and collect data. *See* Transcript 738:12-18.

143. Similarly, Ms. Maddux testified that part of the reason the Child Study Team refused to evaluate K in November 2019 for special education is because they wanted to see the 504 Plan have time to be implemented. 970:2-8.

144. However, Mr. Nelson also testified that the November 7, 2019, revisions to the 504 Plan, upon which the District relied to refuse to evaluate K for special education, was virtually identical to the earlier 504 Plans for K which had been in place since September of 2017. *See* Transcript 738:19-25, 739:1.

145. In her testimony, Ms. Maddux stated that one of the "general education interventions" she would have liked to see K utilize was Wednesday night tutoring, which she said K was

“not taking advantage of” at that time; however, in the Fall 2019 term, K was already attending private tutoring, and Southeast knew this. *See* Transcript 852:11-25, 853:1-6, 956:16-957:3, 1044:2-13.

146. The November 13, 2019, Prior Written Notice from the District, refusing to evaluate K for special education, further stated in “Description of the Data Used as the Basis for the Proposed or Refused Action” that the “data” relied upon by the Child Study Team in refusing to evaluate K for special education included “Teacher/staff reports and/or observations, educational records and parent reports.” *See* Exhibit 45.

147. Ms. Maddux testified that she did not know whether Southeast school psychologist Dan Luebbe reached out to Complainants to collect information in the form of a “parent report” in connection to Complainants’ request for special education for K in November 2019. *See* Transcript 967:22-25.

148. Ms. Maddux testified that the Child Study Team made its decision to refuse to evaluate K for special education in November 2019 based on the teachers’ observations and the 504 teams’ recommendations, as well as Ms. Maddux’s observation of the November 7, 2019, 504 team meeting because the 504 team “felt like they had a handle and they wanted to try to implement what they were doing on the most recent 504 Plan,” and she apparently “observed people seemed to be happy with what the 504 team was presenting . . . and people were agreeable. That’s what I was there to observe is how things were going and everybody seemed to be in agreement and happy with the plan that people were putting forth.” *See* Transcript 968:7-969:2, 971:23-25, 972:1-6.

149. Despite the numerous emails from each of K’s teachers discussing the same significant problems and continuing issues with K’s classroom functioning that occurred throughout the 2019-2020 academic year, the District still refused to evaluate K for special education, with Ms. Maddux, a member of the Child Study Team at that time, testifying, without explaining how or why, that those teacher comments about K somehow swayed the Child Study Team into refusing to evaluate K for special education. *See* Exhibits 45, 46, 48, 49, 50, 51; Transcript 92:8-12, 968:7-20, 971:23-25, 972:1-3.

150. Ms. Maddux testified that part of the Child Study Team’s decision to refuse to evaluate K for special education in November 2019 was because at the November 7, 2019 504 Plan meeting, she “didn’t see people upset, that people were thinking their kid’s needs weren’t being met, that I needed to advocate something for a student that wasn’t occurring....[T]he team that had been working together that knew K the best seemed to be feeling like with whatever they were doing,

they seemed to feel like they were moving forward in some direction.” *See* Transcript 972:13-18, 973:14-19.

151. These subjective perceptions from Ms. Maddux, which shaped the decision of the Child Study Team to refuse to evaluate K for special education in November 2019, came only a week after Complainants had emailed K’s French teacher to state that “regular school does not seem to be working for him and hasn’t been for quite some time,” (Exhibit 41), three days after K’s father had sent a detailed email to Southeast regarding the voluminous problems with K’s academic and behavioral performance and in which Mr. D requested an IEP for K (Exhibit 42), and these perceptions from Ms. Maddux came despite the serious concerns expressed by K’s teachers in response to Mr. Luebbe’s requests for information (Exhibits 46, 48, 49, 50, 51, 52) which were never shared with Complainants, and they came only one week before K’s Algebra teacher stated K was doing no work and that she had tried all of the accommodations and nothing was working (Exhibits 53 and 54), and they came only days before Mr. D came back to Southeast and requested a meeting to “discuss other options for K” (Exhibit 57), and only weeks before Mr. D emailed two of K’s teachers to state “K has been struggling in school this year in almost all his classes.” (Exhibit 60). In short, the Hearing Officer finds that the evidence renders Ms. Maddux’s statements regarding the November 7, 2013, 504 meeting and the subsequent, related decision by the Child Study Team and District to refuse to evaluate K for special education, to not be credible.

152. Ms. Maddux further testified that the Child Study Team’s decision not to evaluate K for special education in November 2019 was “based on feeling like the 504 team felt like they had a handle, that they wanted more time to see if K[en] could make progress with his 504 Plan and to let that – in his least restrictive environment exactly what was written on the PWNE and to see if that could occur, and it was fully that if that did not happen, that we might need to look at a Special Education Evaluation in the future.” *See* Transcript 976:24-25, 977:1-8 (emphasis added).

153. However, despite Ms. Maddux asserting that the Child Study Team felt that they may need to look at a special education evaluation in the future for K if he was not making progress, the Child Study Team did not look at or discuss K again for the rest of the 2019-2020 school year. *See* Transcript 977:13-20, 978:21-23, 1056:17-21, 1057:1, 1057:21.

154. In fact, when asked whether the Child Study Team looked at K again the rest of the 2019-2020 academic year, Ms. Maddux agreed it had not and placed the blame on the 504 Plan

team, stating, “The 504 team did not come to us and look at that,” despite the Child Study Team being tasked with identifying children who should be evaluated for special education, not the 504 team. *See* Transcript 583:17-25, 584:1-4, 589:9-12, 634:23-25, 635:1, 977:18-24.

155. Dr. Hatfield, a member of the Child Study Team at Southeast during the 2019-2020 academic year, also stated she did not know if the Child Study Team kept track of the single new accommodation set forth in the November 7, 2019 504 Plan, which the Child Study Team and District said needed to have time to be implemented as its justification to deny special education evaluation of K in November 2019, and again, the Child Study Team did not look at or discuss K again for the rest of the 2019-2020 school year. *See* Transcript 977:13-20, 978:21-23, 1056:17-21, 1057:1, 1057:21.

156. Dr. Hatfield’s testimony reflects that she surmised she knew in November 2019 that the Child Study Team, of which she was a member at that time, had refused to evaluate K for special education, but she had forgotten that fact in the interim. *See* Transcript 1053:22-25, 1054:1-4.

157. At the hearing, Dr. Hatfield originally testified that she *may* have been at the Child Study Team meeting that discussed K in November 2019, but then eventually testified that she was not actually part of that meeting. *See* Transcript 1005:10-13, 1081:22-23. Dr. Hatfield further testified that Heather Maddux and Dan Luebbe—the school psychologist who sought and received the very alarming comments from K’s teachers discussed above— “ran” and “led” the Child Study Team meetings. *See* Transcript 1053:15-19.

158. As noted by the Hearing Officer, some of the District’s witnesses were unwilling to provide forthcoming answers about the subject of this hearing and refused to provide responses to yes or no questions. When Dr. Hatfield was questioned about whether she simply believed K was an academic concern for her, she failed to provide a cogent answer. The Hearing Officer notes this evasiveness creates a negative inference as to the forthrightness of the District’s witnesses and is indicative of the District’s strategy throughout this process - to deflect blame and avoid taking responsibility for their failure to provide a proper learning environment for K. *See* Transcript 1064:8-22.

159. On November 14, 2019, only one day after the District refused to evaluate K for special education, Ms. Bano-Rizzo sent an email to Dr. Hatfield, again, a member of the Child Study Team, and Mr. Nelson, K’s 504 Plan coordinator, stating the following:

K is literally NOT doing anything in class. Every day, he comes up with a new excuse so he does not have to do his work. And every time I figured it out and

provide an alternative, he would come up with something new. It is never ending list of new excuses. It is extremely FRUSTRATING me because he is a SMART kid. And also, because I do not have time for excuses every time. I have a class to run and a lesson finish. Just a case in point, this afternoon, after coming back from the office with his new device, the class was working on the test review. He just sat there and do nothing and later on started distracting other people. I approached him to redirect he gave me an excuse and when I turned around he flipped me (I saw the middle finger gesture on right side of his face as I turn around). I am done playing his game. I have been very nice, respectful and all, but he just finds every possible excuse to not do his work and/or disrupt others. Today, his excuse was that he lost his book. He is saying that he cannot do his work because he lost his book. So, I said you do not need your book for this (since he was sitting in class all hour every class). And then, he started blaming me for losing his book. Btw, this is not the first time he supposed lost his book. But, it's the first time it has become MY (Mrs. Bano-Rizzo) fault.

I admit. I am lost. I do not know how to make this kid do anything asked. He has defied my direct order many times. Do you have any suggestions?

Needing your help,
Mrs. Bano-Rizzo
Algebra 1

I tried:

1. Proximity and relationship
2. Get him a one-on one help (Ms. Hardin- did not work, same excuses)
3. Pair him up with someone who can potentially help (he refuses to seat with anyone)
4. Communicate with parents (which ended him getting a tutor)

Excuses he has used

1. Lost his book
2. He doesn't know the material
3. He can multitask --- drawing and learning Math (which I thought, possibly) but NO! not true by far.
4. He was upset by something else
5. And the list goes on
6. And today, the excuse was that It's my fault he can't do the work because I lost his book!!!!

See Exhibit 53; Transcript 92:20-21, 94:1-4.

160. Dr. Hatfield testified that she did not forward this email to the Child Study Team. See Transcript 1059:8-1060:8.

161. On November 14, 2019, Ms. Bano-Rizzo also sent an email to Complainants, which stated as follows:

Dearest Parents,
Good evening.

I just want to inform you I have trouble making K do any Math work in class. Today, after picking up his new device (which he did not like and it is obvious why and probably prompted all the misbehavior (now that I had time to process this), K came back as the class was reviewing for the upcoming test. So, I handed him the test review thinking that since he was in-class most days although doodling mostly on his laptop multitask. I gave in because he said he can multitask (in one of the occasions I talked to him about it). Well, today was the test for this little claim an[d] the result was a big NO. He said he does not know anything about it. So, I suggested to go to the next room to get one-on-one help but he refused that option. He then sat there which later on started disrupting other kids (who do not need any help getting distracted anyways). When redirected, he threw a fit saying that he lost his book and later on blamed me for losing his book. I told him to just go to the office which he also refused to do. So, I went to my teacher's corner and started emailing but then when I turned around he flipped me out. The gesture I saw was his right middle finger on his face. I commented on it and then he decided to kind of changed it up. He was silently cursing in an obscure way but I happen to see it.

My point is that, K is taking so much effort in avoiding work. He comes up with new excuses every time he is confronted about it. I do not know what to do anymore. Nothing works.

I tried proximity and relationship, private conference, get him one-on-one help, communicated with you guys. He has defied me in front of my freshmen class. I cannot have him do that to me and expect other kids to listen to my instructions. I would like for either of you to come and join K to class next hour so you can see what he does in class. Otherwise, I would not want him there. This is very frustrating and very sad but we have 20 some days left and the trial and error and experimenting with what works has to have some sort of ending. Sadly, NOTHING has worked. If you have any suggestions, I am open. Please share.”
See Exhibit 54; Transcript 99:8-9, 12-13, 20-23.

162. Complainants agreed with Ms. Bano-Rizzo's email, which is precisely why they had requested a special education evaluation only ten days prior. *See Transcript 100:9-11.*

163. The Child Study Team did not receive Ms. Bano-Rizzo's email to the Complainants, the day after the District refused to evaluate K for special education, which stated that “the trial and error and experimenting with what works has to have some sort of ending. Sadly, NOTHING HAS WORKED.” *See Exhibit 54; Transcript 983:19-24.*

164. In response to Ms. Bano-Rizzo's November 14, 2019 email to Southeast administration, Mr. Nelson replied with the following, in relevant part: “Sounds like you've tried all the strategies and accommodations listed in his 504, so at this point, I would say keep your cool and remain consistent in what you're trying to do to engage the student; but, hold him accountable as well

– especially, when he flips you off or does something against school rules. I say keep trying to build the relationship and when he gets dysregulated send him to me or the nurse to cool down.” *See* Exhibit 53; Transcript 94:17-18.

165. The Child Study Team did not receive Mr. Nelson’s reply email to Ms. Bano-Rizzo that it “Sounds like you’ve tried all of the strategies and accommodations listed in his 504,” which were not working, according to Ms. Bano-Rizzo. *See* Exhibit 53; Transcript 983:4-10, 1062:12-15.

166. Ms. Carlstrom, a member of the Child Study Team, testified that she received the internal email from Ms. Bano-Rizzo dated November 14, 2019, the day after the Child Study team refused to evaluate K for special education, with that email stating that nothing was working to get K to participate in class, as well as the emails from Mr. Nelson and Dr. Hatfield responding to Mrs. Bano-Rizzo. Ms. Carlstrom did not share this email with the Child Study team. *See* Exhibit 53; Transcript 592:22-25, 593:1-24, 594:3-20.

167. The Child Study Team also did not receive Ms. Bano-Rizzo’s November 14, 2019, email stating that nothing was working. *See* Exhibit 53; Transcript 982:23-25.

168. Ms. Carlstrom responded to Ms. Bano-Rizzo’s email as follows, in relevant part: “My personal opinion, This is all his CHOICE to not do anything. I do not believe this has anything to do with his anxiety or 504 disability. We can offer every 504 accommodation and the teachers can help get him started, check in, do this or do that, but HE HAS TO CHOOSE TO DO IT! He will not be successful until he decides school is important to him or what it can do for him. There is no pointing fingers at anyone but himself right now. My suggestion for her: offer what is needed on 504 and then let him be.” *See* Exhibit 55.

169. K’s 504 Plan case manager Mr. Nelson responded to this statement from Ms. Carlstrom, stating, “I agree,” however, Mr. Nelson testified that when he sent this email agreeing with Ms. Carlstrom’s statements about K not doing work being his “CHOICE” and not having “anything to do with his anxiety or 504 disability,” Mr. Nelson had not discussed that opinion and issue with any of K’s treatment providers, and without Mr. Nelson having ever once observed K in a classroom setting to see what he was doing in class. *See* Transcript 743:23-25, 744:1-25, 745:1-25, 746:1-10.

170. This response came two days after the November 13, 2019, denial of a special education evaluation for K. *See* Transcript 171:2-5.

171. Ms. Carlstrom testified that when stating it was K’s “CHOICE to not do anything” and “I do not believe this has anything to do with his anxiety or 504 disability,” she did not contact any of K’s providers before making that statement, that she does not have training in the field of emotional dysregulation in students, that she does not have training in the field of neurodevelopmental disorders in students, that she never observed K in the classroom, and she did not run or request any diagnostic tests or a functional behavior assessment in reaching that conclusion. *See* Transcript 598:1-25, 599:1-9.

172. When asked about the District’s decision to not evaluate K for special education and her testimony that the 504 Plan for K was not working as of December 2019, Ms. Carlstrom testified, “I don’t think they failed. Most of the teacher reports that we said is he was not choosing to want to do the work, so how do we not know if he would have chose[n] to do the work if he would not have been successful.” *See* Transcript 606:2-18.

173. Ms. Carlstrom then immediately admitted that she did not contact any of K’s providers to discuss why K was “choosing” not to do the work. *See* Transcript 606:19:22.

174. Dr. Hatfield offered similar testimony at the hearing, stating, “I think a lot of K’s struggles academically were not engaging or not doing the work and that’s where a lot of his – that’s where a lot of his struggles came from. And from the work we did see, it wasn’t that he couldn’t, it was that he was choosing not to....[Y]ou’re trying to figure out is it a skill or a will problem, and a skill problem is a lot more alarming than a will problem[.]” *See* Transcript 1019:8-14, 1073:21-24.

175. The position of the District, enunciated through contemporaneous email traffic, as well as through the testimony of Dr. Hatfield and Ms. Carlstrom, is that the 504 Plans would have been successful if K had “chosen” to do his schoolwork, but the Hearing Officer finds that is the crux of the problem—there was no effort on the part of the District to determine *why* K was not doing the work and whether it was connected to K’s exceptionalities; a special education evaluation would have been able to deduce, or at least test, whether K’s refusal to do work was related to his disabilities, but the District refused to conduct such an evaluation.

176. The District presented zero evidence in support of the notion that K not completing schoolwork was somehow disconnected from his disabilities, including zero expert testimony, while Complainants presented voluminous testimony (including expert testimony) and documentary evidence connecting K not completing work to his disabilities.

177. In fact, under questioning from the District's own attorney, Dr. Hatfield admitted "It could be true" when asked "Could there be a time when the student is not willing to do it and it's part of a larger mental health issue or emotional disturbance issue." *See* Transcript 1074:5-9.

178. Similarly, District witness Holly Yager testified that she saw nothing in K's records which suggested K shutting down and refusing to do schoolwork was "disconnected from his diagnoses." *See* Transcript 1476:21-1477:1.

179. Further, Dr. Hatfield gave another evasive response when asked if she had "looked at K D's health records in Synergy at any time," with Dr. Hatfield refusing to actually respond to this question, instead giving a generic answer about who at the school has access to these records. *See* Transcript 1080:8-18.

180. Dr. Hatfield also stated she did not know if the Child Study Team looked at any of K's health and psychological records when refusing to evaluate him for special education, and she further did not provide a cogent answer to the question of how she and the Child Study team believed what was happening with K was a "will problem." *See* Transcript 1080:19-1081:23.

181. The Hearing Officer finds as a matter of fact that the Southeast Child Study Team relied on its members' own flawed and uninformed subjective impressions of K and his educational, behavioral, and social/emotional/mental health status in refusing to evaluate K for special education in November 2019, instead of relying on the teacher reports they received regarding K, the objective history of his poor performance found in his District grade and behavioral records, the regular concerns expressed by Complainants, and the medical/psychological treatment and evaluation records for K which the Child Study Team neither requested nor reviewed. The Hearing Officer has carefully reviewed Ms. Carlstrom's conduct and demeanor during the hearing and has found her testimony to lack credibility.

182. Mr. Agnew, school psychologist, responded to the above email from Ms. Carlstrom as follows, adding his comments about these teacher concerns, stating that he can "tell the teacher is very frustrated and I believe he [K] can bring that spirit out of most people. Ms Bano is a very supportive teacher. I do see that the power struggle is present in her email. Sadly, our systems are set up to support many of these excuses. Unfortunately, I did not attend his 504 meeting, but I understand through discussions with others that attended that his therapist has told the parents not to challenge him about his academics and to allow us to be the people to push educational and evidently parental expectations. We are not doing this young man any favors or preparing him for the bigger world. We

need to clearly identify what is 504 issues and what is defiance. We need to assure that his accommodations are in place for his disability but guide this young man with rewards and consequences for choice behaviors that are disruptive to his success and others in his classes. We must send a clear message of what is okay and not okay.” *See Exhibit 55; Transcript 171:14-16, 171:24-25.*

183. In particular, Ms. Carlston played a significant role as liaison between the 504 Team and the Child Study Team. Ms. Carlston apparently felt that an accommodation given to a 504 student was, in effect, giving him more than his peers. (See Findings of Fact 86). Indeed, taking K off the D & F list would be giving him “more” than any other student in the school. (See Findings of Fact 88). In addition, she seemed to believe that only students with “extreme disability,” such as physical disabilities or seizures would be prioritized to have a one-on-one para. (See Findings of Fact 92). She apparently strongly believed that K’s behaviors in class were a CHOICE, not directly affected by his anxiety or 504 disability. (See Findings of Facts 168). The Hearing Officer has carefully reviewed Ms. Carlston’s conduct and demeanor during the hearing and found her testimony to lack credibility.

184. On November 15, 2019, Ms. Bano-Rizzo replied to Mr. Nelson and Ms. Carlstrom, who earlier in this email thread stated that Ms. Bano-Rizzo should offer K “what is needed on the 504 and then let him be,” with Ms. Bano-Rizzo replying that “I have done this [sic] accommodations all this time. No result as of yesterday. . . This strategy is not working” *See Exhibit 56; Transcript 174:3-4, 8.*

185. The Child Study Team also did not receive the email from Ms. Bano-Rizzo to Mr. Nelson stating, “I have done this [sic] accommodations all this time, no result as of yesterday... This strategy is not working.” *See Exhibit 56; Transcript 987:16-23.*

186. Furthermore, even though Ms. Carlstrom, a fellow member of the Child Study Team, was forwarded and copied on the above emails, she never shared these emails with the Child Study Team. *See Transcript 984:23-25, 985:1-2.*

187. Ms. Maddux testified that these emails would have interested her as a member of the Child Study Team. *See Transcript 983:25, 984:1-6.*

188. Despite Ms. Bano-Rizzo’s clear assertion that K’s 504 Plan accommodations were “not working,” no one from Southeast or the District came back to Complainants and stated that a special education evaluation needed to be done for K. *See Transcript 174:12-16.*

189. In response to Ms. Bano-Rizzo’s email stating she had done the accommodations in K’s 504 Plan with no results, Ms. Carlstrom stated that “[a]ll you legally have to do is offer and

attempt his 504 accommodations” and “[y]ou are TRYING everything, you want him to succeed and really that is all you can offer and they ask of you. It is extremely frustrating when you see potential not being used, but K has [to] think its [sic] important and want to do it. You, myself, his parents can’t want it for him or do it for him and it work.” *See* Exhibit 56; Transcript 174:19-21.

190. Ms. Carlstrom’s comments in this email confirm that K’s algebra teacher was “trying everything” but that it was not working. *See* Exhibit 56.

191. Ms. Carlstrom’s comments in this email regarding K needing to think schoolwork was important and needing to “want to do it” were made without Ms. Carlstrom having seen or even requested medical and psychological records from K’s providers. *See* Transcript 965:5-13, 965:14-19.

192. Ms. Carlstrom could not identify why she expressed in this email that “all” the District “legally ha[d] to do is offer and attempt his 504 accommodations,” nor could she adequately explain why she held that belief, instead stating that “the student has to choose to use those accommodations and put them to work.” *See* Transcript 548:14-24, 600:25, 601:1-25, 602:1-25. Again, the District presented zero evidence stating or suggesting that K “choosing” not to do schoolwork and “choosing” not to use the 504 accommodations was somehow disconnected from his exceptionalities.

193. Ms. Carlstrom also stated in her November 15, 2019, email the following “Just remember that just because he has a 504 does not mean that if he is causing disturbances that he can’t be written up or sent to the office as needed. Follow those ‘crisis steps’ on his 504, if that doesn’t work, I recommend to call Mr. Nelson and have him have disciplinary action.” *See* Exhibit 56; Transcript 176:7-10.

194. At the end of the Fall 2019 semester, Complainants explored enrolling K in a private school in Wichita called Independent for the Spring 2020 semester, because of the lack of progress K was making at Southeast and because they had been rebuffed in seeking accommodations for K beyond just the 504 Plan. *See* Transcript 179:5-25; 180:1-2.

195. On December 17, 2019, Complainants emailed two of K’s teachers at Southeast, including Ms. Bano-Rizzo, to request that they complete recommendation forms for K’s application to Independent. *See* Exhibit 60; Transcript 180:6-15.

196. Ms. Bano-Rizzo responded to Complainant’s request by stating in relevant part, “I would like to write him [a recommendation] but he has never done anything that I ask him, both academically and behaviorally.” *See* Exhibit 62; Transcript 181:20-22.

197. In Ms. Bano-Rizzo's recommendation letter to Independent, she wrote that "K is a person who seems to live in his own world. He is disengaged and disconnected to what is happening around him."; she also wrote, "K has not demonstrated mastery on any of the required skills for the first semester" and "[h]e is disengaged in class and refused to work with peers." *See* Exhibit 64; Transcript 182:21-25, 183:119.

198. Ms. Bano-Rizzo also wrote in part that "K[en] has many interests, but I have not seen him work with peers nor adults in a productive manner" and that "I hope that one day he will figure out a way to manage his difficulties and struggles. *See* Exhibit 64; Transcript 184:19-22, 185:8-11. These comments were consistent with the comments that K's teachers had provided the Child Study Team in November 2019, when it refused to evaluate K for special education.

199. K's 504 Plan case manager at Southeast, Mr. Nelson, testified that the standard and goal of the November 7, 2019, revision to the 504 Plan was working toward improving K's grades of Ds and/or Fs by 3 percent each week. *See* Transcript 739:8-17.

200. K received straight F's, one A in seminar (homeroom), and two B's in physical education during the Fall 2019 semester of his ninth-grade year at Southeast. *See* Exhibit 59, Transcript 178:2-16, 740:1-8.

201. Despite these abysmal grades, no one at Southeast recommended that K be evaluated for special education. *See* Transcript 178:25, 178:1-:4.

202. Because of K's grades, he was not able to secure a spot at Independent and was instead told he could attend Independent if he passed all his classes during the Spring 2020 semester. *See* Transcript 185:12-25, 186:1-3.

203. Despite his terrible grades and this very poor recommendation letter written by one of his teachers at Southeast, no one from the District reached out to Complainants to offer to evaluate K for an IEP at the close of the Fall 2019 semester nor during the Spring 2020 semester, and the Child Study Team at Southeast did not even discuss K again during the 2019-2020 academic year. *See* Transcript 186:7-10, 977:13-20, 978:21-23, 1056:17-21, 1057:1, 1057:21.

204. Ms. Carlstrom testified that she never suggested special education for K. *See* Transcript 603:2-4.

205. After reviewing K's grades at the end of the Fall 2019 semester, Ms. Carlstrom admitted there was no progress under the November 2019 504 Plan. *See* Transcript 605:5-17.

206. Dr. Hatfield stated that K's grades at the end of the Fall 2019 semester were something "you certainly wouldn't want to see [] on a report card." *See* Transcript 1065:12-23.

207. Ms. Maddux testified that the grades K received at the end of the fall 2019 semester were "not okay." *See* Exhibit 13; Transcript 975:8-10.

208. Again, despite these grades and the lack of any progress for K under the 504 Plan, the Southeast Child Study Team did not even discuss K again for the rest of the 2019-2020 academic year. *See* Transcript 977:13-20, 978:21-23, 1056:17-21, 1057:1, 1057:21.

209. Ms. Carlstrom, a member of the Child Study Team at Southeast, admitted she did not know whether only students with learning disabilities are eligible for special education. *See* Transcript 606:23-25, 607:1-11.

210. On January 7, 2020, at the beginning of the Spring 2020 semester, Mr. Nelson sent K's teachers an outdated 504 Plan, dated September 10, 2019, and asked the teachers to provide K with the listed accommodations. *See* Exhibits 63, W; Transcript 186:16-19, 187:1, 711:15-20, 712:1-16. There is no documentary evidence in the case that Mr. Nelson ever sent out an email correcting this mistake. *Id.*

211. On January 22, 2020, Martha Gates, K's drama teacher, responded to Complainant's email checking in on K's grades in the class, which were zeroes, by stating "[h]e does not do any written assignments. . . I appreciate your help and any support you can provide." *See* Exhibit 66; Transcript 189:4-12.

212. Complainants and Ms. Gates agreed that Ms. Gates would send Complainants K's assignments and Complainants would help K complete the assignments. *See* Exhibit 66; Transcript 189:14-17; 190:1-4.

213. Complainants raised a complaint to Ms. Gates in which K stated he was unable to "keep up with watching the video and writing answers without pausing the video or something." *See* Exhibit 66; Transcript 190:8-12. Complainants further stated "[t]hat may be an accommodation we need to add to his 504 Plan." Exhibit 66; Transcript 190:10-12.

214. However, the 504 Plan was not modified at this point in time during early 2020. *See* Transcript 190:23-24, 609:9-19.

215. Ms. Carlstrom, a member of the Southeast Child Study Team, also did not receive the emails from K's teachers and Complainants at the beginning of the Spring 2020 semester

expressing concerns about K's behavior, just weeks into the semester. *See* Transcript 609:9-25, 610:1-25, 611:1-16; *see also* Exhibits 66-68.

216. Mr. Nelson, K's 504 Plan case manager at Southeast, testified that K was not turning in work, K not connecting with his classmates, K refusing to do work in class, K's teachers being unable to motivate him to do anything, all squared with Mr. Nelson's experience with K. *See* Transcript 742:6-15.

217. Complainant J D testified at the hearing that during January and February 2020, "[i]t was really frustrating taking this much time out of every day to communicate with his teachers and staff to try to help him with schoolwork, to try to find ways to get him to engage. . . Nothing made any difference. And there were times like this where we had thoughts like, well maybe we can add this to the 504, and we always tried to do that, but it always just felt pointless because they hadn't changed it since it was put into place, so why would they change it now. . . He still had the same struggles. He struggled with screen time addiction, struggled with social interactions and still really did not think highly of himself because of his grades." *See* Transcript 191:6-24.

218. Complainant Mr. D further testified that there were arguments at home over school during this time, and that Complainants had to back off of having these conversations so frequently with K "because otherwise it was just a non-stop contentious environment at home." *See* Transcript 192:8-25.

219. On February 3, 2020, Complainants received a Suicide Behavior Parent Notification from Southeast regarding K. *See* Exhibit 207; Transcript 193:1-6.

220. That same month, K also wrote a note that stated "[i]f you're reading this, I'm sorry. I checked myself in the hospital. I have been having suicidal thoughts and I almost hung myself. I love you, K. It's for the best"; Complainant provided this note to Southeast. *See* Exhibit 207; Transcript 193:19-24, 194:3-4. 194:17-25.

221. In response to the above note and Parent Notification regarding suicide behavior, no special education evaluation was suggested nor requested for K by the District, nor did the Southeast Child Study Team discuss K again during the 2019-2020 academic year. *See* Transcript 195:8-12, 977:13-20, 978:21-23, 1056:17-21, 1057:1, 1057:21.

222. On February 24, 2020, K was admitted to the pediatric psychiatric unit at St. Joseph Hospital in Wichita after tying a scarf around his neck with a plan to commit suicide. *See* Exhibit 70; Joint Exhibit Y, Transcript 196:10, 20-24.

223. On February 25, 2020, Complainant Mr. D emailed Jacob Henning, Assistant Principal at Southeast, stating that “Last night K checked into the adolescent psych unit at Via Christi after calling the prairie view crisis line. He says he nearly attempted suicide yesterday evening. So he’s in the hospital and won’t be in school for a little while”; Mr. D also asked Mr. Henning to forward this email to Southeast school nurse and member of the Child Study Team Regan Carlstrom. *See* Exhibit 72.

224. Mr. Henning replied and copied Ms. Carlstrom on the email, and Ms. Carlstrom, school nurse and Child Study Team member, eventually replied on this email thread to state that K “is in the best and safest place for him to get better and his health and wellness is the most important thing.” *Id.*

225. Mr. Agnew later in this email thread sent an email only to Southeast personnel regarding K’s return to school after his release from the hospital, stating “There probably needs to be a plan in place for academics”; Ms. Carlstrom’s reply was that she would “send out an email that due to his 504 disability and his health he will only be attending school Tu/Th this week and next. He will get 2 days of each odd and even days. Please provide homework but to what is an absolute must. Cut it down to mastery or however is going to be best to accommodate this health needed schedule. If you have any other suggestions, let me know ASAP!” *Id.*

226. The District did not suggest, request parental consent for, nor conduct an evaluation for special education at that time. *See* Transcript 208:6-11.

227. Within the records relating to K’s February 2020 psychiatric hospitalization, the “HPI/Reason for Hospitalization” stated in part, “Fourteen-year-old male with a history of anxiety and depression presents to the ED with dad for suicidal ideation. Patient tied a scarf around his neck with the plan to commit suicide, but never tied it to anything or took his feet off the ground.” *See* Exhibit 70.

228. The hospitalization records also stated that “Patient was brought to the ED for suicidal ideation with plan to hang himself. Patient states he thought about stabbing himself in the chest but decided hanging himself would be less painful or heinous. Tied scarf around his neck but stopped himself and told his dad about his suicidal ideation....Patient has been self-harming off and on since middle school around age 12.” *See* Exhibit 70, Joint Exhibit Y,; Transcript 196:18-25, 197:16-20.

229. K was discharged on February 28, 2020. *See* Exhibit 70; Transcript 196:11.

230. In the psychiatric records relating to K's psychiatric hospitalization, a release form was completed that allowed the hospital to exchange information with the District; it was noted that the school liaison would "work with Southeast High to coordinate any services that might benefit him in school." *See* Exhibit 70; Transcript 199:9-12.

231. These psychiatric hospitalization records and the Discharge Summary were provided to the District when K was discharged from the hospital in Spring 2020, and the District confirmed it indeed had these documents in its possession as it produced these documents during discovery in this matter, as evidenced by the District's own bates labeling at the foot of these documents. *See* Transcript 199:22-25, 1-8; Exhibit 70.

232. Mr. Nelson testified that he was not sure what K was hospitalized for in February 2020, despite being K's 504 case manager at Southeast. *See* Transcript 714:2-7.

233. Holly Yager, a District employee and member of the IEP development team for K in Summer 2021, testified that it was a mistake that Mr. Nelson, the 504 coordinator for K at Southeast, did not meet with K again when he got out of the hospital in February 2020. *See* Transcript 1470:13-19.

234. Ms. Yager also testified that no revisions being made to K's 504 Plan after the February 2020 hospitalization was also a mistake. *See* Transcript 1474:4-9.

235. On February 25, 2020, while K was still hospitalized, Malinda Wehlmann, the District's Hospital School Liaison, emailed Antoine Agnew, Southeast school social worker, to notify him that she had obtained releases from K's parents, that K had been admitted the day prior on the inpatient unit; that she had met with Complainants; that they had shared with her that they had been in contact with the school on several occasions about K's mental health, being behind on his school work, failing grades, and his 504 Plan; that they touch base with his teachers regularly; that they had concerns that not all of the accommodations were being followed on K's 504 Plan; that K overreacts in social situations, often internalizes ideas/thoughts of others, impressionable, and is emotionally immature; doesn't turn in work, school has always been difficult, has been told he is able to do the work and does not have a learning disability; that there are a lot of triggers around school— work, social interactions, expectations, perceived social rejection; that they had heard that K was picked on regularly at school; that he did not have any coping skills; and that K cuts regularly and has had increasing [suicidal ideation] with a plan." *See* Exhibit 71.

236. Ms. Wehlmann closed by stating “Please let me know if you have any information to share with the hospital team in regards to him at school.” *Id.*

237. The next day, February 26, 2020, Mr. Agnew responded to Ms. Wehlmann, and copied on the email various Southeast officials, including Mr. Nelson, who was K’s 504 Plan coordinator, as well as Dr. Hatfield and Ms. Carlstrom, both of whom were on the Southeast Child Study Team during the 2019-2020 year; this allowed those Southeast personnel to review Ms. Wehlmann’s email of February 25, 2020, in its entirety. *Id.*

238. Mr. Agnew’s reply email to Ms. Wehlmann stated, “The school has been in frequent contact with the parents and the student regarding ongoing situations. He definitely struggles with social interactions. I would recommend in the planning that the family and mental health providers address these issues with outpatient mental health services to help K find ways to appropriately express himself. The school has been very accommodating and supportive of K and will continue to be when he returns.” *Id.* (emphasis supplied).

239. Mr. Agnew also forwarded this email thread to Jacob Henning, an Assistant Principal at Southeast, on February 26, 2020. *Id.*

240. When Mr. Henning replied to ask if he needed to do anything “as far as teachers not following 504,” Mr. Agnew replied, “The parents appear to seek fault with the school. I believe all teachers are very accommodating to this young man. We had a 504 meeting with the parents, and they told us they were instructed to not enforce too many boundaries at home to avoid parent child conflicts. Also, the parents felt it was unjust for him to be held accountable with the D and F list. These few approaches are more indicators there is a break down in the family system and the supports involved with the family. Unfortunately, we will be in a constant battle with supporting this young man while battling with unreasonable and unhealthy expectations.” *Id.*

241. This email from Mr. Agnew, which made no attempt to discuss or identify whether or not K’s 504 Plan was being followed, despite the concerns expressed by Complainants to Ms. Wehlmann and the email from Mr. Henning on that point, and instead criticized Complainants including by alleging “there is a break down in the family system and the supports involved with the family” and stating that Southeast “will be in a constant battle with supporting this young man while battling with unreasonable and unhealth expectations,” was sent the same day K was discharged from a nearly week-long psychiatric hospitalization due to suicidal ideation. *Id.*

242. Complainant Mr. D firmly disagreed that Southeast had been very accommodating of K. *See* Transcript 203:11-21.

243. Mr. D also testified as to a feeling of shock, outrage, and betrayal in seeing that email from Mr. Agnew regarding K and Complainants, particularly after Complainants worked diligently with the District to try to resolve the problems with K. *See* Transcript 204:23-25, 205:1- 25

244. On February 28, 2020, Ms. Wehlmann replied to all of those who had been copied on Mr. Agnew's February 26, 2020, email, to let them know K was being discharged from inpatient that day and would start an outpatient partial day program, and that Wehlmann would keep them all apprised of updates to K's treatment plan. *See* Exhibit 75.

245. Mr. Agnew "replied all" and stated he thought this was a "good plan for K" and that Southeast looked "forward to an update to help him reintegrate back into Southeast." *Id.*

246. On March 2, 2020, Regan Carlston notified teachers that K will be transferring back into school on Tuesdays and Thursdays due to his 504 disability and medical need. She reminded them that K "already struggles with completion of work and anxiety of work" and asks them to require only what is necessary of him. She further states that she does not know what his status will be after spring break. Joint Exhibit Z.

247. In a March 3, 2020, reply all email to Regan Carlston, Counselor Erica Winkenwader, and multiple administrators at Southeast High School providing an update regarding K, stating he had been admitted into the Intensive Outpatient Program, which was a three-day per week program, with K attending school the other two days per week; she attached his discharge plan "to help prepare for his transition back to school"; and that other recommendations from K's parents were "a designated staff member who can provide a daily check-in at school and work to build a relationship with K, a meeting to review his 504 accommodations and implementation, and a descriptive plan on how K can access a support staff member to help him regulate when he experiences increased anxiety." *Id.*

248. The intensive outpatient program is intended to teach K coping skills and emotional regulation techniques to help him transition back to school. Joint Exhibit AA.

249. The next day, March 4, 2019, Ms. Carlstrom, the Southeast school nurse and member of the Child Study Team during the 2019-2020 academic year, replied all to the March 3, 2019 email from Ms. Wehlmann, with Ms. Carlstrom attaching K's "current 504 Plan" from November 7,

2019; stating that at the November 2019 504 Plan meeting to discuss K the school staff had “addressed our concern with his peer relations and mention[ed] autism spectrum”; that she saw in the discharge summary paperwork the word “spectrum,” and she expressed that “it possibly affected his interpersonal relationships”; that “K has come to my office twice to speak with me regarding self-harm ideas and actually haven [sic] done so with Dad notified and our protocol followed. K coming to me and advocating for himself was a big deal and I think telling his Dad about the SI thoughts/attempt at home is a positive step as before, he tend [sic] to NOT want say anything [sic] because wa [sic] nervous/afraid of reactions (disappointment of his Dad)” and finally, “We will continue to keep in contact and as we get more specific needs from treatment we will definitely do our best to implement for K here at SE.” *Id.*; Transcript 208:24-24, 209:1-2, 7-8.

250. Ms. Carlstrom, the Southeast school nurse and member of the Southeast Child Study Team, testified that any time K had medical needs or needed a safe place to go to, she was one of his safe places. *See* Transcript 536:8-9, 20-25.

251. Ms. Carlstrom, a member of the Southeast Child Study Team in the 2019-2020 academic year, also testified at the hearing that she was aware that K had self-harm ideas, and at one point K had even visited her office and “did a suicide prevention.” *See* Transcript 543:1-5. She also testified that she had received K’s discharge summary of his February 2020 hospitalization at St. Joseph. *See* Joint Exhibit Y; Transcript 543:19-21, 544:14-16.

252. Ms. Carlstrom stated that she spoke with K on at least two occasions about suicidal ideation issues during the 2019-2020 academic year and that she was concerned for K’s safety. *See* Transcript 551:24-25, 552:1-5.

253. Despite K’s hospitalization for suicidal ideation, and Ms. Carlstrom stating twice in writing in early March 2020 that she had concerns about K’s peer relations and interpersonal relationships, and further that K came to her at least twice to talk about suicidal ideation, as well as her concern in writing that K was on the autism “spectrum” as far back as November 2019, Ms. Carlstrom—a member of the Child Study Team at Southeast at that time—did not recommend that K be evaluated for an IEP, nor was K even discussed by the Southeast Child Study Team following November 2019, meaning K was not evaluated for special education by the District during the 2019-2020 academic year nor was such an evaluation requested by the District, even after a psychiatric hospitalization relating to suicidal ideation and multiple Southeast personnel stating that

K struggled with interpersonal relationships. *See* Transcript 619:6-15, 977:13-20, 978:21-23, 1056:17-21, 1057:1, 1057:21.

254. Ms. Carlstrom's email to others at Southeast that K had come to her office twice to speak with her regarding self-harm ideas is a sign of severe depression of which the District was clearly aware. *See* Exhibit 75; Transcript 1472:17-20.

255. On March 2, 2020, Ms. Carlstrom emailed K's teachers and 504 Plan team an update on K's attendance at school and to make sure his 504 accommodations were in place. *See* Joint Exhibit Z; Transcript 544:20-25, 545:1-9.

256. The 504 Plan attached to this email was the November 7, 2019, 504 Plan, which had not been modified after K's hospitalization for suicidal ideation; Ms. Carlstrom further stated in this email that "K already struggles with completion of work and anxiety of work." *See* Joint Exhibit Z.

257. K's 504 Plan case manager Mr. Nelson confirmed that after November 7, 2019, there were no further revisions to K's 504 Plan at Southeast during the 2019-2020 school year. *See* Transcript 747:18-25.

258. In response to questioning about the efficacy (or lack thereof) of 504 Plan accommodations, Ms. Carlstrom testified that a student must "choose to use those accommodations and put them to work" and it does not matter if anyone else wants that student to be successful. *See* Transcript 548:15-24.

259. Ms. Carlstrom made this comment despite admitting she has had no training in the field of emotional dysregulation nor any formal training or certification in the field of neurodevelopmental disorders in students, and without consulting with any of K's providers, such as his psychologists, psychiatrists, or therapists. *See* Transcript 570:5-13, 598:1-19.

260. In response to questioning regarding mental health issues in K that could be seen as or reflected as "emotional disturbance," Dr. Hatfield stated that "later in" the 2019-2020 school year, "I think there's evidence that it was there." *See* Transcript 1081:25-1082:11 (emphasis supplied).

261. Again, despite K's hospitalization for suicidal ideation and the multiple District employees expressing concern about K's peer relations and his failure to complete schoolwork, the District did not evaluate K for special education, nor even contact Complainants to request to evaluate K for special education. *See* Transcript 200:2-13; 208:9-11.

262. The Hearing Officer finds as a matter of fact that the Southeast Child Study Team did not discuss K again during the 2019-2020 academic year after November 13, 2019.

263. Following Spring Break in March 2020, the District moved to a fully remote learning platform in response to the COVID-19 pandemic. *See* Transcript 210:23-25, 211:1-15. All schools in Kansas were closed by the Governor, due to COVID-19 pandemic (Executive Order No. 20-07 issued by Governor Laura Kelly, dated March 17, 2020), temporarily closing all Kansas K-12 schools to slow the spread of COVID-19. The Hearing Officer has taken official notice of the Executive Order.

264. As of March 2020, K's grades at Southeast were D, F, D, C, F, B, F, F, A, with the A being in Seminar (study hall). *See* Exhibit 79; *see* Transcript 211:11-19.

265. During the March to May 2020 period that led to these grades, Complainant J D helped and worked closely with K to get the grades listed above, to the point his job noticed his lack of productivity. *See* Transcript 774:1-25, 775:1-25, 776:1-25, 777:1-18.

266. The District was fully aware that J D was working closely, in a one-on-one capacity, with K during the last portion of the 2019-2020 academic year, during remote learning. *See* Transcript 212:11-25, 213:1-25, 214:1-25, 215:1-4; Exhibits 84 and 85.

267. Mr. D testified that the March 2020 report card would have been issued around the time that all students were doing school from home due to the pandemic. (Transcript Vol. 1 at 211, ln. 1-15). After the students went into remote learning in March 2020, all the parents were told that "grades were locked from going down. Grades could not go down from where they were and were completed from that point forward, would just count towards rising grades, so grades wouldn't get any lower, but they could go higher." (Transcript Vol. 1 at 212, ln. 5-10). Mr. D worked with K to get at least passing grades in his classes. Once K had reached a passing grade, he was not interested in doing any more schoolwork. (Transcript Vol. 1, at 212, ln. 11-213, ln. 13). Mr. D later amended his testimony and stated that they had wanted K to receive at least C's, that K would not work beyond that. (*Id.* at 215, ln. 11-24).

268. K ended his ninth-grade year at Southeast with the following grades: C, A, B, B, F, A, C, C, P. *See* Exhibit 86; Transcript 215:5-11.

269. While the District sought to portray these grades as a substantial improvement and evidence that the 504 Plan was effective, the Hearing Officer finds that the evidence establishes that these grades were the direct result of the District's "grade freeze policy" which established that grades could not decrease and could only improve from where they were at the time remote learning began,

and so these grades are not an accurate reflection of K's true performance. *See* Transcript 211:20- 25, 212:1-10, 215:9-25, 216:1-13, 622:1-11, 1067:24-1068:11.

270. The Hearing Officer also finds that these grades were the direct result of Complainant Mr. D working intensively and in a one-on-one manner with K following Spring Break in March 2020, when the District switched to fully remote learning; regarding his work with K during remote learning, including from March 2020 through the end of the Spring 2020 term, Mr. D testified as follows:

Okay. So my job is a work-from-home job, it always has been. I have an office area set up in the basement with a U-shaped desk and I sit on one side of it. When remote learning began, we cleared off the other side of the desk for K and we sat him up with a station where he could sit and do school, so every day, he and I were sitting back to back, I'm working and he's hopefully doing school, and so I was with him that whole time. As much as I could, I would turn around, see what he was doing, encourage him, ask him if he needed some help, ask him what he was doing, just trying to make sure he was doing some sort of school. It was very challenging, it was very difficult because as we've established, a lot of times he just doesn't want to do it, and when the grade freeze policy was put into place, we tried to use that to negotiate with K and say, hey, do you think – other than math because we don't have the foundation for that, we'll let that go, but other than math, do you think that you can at least get your grades up to a C and we explained to him your grade right now can't go down, so if you just do little bits of work, little bits of work, you can get there, we know that you can do it. He agreed – that doesn't always mean it's going to happen with him but he agreed, and so for the remainder of the semester, we worked bit by bit to get those grades up to a C, and those three, History English and Drama, they didn't all reach a C at the same time, but the instant that they did, he refused to do any more work in that class. There was nothing we could do. I tried saying, hey, you've got some momentum, you can bring this up even more. I think that might have happened in maybe photography, I'm not sure, but I don't think that happened in any of those other classes that have a C. He just wouldn't do it. And I will tell you that this impacted my productivity at work to a point that was noticeable by other people, so I had to speak with my supervisor and explain the situation say here's what's happening, here's why you're not seeing quite as much output from me. Ultimately I think that it – I mean it turned out okay, my job is fine, but that is something that happened during that time.

Q So I want you to talk with a little bit more specificity if you can about exactly what you were doing to help K with school work during this grade freeze period and through the end of the year. Can you give us some examples of some of the things that you were doing to work with K on his school work.

A Yeah. So I would log into ParentVue which is the software where you can log in, it's the website that 259 has set up. I can log in, look at his assignments, look

at his grades, et cetera, so I would look at those classes that we were working on with him. I would look for assignments that were late or missing or whatever, and then I would contact his teachers and say things like is there something that we can – is he missing this, how do we do this, and we'd get an answer and sometimes that would happen over the Teams video calls. They were logging into class using Microsoft Teams and so sometimes I would turn around and I would either listen for what the assignment was or I would poke my head in and chat for a minute with the teacher over the video call and try to – just try to get my head around what specific assignments he could do so that I could look at him and know whether he was working on those or I could look at him and have suggestions for, okay, it seems like you don't want to work on this History assignment, what about this English, I know you have to do whatever the assignment was. And so I would use the knowledge that I had through ParentVue and through interacting with the teachers of the assignments to try to encourage him to do work in whatever ways we could get him to do it on any given day.

Q So just to be clear and to wrap this up, is it your testimony that you were working very closely with K to get schoolwork done and that involved helping K with the specific discreet assignments that were part of the curriculum of these courses; is that correct?

A Yes.

Q So last question on this bit of the grade card here. You were there – you just testified that you were working with K. Is it your opinion having worked with K during this period whether or not the 504 Plan that was in place made a difference in these grades?

A How could it? I mean most of the accommodations on the 504 had to do with being in school. The 50 percent for extra time didn't really apply anymore because it was just a matter of like you could get your grade up and not down. There was things like taking him out of class when he's dysregulated didn't apply. I don't think the 504 – I think the 504 had little to nothing to do with this period of time. *See* Transcript 773:19-778:9.

271. The Hearing Officer finds as a matter of fact that K's 504 Plan made no positive difference in his grades at this point in time since he was at home with Complainants, so many, if not all, of these 504 Plan accommodations became moot. *See* Transcript 777:19-25, 778:1-9.

CHESTER LEWIS ACADEMY (2020-2021 SCHOOL YEAR)

272. After K's disastrous freshman year at Southeast High School, in which Complainants had specifically requested an IEP for K but had been refused by the District, with no further discussion by the District of evaluating K for special education despite terrible grades at the

conclusion of the Fall 2019 semester and a nearly-weeklong psychiatric hospitalization related to suicidal ideation, Complainants decided to enroll K at Chester Lewis Academy (“Chester Lewis”), an alternative high school within the District. *See* Transcript 216:14-18.

273. Complainants enrolled K at Chester Lewis Academy “due to its smaller class size, flexibility with schoolwork, really cool teachers that seemed to be really involved in their classes and caring and an important part of it was their flexibility with schoolwork.” *See* Transcript 217:1-5, 7-8; Transcript Vol. 1, at 217, ln. 5-9.

274. Complainants were trying everything in their power to keep K within the District. *See* Transcript 217:24-25, 218:1-9.

275. In August 2020, K was hospitalized again for self-harm statements. *See* Transcript 218:10-23.

276. K was hospitalized from August 11 through August 16, 2020. *See* Transcript 362:3-7.

277. Complainant J D testified that he let the District know about K’s August 2020 hospitalization. *See* Transcript 219:12-15.

278. However, there is evidence that some key District personnel were not notified about K’s August 2020 psychiatric hospitalization until the IEP process began in June 2021, despite the District admitting to being informed about this August 2020 psychiatric hospitalization. *See* Exhibit 1; Transcript 1265:1-12, 1299:17-25, 1300:1, 1336:24-25, 1337:1-3.

279. As K was transitioning from Southeast to Chester Lewis, nobody at Southeast High School contacted Chester Lewis’s Child Study Team or 504 Team regarding K. *See* Transcript 1148:18-23.

280. Similarly, as K was transitioning from Southeast to Chester Lewis, nobody at Chester Lewis contacted anyone at Southeast regarding K. *See* Transcript 1148:24-1149:4.

281. On September 2, 2020, Leroy Parks, Principal at Chester Lewis, sent an email to Chester Lewis teachers notifying them that K had a 504 Plan and that staff needed to ensure the accommodations were followed. *See* Exhibit DD; Transcript 1102:16-23.

282. After K’s 504 Plan Re-Evaluation at the beginning of the 2020-2021 school year, the September 8, 2020, 504 Plan for K included no substantive changes from previous 504 Plans, other than a change geared toward remote learning and some comments that were not actually accommodations. *See* Exhibit 88; Transcript 222:3-6.

283. On September 9, 2020, Complainants sent an email to K's teachers to open the lines of communication and to provide some guidance on how to interact with K. *See* Exhibit 89; Transcript 222:8-22.

284. On September 11, 2020, Complainant J D sent Virginia Quincy, K's seminar teacher at Chester Lewis, an email stating that K has a significant processing delay with his processing speed being in the 4th percentile. *See* Exhibit 93; Transcript 223:4-10.

285. Ms. Quincy forwarded the email to Marcia Hansen, special education teacher at Chester Lewis, who replied to state that she is the special education teacher, and she does not provide accommodations for students with 504 Plans; Ms. Hansen advised Ms. Quincy that she needed to follow K's 504 Plan and to direct questions or concerns about "same" to Holly Smith, social worker at Chester Lewis. *See* Exhibit 93; Transcript 222:19-25, 223:1-3.

286. Despite Ms. Hansen, special education teacher and member of the Chester Lewis Child Study Team receiving this email, no special education evaluation was suggested nor requested for K, nor was this email brought to Chester Lewis' Child Study Team's attention. *See* Transcript 224:4-9, 1152:1-25, 1153:1-24.

287. The members of the Child Study Team at Chester Lewis during the 2020-2021 school year were Danae Cramer, Holly Smith, Leroy Parks, Pamela Bush, Tiffany Springob, and Marcia Hansen. *See* Transcript 1315:18-22.

288. Principal Mr. Parks, a member of the Child Study Team, testified that he did not remember the Child Study Team discussing K's processing delay. *See* Transcript 1152:8-20.

289. On September 11, 2020, Ms. Quincy sent an email to Holly Smith, school social worker at Chester Lewis, stating regarding K, "[t]his baby is going to need some help. Let me know what I can do to get him some help." *See* Exhibit 94; Transcript 224:23-24.

290. In response, Ms. Smith stated in relevant part, "On his 504 it is listed that he has 50 percent extra time for completion. I left that accommodation intact. Can you doublecheck the 504 I sent you to see if it appears that way on your end." *See* Exhibit 94.

291. No one from the District contacted Complainants to request to conduct a special education evaluation for K, and Ms. Smith, a member of the Child Study Team did not share this email with the Child Study Team. *See* Transcript 225:8-13, 1154:15-19.

292. On September 15, 2020, Complainants emailed Ms. Quincy because K was behind in all of his classes and they wanted to know what, if anything, could be done to catch K up. *See* Exhibit 96; Transcript 225:17-20.

293. Ms. Quincy's response to Complainants was, "Hang tight for a response. I have spoken to Danae, the counselor, and Holly, the social worker. We are working on a plan." Exhibit 96.

294. The Child Study Team at Chester Lewis met on Wednesdays for approximately two hours in which twenty to thirty students are discussed if there are problems, re-evaluations, or initial evaluations for the children. *See* Transcript 1344:21-25, 1345:1-11.

295. Later that day, Ms. Quincy forwarded Mr. D's email to Danae Cramer, School Counselor at Chester Lewis and member of the Child Study Team, with Ms. Quincy stating, "I receive emails from his grownups, sometimes more than once a day, like this. It is almost every day. I really think he needs assistance. He does have 504. Also, he is new to this. Any thoughts or help would be appreciated. I will respond in a bit. Please let me know what I can help with but it is going to take more than me. Also, they are often watching him the entire class." *See* Exhibit 100.

296. Ms. Cramer, a member of the Child Study Team, responded to give generic commentary about how "some kids" handle situations like this, but her reply mentioned nothing about evaluating K for special education; later in this email thread, Holly Smith replied to state that "We can request that all the teachers change his Target date due to his 504 accommodation of extended time." *Id.*

297. Later in the day on September 15, 2020, Ms. Cramer reached out to Complainants and let them know that she would change the due date for his assignments, and the solution to this issue is that she would take another look at K's 504 Plan the next day to see if there was any additional help that could be provided. *See* Exhibit 97; Transcript 226:11-21.

298. Instead, the solution from the District was that the target date in Edgenuity, the school's website that shows how far behind a student is on an assignment, would be moved in order to assist K with motivation. *See* Transcript 1160:15-20.

299. On September 15, 2020, Ms. Quincy also emailed Ms. Cramer and Ms. Smith, both members of the Child Study Team, and stated "I know Marcia said students on 504s can receive assistance from one of the paras. She reminded me you handle 504s. I think it would be great if he has this accommodation." *See* Exhibit 101; Transcript 231:10-15.

300. Although Mr. Parks testified at the hearing that the Child Study Team reviewed K the following day (September 16, 2020), there is no documentary evidence confirming or even suggesting that occurred, and it is beyond debate that no special education evaluation for K was initiated or requested by the District at that time. *See* Transcript 1156:24-25, 1157:1-4.

301. Despite this clear request by K's teacher for a para for K, sent to two members of the Child Study Team, no para was ever offered to K and this email was never shared with the full Child Study Team. *See* Transcript 231:16-20; 1161:14-25, 1162:8-10, 1163:1-4, 1164:1-3.

302. On September 16, 2020, Ms. Smith sent Complainants—K's parents, who are not teachers— suggestions on how to increase K's work completion, including having Complainants check in on K's work and push K to complete it, with this work supposed to be done by Complainants in the evenings to try to move K forward academically. *See* Exhibit 98; Transcript 228:6-21.

303. On September 16, 2020, Marvin Foxx, K's history teacher, reached out to Complainants and informed them that K had only completed 3.8% of the history course and was not doing his work during class; Mr. Foxx also stated that other students were complaining about K. *See* Exhibit 99; Transcript 228-22-25, 229:1-20.

304. Mr. Foxx's email and concerns were not brought to Principal Mr. Parks' attention. *See* Transcript 1159:10-13.

305. Between September 30, 2020, and October 1, 2020, Ms. Quincy, Josh Schepis, another one of K's teachers, and Mr. Foxx, emailed each other and Complainants letting them know that K was still not doing his classwork and was ignoring teachers. *See* Exhibits 107, 105; Transcript 235:5-23, 236:5-7, 237:14-17, 237:21-24.

306. On September 30, 2020, Ms. Quincy emailed three other teachers at Chester Lewis to state, "Ryan [Anderson] and I were discussing this earlier. Something is not right. He has also disappeared visually. He used to show himself, often, and talk. Now, he barely responds." *See* Exhibit 105.

307. Mr. Foxx, K's History teacher, responded "He's still not working in my class." *Id.*

308. On October 1, Ms. Quincy sent an email to Complainants and numerous teachers and administrators at Chester Lewis stating the following:

Good morning. First, I want you to know I have cc'd in teachers who have expressed concern and the counselor and social worker so communication is more streamlined. I have noticed some changes in K. He does not want to talk. He

checks in and does not respond. Sometimes, when I talk to him he hangs up. I told him if he would finish up his unit I would give him a project about character analysis and development based on his outfit he is building at home. I thought he would be excited, but he seems to have shut down. He has not logged into his English class on *Edgenuity* since 9/22. Please let me know if I can do anything. I told him, today, I can't read his mind or help him if he doesn't let me know his needs. He remained silent and eventually left Teams.

We are here. Please let us know what we can do to help.

Concerned,
Virginia Quincy

See Exhibit 107.

309. Mr. D testified that these were the same things that had been happening over and over with K—not doing work, falling behind, ignoring teachers, shutting down. *See Transcript 236:8-19.*

310. On October 5, 2020, Complainants sent a very lengthy email in response to Ms. Quincy's October 1, 2020, email expressing concerns about K, with Complainants emailing all of K's teachers and two members of the Child Study Team at Chester Lewis and stating that Complainants have had to prioritize K's happiness and mental health which unfortunately meant de-emphasizing academics. *See Exhibits 108, 109; Transcript 240:25, 241:1-11.*

311. That October 5, 2020, email from Complainants reads as follows:

Thanks for writing. I apologize that it has taken me this long to respond. I'm pretty discouraged and it is taking a lot for me to work up the motivation to get into this.

First I want to reassure you that K is not in danger. I work from home and he sits in the same room as I am. He has been pretty typical, mood-wise.

Second, this shift in him a couple weeks into the semester is not surprising. We always see some kind of change around this time as he settles in and gets comfortable with school. He starts testing boundaries, withdraws from the schoolwork somewhat (more in some classes than others), etc. We expected to see something around this time.

The situation with K is that we are having to balance our hopes for his academic performance with his mental health. S and I believe in the idea that "Kids do well if they can", which was told to us by one of his therapists. We believe that is true in K's case. He didn't just decide to be a jerk and that he doesn't care. We truly believe that he wants to learn and he wants to do well, but there is something blocking him from doing the work. He has always had a very strong resistance to actual work, and the more that is requested/demanded of him, the more unhappy he gets, and the more he is pressured, the more he shuts down. He hates the physical act of writing with

pen and paper, for example. Our current theory is that anything which requires him to be mindful and present is extremely difficult for him, and that schoolwork tends to pull him in that direction. He would rather be somewhere else in his head at all times.

Last year we came to realize that even the moderate pressure we were putting on him to do his schoolwork (we simply asked him to try not to fail his classes) was creating a home environment for him that he couldn't handle. He was having thoughts of self harm, overwhelming anxiety and depression, etc. We had to make a choice to prioritize his happiness and mental health, and unfortunately that meant de-emphasizing his academics. We stopped pressuring him and outwardly, we stopped caring very much about his grades. Of course, it's impossible for us to actually not care, but we have to act like it. The advice we got from his therapist was to prioritize the family relationship first, and when it came to school, to "let him fail" if that's what has to happen.

I tell you all of this to explain why we feel like we can't lean on him harder about school.

So here we are, we find ourselves in this situation where K is disengaged, not doing the work, hardly talking to his teachers, and if we pressure him very much, we have worries for his mental health. I would like to think he would be doing better in person at Chester Lewis but that's impossible to know. So what do we do? Where do we go? I have some thoughts.

1. We can ask him to come back from the sofa to his desk, where I can see his screen. That will put a little accountability back. I don't spend much time throughout the day hovering over what he's doing since I'm working, but at least he'll know I can turn around and see his screen.
2. We can brainstorm on ways to reward him for getting work done, both short term immediate rewards and longer term ones. I'm willing to try to provide whatever in-person rewards might work for him here. We may have to change up the rewards periodically as no matter what it is, he'll eventually get bored with it.
3. We really need to convince him that Edgenuity's display of his completion percentage is just a feature of the program – that it always shows that – and not something we actually care about (even if it is). When he sees himself being behind, he immediately gets overwhelmed and gives up. He may do better if we can eliminate that pressure, but I think it may be difficult to convince him that the percentage doesn't matter. Once he decides something is a barrier for him, it's tough to change his mind. I'm open to any thoughts or ideas you all have. Thanks so much for your concern. We definitely all just want to find a way for K to be successful.

See Exhibit 108, 109.

312. The District's staff at Chester Lewis attempted to paint the October 5, 2020, email from Complainants as being uninvolved or lax parents, ignoring the dozens, if not hundreds, of emails Complainants had sent to District personnel over the years trying desperately to figure out a solution to K's problems with school, but even in this email, Complainants set forth some actions they (Complainants) could take to continue helping K's educators with his progress in school, despite not being educators themselves; Complainants also clearly discussed the history of K's problems and that "there is something blocking him from doing the work," as well as discussing K's history of thoughts of self-harm, overwhelming anxiety and depression, and that even moderate pressure placed on K to do his schoolwork was creating a home environment for him that K could not handle. *See* Exhibit 109 and 110.

313. Despite Complainants notifying K's teachers that they needed to step back and prioritize K's mental health instead of acting as K's at-home educators, Chester Lewis personnel still insisted that help from home was necessary for getting things get accomplished with K. *See* Transcript 1222:4-12.

314. Mr. Parks testified that he could not remember the emails discussed above, from the October 2020 time period, being discussed by the Child Study Team, despite members of the Child Study Team receiving these emails. *See* Transcript 1166:8-1167:21.

315. Ms. Springob, a school nurse at Chester Lewis Academy, testified that part of the reason for the existence of the Child Study Team is to identify kids who need special education and create interventions for them that work and that allow them to make academic progress, and that it is not up to parents to solve educational problems for their kids within the District. *See* Transcript 1303:17-18, 1357:10-19.

316. Despite this clear commentary about the significant problems with K and schoolwork, the District still did not request to evaluate K for special education, nor conduct a special education evaluation of K; instead, the District continued tinkering with K's 504 Plan. *See* Transcript 234:11-25, 235:1, 236:20-21; 243:1-7, 1165:23-1166:4; *see also* Exhibit 104.

317. The Child Study Team did not request nor order an evaluation for emotional disturbance nor a functional behavior assessment for K during the Fall 2020 semester. *See* Transcript 1168:5-12.

318. Mr. Foxx sent an email only to other Chester Lewis staff disparaging and distorting Mr. D's lengthy comments about K discussed above and in Exhibits 108 and 109, and Holly

Smith, Social Worker at Chester Lewis and member of the Child Study team, added that the school should continue to check in verbally or non-verbally with K for every class because “Technically his 504 states” that, “even if Mom and Dad have to take a different approach at home.” *See* Exhibit 111.

319. During this time period, K was also still receiving therapy, counseling, and medical treatment from his providers, including a therapist and a psychiatrist. *See* Transcript 241:21- 25, 242:1-4.

320. On October 7, 2020, Tiffany Springob, school nurse, sent an email to K’s teachers requesting that they fill out a Teacher Input for Section 504 Evaluation form. *See* Exhibit 112; Transcript 243:12-14, 1307:12-16.

321. The Teacher Input forms gave very poor ratings of K’s behavioral and academic performance and further state that K was not logging on for class and not doing his schoolwork. *See* Exhibits 114, 115, 116; Transcript 244:4-25, 245:1-23.

322. These were the same themes seen in K for years at school. *See* Transcript, 245:20-25.

323. In Ryan Anderson’s (K’s Business and Technology teacher) October 7, 2020, Teacher Re-Evaluation Form for K’s’ 504 Plan, many areas were marked as “not observed.” *See* Exhibit 113; Transcript 1225:1-25, 1226:1-25, 1228:7-25, 1229:1-25, 1230:1-18.

324. Mr. Anderson testified that in filling out this form, he wanted to “give some benefit of the doubt” to K, indicating that some of the scores memorialized on this form were possibly inflated. *See* Transcript 1228:22-24.

325. In another instance, Mr. Anderson admitted that in regard to “Works cooperatively with others” he “honestly [] probably at this point should have said not observed because I never had any other peers in the classroom” rather than marking “below average,” again indicating that the scores Mr. Anderson put on the form were not exactly as he observed. *See* Exhibit 113; Transcript 1229:9-13.

326. Mr. Anderson’s form is also riddled with other inconsistencies, such as giving a K for a 5 for “generally cooperates or complies with teacher requests” but also stating in the same vein that “he buys in for a little bit but once we log off the meeting, nothing gets completed. I always get that I don’t care vibe.” *See* Exhibit 113; Transcript 1258:20-25, 1259:1-7.

327. On Mr. Anderson’s form, under “Classroom Observations,” there is no text; despite K being remote at the time, any member of the Chester Lewis Child Study Team or 504 Team

could have asked for an invite to observe K during class time using the Teams video conference technology at any time if they chose to and asked to. *See* Exhibit 113; Transcript 1298:19-25, 1302:1-13.

328. Initially, Mr. Anderson testified that K was not “disruptive by any means” but then testified that “K [en] always exhibited this behavior, what I would call like the shutdown behavior when he didn’t want to do something where it was the head on the desk or the just refusal to work on his stuff.” *See* Transcript 1206:1-5, 1237:4-8, 1247:18-25.

329. Mr. Anderson’s testimony in which he avoided answering questions on cross-examination further compounded the hearing officer’s concerns that the District’s witnesses were unwilling to provide forthcoming answers about this matter. *See* Transcript 1260:10, 1261:24, 1265:25, 1268:11, 1268:20, 1270:9, 1272:14, 1279: 2, 1279:20-22, 1286:13-16, 1292:25.

330. October 10, 2020, Notice of Meeting sent from Chester Lewis Academy for re-evaluation under Section 504. *See* Dist. Exhibit 319.

331. During the October 2020 504 Plan Re-Evaluation meeting for K, no one on the Chester Lewis 504 Plan Team contacted K’s providers, despite Chester Lewis having in its possession a release form signed by Complainants to contact K’s providers, with the release form even providing the names and contact information for these providers, nor were any records from these providers reviewed. *See* Exhibit 122; Transcript 1337:10-25, 1338:1-12, 1339:16-23.

332. On October 20, 2020, K’s 504 Plan re-evaluation meeting occurred. *See* Exhibit 119. The meeting was quick, and the 504 Team talked about K’s difficulties and the lack of work he was completing. *See* Transcript 248:7-10.

333. An IEP was not mentioned by the District during this meeting. *See* Transcript 248:13.

334. However, as a result of the meeting, K’s 504 Plan was slightly revised and dated November 2, 2020. *See* Exhibit 124, Dist. Exhibit 324; Transcript 252:5-9.

335. Only two minor changes were made: “K will check in each hour for attendance but may not necessarily work on that particular class if he is focused and trying to finish another project or assignment. He can either check via Teams or send an email to you” and the change of K’s name to A D and his preferred pronouns. *See* Exhibit 324; Transcript 252:18-23, 243:1-4, 1101:11-14.

336. The Hearing Officer notes that the first accommodation change was not truly an accommodation, but rather a statement of what all students at Chester Lewis were already permitted to do. *See* Transcript 1101:18-22, 1176:8-22, 1246:2-5.

337. Notably, as Principal Mr. Parks and Mr. Anderson testified, *every* student at Chester Lewis was afforded the opportunity to work flexibly on their assignments. *See* Transcript 1088:7, 1096:17-24, 1101:18-22, 1176:8-22, 1246:1-5. Therefore, the new “accommodation” featured in the October 2020 504 Plan update stating that K could work flexibly was not a true accommodation tailored to K’s individual needs.

338. Ms. Yager testified at the hearing that the October/November 2020 revisions, in which only two changes were made to K’s 504 Plan, were not sufficient changes. *See* Transcript 1484:2- 25, 1485:1-14.

339. On October 14, 2020, Mr. Anderson made Ms. Smith and Ms. Cramer, members of the Chester Lewis Child Study Team, aware that K was not doing any work in his class, that Complainants were aware that K was not doing work in *any* class, and that Complainants were working on bringing someone in to help K, as Mr. Anderson forwarded an October 14, 2020, email from Complainants stating the same. *See* Exhibit 118; Transcript 1233:16-23.

340. On November 4, 2020, Tiffany Springob, Nurse at Chester Lewis Academy, sent an email to the parents thanking them for participating in the re-evaluation meeting held on October 30, 2020, and provided a copy of the updated Section 504 Accommodations Plan. *See* Joint Exhibit FF.

341. During the Fall 2020 semester, Complainants indeed brought in D W, Mr. D’s cousin, to provide K one-on-one help, 6 hours a day, three days a week. *See* Transcript 247:6-18.

342. Ms. W had reached out to Complainants and offered to help K academically because she knew he was struggling and essentially was not doing any work in school. *See* Transcript 514:2-19.

343. Ms. W worked with K one-on-one for several hours a day, two or three days a week, for which she was compensated by Complainants alone, beginning in October 2020 and through January 2021. *See* Transcript 250:15-25, 515:11-17, 516:20-24.

344. Ms. W provided one-on-one individualized educational and academic help and tutoring that was solely focused on K. *See* Transcript 517:1-5.

345. Ms. W described her work with K as intense and that a lot of work went into it. *See* Transcript 520:1-20.

346. On some weekends, Ms. W brought K home with her so the two could work on more homework; Ms. W believed this made a difference in K's completion of his schoolwork. *See* Transcript 518:4-22.

347. Although Complainant Mr. D and Ms. W exchanged texts venting their frustrations regarding K, Mr. D linked his frustrations and difficulties at home with difficulties and frustrations at school. *See* Transcript 769:4-25.

348. Ms. W testified that teachers at Chester Lewis had permission to speak with her and that she did speak to some teachers. *See* Transcript 521:13-22.

349. The District was aware that Ms. W was working with K, and emails between Complainants and Chester Lewis personnel from that time period confirm same. *See* Exhibits 120, 125.

350. In January 2021, at the start of the Spring 2021 term, Ms. W emailed Ms. Quincy at Chester Lewis to state that K "does absolutely nothing when I'm not around, and even when I am, some days are a struggle. If I can help in any way after he returns to school, I am happy to do so, but getting him to work outside of school hours is an even bigger challenge." Exhibit 130.

351. This email was forwarded to some members of the Child Study Team on February 5, 2021. *See* Transcript 255:9-13.

352. No teacher or employee at Chester Lewis suggested to Ms. W that K should be placed on an IEP. *See* Transcript 523:14-19.

353. In spite of the fact that the District was aware that Ms. W was assisting K on a one-on-one basis, it did not offer a District tutor or para, and did not offer to reimburse Complainants for hiring Ms. W. *See* Transcript 250:2-14.

354. Ms. W testified that getting K to do schoolwork on evenings and weekends was very difficult, and that K needed hand-holding every step of the way to get work done. *See* Transcript 522:23-25, 523:1-13.

355. During K's therapy sessions with his therapist Mr. Todd Hawkins, K shared that he had a tutor to help him with school. Based on his interactions with K during his treatment of him, Mr. Hawkins believed that the tutor, Ms. W, had been helpful for K. *See* Transcript 111:8-14; Exhibit 262.

356. At the end of the Fall 2020 semester, one of K's teachers, Mr. Anderson, began noticing an improvement in K's participation in class, which Complainants attribute to working with Ms. W on a one-on-one basis. *See* Exhibit 126; Transcript 253:14-25, 254:1-8, 1269:12-25.

Ms. W stopped working with K in January of 2021, because K returned to in-person learning at Chester Lewis. *See* Transcript 516:18-24, 517:14-20.

357. The “improvement” noticed by Mr. Anderson at the close of the Fall 2020 semester was short-lived; on January 28, 2021, after returning to in-person learning at Chester Lewis, Amy Lou Rishell, one of K’s teachers, sent an email to Ms. Cramer and Mr. Parks stating that she was “looking to find a solution to [K] D’s desire to refuse to engage in any type of response to me.” *See* Exhibit 131; Transcript 256:1-16.

358. Mr. Parks responded that Ms. Rishell should review K’s 504 Plan, which had already proven to be ineffective. *See* Exhibit 131; Transcript 256:19-25.

359. Ms. Rishell noted that although she had read it before, she would read it again, and after her review, she stated that she remained concerned “that something significant had changed” and that K was “completely non-compliant, even to responding to hello.” *See* Exhibit 131; Transcript 257:3-4, 22.

360. This teacher concern did not result in the Child Study Team neither requesting consent for nor referring K for a special education evaluation. *See* Transcript 1173:2-6.

361. Similarly, on January 29, 2021, Ms. Quincy yet again emailed Complainants to state that K “is not wanting to work or communicate today. He has put his head down.” *See* Exhibit 136.

362. Complainant Mr. D responded, stating “What you’re seeing right now is one of the main fixtures of the difficulties we have with him and have not been able to figure out”; in a follow up email, Mr. D asked Ms. Quincy to forward this email to other teachers, and which Ms. Quincy forwarded to other staff at Chester Lewis including Ms. Cramer, a member of the Child Study Team, whose only reply was “I did. ”, with Ms. Quincy then stating to Ms. Cramer, member of the Child Study Team, “He is going to be a challenge for us all.” *Id.*

363. Also on this date, January 29, 2021, K’s Chester Lewis history teacher, Mr. Foxx, emailed other teachers at Chester Lewis stating that K had not “worked in my class since he’s been there and I probably won’t be very ‘patient’ with him when he’s disturbing others who are trying to work.” *See* Exhibit 137; Transcript 258:18-22.

364. Ms. Cramer, member of the Chester Lewis Child Study Team, responded to Mr. Foxx and stated “I do not disagree with your opinion, but tread lightly as he has a 504 and we have ZERO choice but to follow it. I agree; boundaries and expectations must be set but beyond that there is not much we can do.” *See* Exhibit 138; Transcript 259:14-18.

365. Notably, the one thing that the District continued to not do was evaluate K for special education. *See* Exhibit 138; Transcript 259:19-22; 1272:3-8, 1356:16-22.

366. Even the District's own personnel agreed at the hearing that special education would have been an option for the District to consider since the 504 accommodations were clearly not working for K. *See* Transcript 604:1-6.

367. Seven months into the 2020-2021 school year, K was still having a hard time making friends, a trend that had occurred since fourth grade. *See* Transcript 260:25, 261:1-7; Exhibit 140.

368. On February 5, 2021, Mr. Foxx, K's history teacher, emailed Holly Smith, case manager for K's 504 Plan and member of the Child Study Team, to state the following:

Holly – I'm emailing you because you are the Case Manager for A D's 504 Plan. Anyway, having been a part of doing 504's as a principal/asst. principal, there has always been some buy-in from the student receiving the 504. It's my understanding that we have accommodations for A D and that he should be accountable for following the plan as well.

From what I've seen of him in class, he hasn't done or completed any assignments since he's been in class. He's actually gotten more assignments completed when he was remote. He mainly sits and plays on his phone and talks to others during class time. I realize his parents want him to be in-person, but again, he doesn't follow his plan and I don't see how we can follow it if he doesn't.

To hold him accountable, could we at least take away some privileges until he works for at least 20 minutes (non-stop)?

It could have some affect on him, both positive & negative, but we would still be holding his feet to the fire.

Anyway, this is what I propose, let me know what you think?

Marvin

See Exhibit 141.

369. Despite this email to a member of the Child Study Team suggesting that K was the only student on a 504 Plan which Mr. Foxx had ever encountered who hadn't "bought in" to that 504 Plan, Ms. Smith and the Child Study Team did not request nor conduct a special education evaluation, and instead Ms. Smith, a member of the Child Study Team, responded sarcastically, stating, "Can we reward him with special Marvin time?"; Ms. Smith stated that this was "something we have been discussing in the 504 team," but there is zero record of any minutes or notes of those discussions, Mr.

Parks testified he could not remember this issue being discussed by the Child Study Team, and no revisions to K's 504 Plan were made at that time. *See* Exhibit 141; Transcript 1173:25-1174:18.

370. Mr. Anderson testified that around February 2021, it was difficult to manage K's phone use in the classroom in conjunction with K's 504 Plan, which emphasized good relationships with teachers. *See* Transcript 1238:6-18.

371. Mr. Anderson also noted in an email to various Chester Lewis staff, including two members of the Child Study Team, that the "phone parking" system Ms. Smith came up with for all Chester Lewis students was not working for K and was resulting in shutdowns by K, and that K "honestly is pretty defiant to what I ask of him....Anytime I push [K] to do anything, he shuts down. When he shuts down, I notice that he shakes more, and he usually puts his head down....I think it is sad that he wants to go back to SE because he is smart and talented – he could thrive here, but he is choosing not to." *See* Exhibit 142; Transcript 1243:1-15, 1247:18-25.

372. This was yet more language from District personnel indicating their pervasive view that K was just "choosing" not to do schoolwork, without any effort by the District to determine whether K "choosing" not to do schoolwork was connected to his disabilities, as the District did not contact K's providers and did not request a special education evaluation for K.

373. Despite Mr. Anderson stating in writing to two members of the Child Study team that K was defiant, shut down anytime Mr. Anderson pushed K to do anything, and that K "shakes more" when he shut down, no special education evaluation was requested or took place during the 2020-2021 school year.

374. The "phone parking" system was developed with K in mind but implemented across the board at Chester Lewis so as to not draw special attention to K. *Id.*

375. At the hearing, Mr. Anderson testified that K was a very creative student and that some of his different behaviors were due to a lack of knowledge in certain areas, and that K was a social student based on the interactions he witnessed during lunchtime and in the hallways. *See* Exhibit 333; Transcript 1201:5-7, 1201:13-16, 1202:2-4.

376. Mr. Anderson also testified K was a student that needed a relationship with his teacher, he needs a lot of one-on-one attention, assignments tailored to his interests, and that it was difficult to get K to finish his projects. *See* Exhibit 333; Transcript 1202:20-25, 1203:1-17.

377. Additionally, Mr. Anderson stated in the Multidisciplinary Report compiled in June 2021 that K would become dysregulated, silent, and not wanting to communicate with anyone, that

his emotional state was very hot and cold, that he would put his head down and act sick in order to avoid classwork, that K would not always choose appropriate coping strategies, and that K would “require quite a bit of time to reset” when triggered; Mr. Anderson testified that all of those things were happening from the start of the 2020-2021 academic year, and that K “shutting down” affected his schoolwork. *See* Exhibit 333; Transcript 1203:20-22; 1204:1-4, 1205:11-13, 1206:12-22, 1280:7-24, 1281:4-6, 1281:13-25.

378. Mr. Anderson was only an elective teacher for K and admitted that there were many areas for which he could not rate K’s capabilities. *See* Transcript 1224:23-24.

379. However, in his time working with K, Mr. Anderson did observe the following, reflected in the June 2021 Multidisciplinary Report regarding “Classroom Observations” of K:

When he didn’t want to do something, he would log off of his teams meeting if we were remote, or in the classroom he would just put his head down. It got a lot worse when he was given a cell phone. K shuts down when he doesn’t want to do something.

There were days that K would come to school really upset. He would come to class and pace to try to calm down, and he usually did calm down, but whatever was going on in his head acted as a barrier that day to getting any schoolwork done. *See* Exhibit 333 p. 8.

380. Mr. Anderson testified that the behaviors he witnessed from K around Fall 2020 lined up with the concerning behaviors Mrs. Quincy witnessed and discussed in many emails. *See* Exhibit 105, 107; Transcript 1212:4-8.

381. To Ms. Springob’s knowledge, despite the 504 Plan requiring that K meet with his 504 coordinator and counselor weekly, K did not meet with Ms. Smith, K’s 504 coordinator, nor Ms. Cramer, K’s counselor. *See* Exhibit 124; Transcript 1346:10-17, 1346:21-24.

382. Even though Complainants were sending emails to teachers at Chester Lewis throughout the 2020-2021 school year to try to solve the problems that K was experiencing, Ms. Springob acknowledged that no one in the District suggested that K be evaluated for special education. *See* Transcript 1347:1-13.

383. In light of the ongoing and persistent severe problems K was experiencing with school, Complainants contacted Tazim Merchant Salehani, therapeutic consultant, on January 28, 2021. *See* Exhibit 209; Transcript 132:20-25, 133:1-3. In that email, Mr. D stated, “his outbursts and fights at home are harmful to us and to his younger siblings. It’s no longer sustainable for him to continue living at home.” (Id.)

384. On February 4, 2021, Mr. D responded to Ms. Salehani by providing background information regarding K. In his email, Mr. D stated:

These problems have been going on long enough and are bad enough its like its contagious—we're all in individual therapy over HIS stuff. His behavior at home in front of the girls, the anxiety I have about him, the potential at any moment for an argument, it's like our home is a tender box. Whatever he needs is beyond what we can provide at home and him being at home is not sustainable anymore.

So we're hoping to find a program that's appropriate for his needs, financially manageable somehow, and not TOO far geographically from us (but also not too close—we're in Wichita, Kansas).
See Exhibit 209.

385. Ms. Salehani tailors her recommendations for educational placements for children based on their health, academic, and behavioral needs, as well as the family's needs. *See* Transcript 132:3-7.

386. Ms. Salehani reviewed the same materials regarding K that had already been submitted to the District time and time again by Complainants and was concerned about his low processing speed and executive functioning issues. *See* Transcript 140:5-14.

387. Ms. Salehani was surprised to hear that K had not yet been placed on an IEP when she was first contacted by Complainants. *See* Transcript 134:1-3.

388. In February 2021, Complainants expressed to Ms. Salehani that they were looking to place K in a facility with a higher level of care that would include residential components. *See* Transcript 136:1-19; *See* Exhibit 209.

389. Given his condition, Complainants were no longer able to provide K with the support he needed at home and were “hoping to find a program that's appropriate for his needs.” *See* Exhibit 209; Transcript 331:4-7.

390. On February 4, 2021, Ms. Quincy emailed Complainants an “update” on K's “progress,” stating “at this point, we are at a standstill.” *See* Exhibit 140.

391. Three weeks later, Ms. Quincy emailed Complainants again to state “We have not made any improvement in English...academics is not going forward.” *See* Exhibit 143.

392. In response to Ms. Quincy, Mr. D stated “I can't get him to do a damn thing, and when I try, it instantly becomes a huge, dysregulated fight that's just not worth it. So I don't ask him to do anything. It's not a good situation for him but it keeps the peace, kind of. We're working on a plan

for how to get out of this rut. We'll tell you about it when we have a better idea what the heck it is we're doing. Sorry he's so frustrating." *Id.*

393. Complainant Mr. D testified as followed about outbursts by K and fights at home with K: "Typically these fights had to do with us just even trying to have a conversation with him about school, homework, how he was doing, whether he was participating and, you know, we were trying to find that balance of encouraging him to participate in school without creating a worse environment because every time we brought it up, he just exploded, and so a lot of those fights and arguments were around that." *See* Transcript 330:2-11.

394. Mr. D further testified as to the impact and harm K's school and academic problems caused on Complainants, K, and their family testifying that the frustrations and difficulties at home were related to school. *See* Transcript 769:11-772:1-22.

395. Complainant Ms. Z also testified regarding lost educational opportunities for K due to the District's failure to identify K as in need of special education and its failure to furnish special education to K, "K was having pretty significant difficulties in school. We had been taking him to Sylvan and – Sylvan Learning Center here in Wichita for math tutoring specifically because he was missing so many foundational skills that he could not actually do the work in his math class, so we knew that he was having some success there and so we knew that if the school could offer more sort of that one-on-one support, the para, things like that that maybe we could see some progress and so we knew that he needed something stronger. There was also a feeling that we had that an IEP would be taken more seriously than the 504, but that was just – that was a feeling that may have driven part of that, but we knew that K needed support. We knew that K had disabilities that were, you know, preventing him from being successful academically, not just behaviorally." *See* Transcript 818:4-22.

396. On February 25, 2021, Complainants also sent an email to Ms. Springob, Ms. Smith, and Ms. Cramer at Chester Lewis stating "[w]e'd like to revisit getting an IEP put in place for K[en]. When can we meet to start that process?" *See* Exhibit 144; Joint Exhibit GG; Transcript 264:3-5.

397. This email was forwarded to the special education teacher and another member of the Child Study Team at Chester Lewis, Pamela Bush, the next day, and Ms. Bush expressed confusion about what Complainants were requesting; Chester Lewis principal Mr. Parks stated in writing that he "would have liked to talk him [i.e., Mr. D] out of" requesting an IEP for K. *See* Exhibits 144, 148.

398. Despite Mr. Parks trying to “talk [Complainants] out of a special education evaluation,” Complainants insisted that they meant that they were requesting an IEP and not a change to the existing 504 Plan which had already proven to be ineffective. *See* Exhibit 148; Transcript 264:13-17, 265:17-23.

399. After speaking with Ms. Bush, Complainant Mr. D recalls that it boggled his mind why the District would not even consider doing a special education evaluation for K. *See* Transcript 266:3-16.

400. On March 1, 2021, Holly Smith, Social Worker for Chester Lewis Academy, responded, seeking clarification whether the parents wanted a special education evaluation or further modifications to the Section 504 Plan. Upon learning the parents did want a special education evaluation, Ms. Smith informed Mr. D that they would discuss K at the next Child Study Meeting. Joint Exhibit GG.

401. On March 3, 2021, the District sent the parents a PWN seeking consent to conduct a special education evaluation. Dist. Exhibit 327.

402. On March 4, 2021, Complainants signed the Evaluation Request Response Letter authorizing a special education evaluation and asserting that Complainants did not want to utilize general education interventions. *See* Exhibit 326; Dist. Exhibit 327; Transcript 1112:11-18.

403. On March 10, 2021, after trying for years to find success in the District, Complainants took K to blueFire Wilderness Therapy program (“blueFire”) in Idaho based on the recommendation of Ms. Salehani. *See* Transcript 267:2-4, 137:5-8.

404. Ms. Salehani recommended blueFire because she believed it was the right type of program with a therapist who would be the best fit for someone like K, particularly as this therapist works with other kids who also have low processing speed, executive functioning issues and oppositional kids that are emotionally dysregulated. *See* Transcript 138:21-25, 139:1-25, 140:1-14.

405. On March 8, 2021, Mr. D requested that the evaluation be done on an “emergency timeframe.” Leroy Parks responded that they would do their best, but they have limited resources, as they are a small building. Joint Exhibit HH.

406. On March 8, 2021, Mr. D sent an email to blueFire Wilderness indicating he was completing the application. Parent Exhibit 209 at 46.

407. On March 10, 2021, Mr. D took K to Boise, Idaho, for blueFire Wilderness. Exhibit 209 at 48.

408. On March 11, 2021, Complainants emailed Ms. Quincy, English Teacher at Chester Lewis Academy, that he was in Denver on his way back from dropping K off at a wilderness camp in Boise, Idaho. He further stated that he and K flew out to Idaho on Wednesday, March 10, and that K would like be there for at least eight weeks. Mr. D stated “we haven’t told the school or the district, we are still working on how to do that but should be doing that today or tomorrow. *See* Joint Exhibit II; Transcript 650:14-17.

409. Complainants received help from a family member to pay for K’s time at blueFire, as well as a small discount. *See* Exhibit 209, Transcript 334:8-19.

410. On March 12, 2021, Mr. D sent an email to Tazim Salehani, stating: “we want to let him know that he is out for an extended time, but we don’t want to unenroll/withdraw him and we are not sure how much detail to give them, as we are trying to pursue getting him an IEP and eventually want to at least try to get the District to cover some of the RTC costs if we can.” Exhibit 209 at 62.

411. Ms. Salehani testified that no recommendation as of February 2021 had yet been made whether to send K home to Wichita, Kansas, or to a boarding school after he left blueFire. *See* Transcript 142:6-10.

412. On March 15, 2021, Mr. D emailed Leroy Parks, Principal at Chester Lewis Academy, and other Chester Lewis Academy staff members to inform them that K was attending “a therapeutic treatment program for a while.” However, Mr. D does state, “this should not have any affect on getting his IEP set up. We still think he needs it and we want that to be part of the support framework that is in place when he comes back.: *See* Transcript 267:16-25, 268:1-2; Joint Exhibit JJ at 1.

413. On March 15, 2021, Pam Bush, an employee of the District and school psychologist, told Mr. D that the District would not move forward with evaluating K for special education until he “returns to school” because, according to Ms. Bush, “to determine eligibility for Special Education in an IEP requires face-to-face evaluations, so therefore, I will not be able to test until he returns to school.” *See* Joint Exhibit KK.

414. On March 17, 2021, Holly Smith emailed Mr. D to ask what facility K is in and whether they are providing educational services so that the educational request could be forwarded to the treatment facility. Joint Exhibit LL.

415. Leroy Parks testified that this was important because Chester Lewis Academy could send records pursuant to a records request and then dialogue with the teachers there in order to complete the evaluation. Transcript Vol. 5, at 1118, ln. 22-1119, ln. 6.

416. On March 29, 2021, Mr. D responded to Holly Smith that K is at blueFire Wilderness Therapy in Gooding, Idaho and that “they do not have an educational component.” Joint Exhibit LL.

417. On March 29, 2021, Mr. D responded to Pam Bush that they do not know how long K will be gone. Joint Exhibit KK.

418. On March 31, 2021, Pam Bush emailed Dr. Holly Yager, her supervisor, to receive guidance regarding testing for K because he was taken to blueFire Wilderness Therapy about one week after the parent signed consent for the initial evaluation. Dr. Yager forwarded the exchange to Amy Godsey for her input and Ms. Godsey indicated that K should be exited as he was no longer a USD 259 student and that they could not test a student who was not a USD 259 student. This exchange was ultimately forwarded to Leroy Parks, who instructed Pam Ingram, the Registrar, to exit K per the guidance in the email. Joint Exhibit MM; Transcript Vol. 5, at 1119, ln. 7-1121, ln. 10.

419. On April 6, 2021, Shannon Rooney, State Assessment Coordinator for Chester Lewis Academy, sent an email to Leroy Parks and others at Chester Lewis Academy inquiring about K because he was supposed to be testing but she had not seen him recently. Ms. Rooney was informed that K was in an out-of-state facility and marked “medical.” On the same email thread, Pam Ingram asked Leroy Parks if the parents had been informed that K was going to be exited. After the various staff members determined that the PWN to end the evaluation process needed to be completed before K could be exited, Ms. Cramer questioned how K’s absence was different than students who are absent on maternity leave. Ms. Ingram explained that students who are absent on maternity leave are exited from comprehensive school and placed on homebound instruction. Ms. Ingram further explained that Chester Lewis Academy does not have homebound because they use Endgenuity which a student can access from home. However, K was “not in school that offered education and is not in a medical facility, it is a state requirement that if they are physically out of state, they have to be exited.” Joint Exhibit NN.

420. As Mr. Parks testified, Chester Lewis Academy will get a “ding” from the state for students who are on the attendance list but do not take the state assessment. Mr. Parks recalled that Mr. D was most concerned that K would return to Southwest High School if he was exited

from Chester Lewis Academy, but Mr. Parks assured him that K would be accepted back at Chester Lewis Academy. Tr., Vol. 5, at 127, ln. 1118-1128, ln. 16.

421. On April 6, 2021, Pam Bush emailed Amy Godsey that she and Leroy Parks intended to talk with the parents the next day to go over a PWN and the District was ready, willing and able to conduct an evaluation when K returns to USD 259. Joint Exhibit OO.

422. On April 15, 2021, Leroy Parks emailed Amy Godsey informing her that he spoke with the parents that morning about withdrawing K, parents want K tested virtually, and that she will be receiving a call from the parents. Amy Godsey responds on April 16, 2021, that she had received a message and would call them back that day. Mr. Parks responds that he will not take any action on withdrawing the student until he hears from Ms. Godsey. Mr. Parks further noted that he “assured the parents that if and When K is physically back in Kansas that I would reenroll him here and that we would pause the request for testing for now, but they are pushing to do the testing remotely which I told them we can’t do. They had issues at Southwest last year I guess, and they kept bringing that up as well.” Joint Exhibit PP at 2. On October 21, Ms. Godsey reported that she had not received a call back, and Mr. Parks responded that he was going to go forward with withdrawing K so that “he is not on our attendance for state assessments.” Joint Exhibit PP at 1.

423. On March 31, 2021, Amy Godsey, the District’s Mediation/Due Process Supervisor, emailed other District personnel and stated “[t]he student needs to be exited from our District as he is no longer in USD 259. Also, we cannot test a student who is not a 259 student.” *See* Exhibit 159; Transcript 268:19-22.

424. This was Ms. Godsey’s very first response to learning of K’s situation. *See* Transcript 1553:2-1554:6.

425. K was not officially withdrawn from the District until April 21, 2021. *See* Exhibit 168, 169; Transcript 1559:14-18.

426. While Complainants were aware that the District was considering exiting K from the District as early as March, they asked the administration at Chester Lewis not to do so, and in any event, Complainants were not told that K had been officially exited from the district until mid-May by Amy Godsey, Mediation/Due Process Supervisor, over the phone. *See* Transcript 270:6-15; 648:2- 11, 758:2-25, 759:1-25, 760:1-20, 761:3-25, 762:1-4, 763:3-17.

427. An internal debate amongst District personnel regarding whether or not K should be exited took place, unbeknownst to Complainants. *See* Exhibit 160, 162.

428. On May 18, 2021, K was stilling showing as active due to an open PWN with ready, willing and able language in synergy (the District's student information software program), showing it was enrolled to parents on April 28. Chester Lewis staff members will need to confirm whether it was actually sent to the parents via email on April 28, 2021, or not. If it was not sent, Mr. Parks will need to let Amy Godsey know. Joint Exhibit RR.

429. On May 19, 2021, a Prior Written Notice was issued to Complainants stating that "[t]he school stands ready, willing, and able to conduct an evaluation for K D should the student return to USD 259. Parental consent not required." *See* Exhibit 176; Transcript 278:2-5.

430. On May 19, 2021, Holly Smith informs Amy Godsey that the PWN was never sent. Mr. Parks discussed it over the phone with the parents, but it was not mailed. Amy Godsey states that she will do something with it. Joint Exhibit SS. Later on May 19, 2021, the read, willing and able PWN was mailed to the parents. Joint Exhibit UU. Mr. Parks testified this was the procedure that was required under the District's exit procedures in place at the time. Joint Exhibit QQ. Transcript Vol. 5 at 1128, ln. 17-1129, ln. 13.

431. This Prior Written Notice further stated: "Options considered include completing initial evaluation for Special Education services, however, this option was rejected due to the student not being in the state or school attendance at this time." *See* Exhibit 176.

432. Complainants did not receive that Prior Written Notice confirming that the District would be ready, willing, and able to evaluate K should he return to the district until May 19, 2021, because it had apparently never been finalized within the Synergy system. *See* Exhibit SS; Transcript 1133:16-25, 1134:1-2.

433. Ms. Godsey first became aware of K when Mr. Parks contacted her to tell her that an initial evaluation had been requested by Complainants, but that K was attending blueFire Wilderness. *See* Transcript 1504:23-25, 1505:1-16.

434. Ms. Godsey was the District employee who determined that K needed to be exited from the District in accordance with exit protocol. *See* Exhibit QQ; Transcript 1506:8-16.

435. Ms. Godsey had not talked with either Ms. Yager or Ms. Bush before determining that K was to be exited from the District. *See* Transcript 1553:20-25, 1554:1-6.

436. Ms. Godsey was notified very early in the process that Ms. Smith believed that "this situation may turn contentious with parents. They have mentioned feeling blown off by the schools in the past in regard to student's needs." *See* Exhibit 164; Transcript 1557:14-21.

437. As of April 6, 2021, it was Ms. Godsey’s understanding that nobody with the District had notified Complainants that K was being exited from the District. *See* Transcript 1555:25, 1556:1-4.

438. Complainant J D testified that he had a phone meeting with Mr. Parks on April 15, 2021, to discuss K’s status with the District, and Complainant Mr. D testified that Mr. Parks did not discuss nor even mention a Prior Written Notice and the District’s position that they would evaluate K if he returned to the District. *See* Transcript 645:4-10.

439. Mr. Parks testified at the hearing that he reviewed this PWN on the phone with Mr. D, but there is zero firm evidence that this PWN was even created by the District as of April 15, 2021, and an April 15, 2021, email from Mr. Parks to Ms. Godsey following Mr. Parks’ conversation with Mr. D that day mentions nothing about the PWN. *See* Joint Exhibit PP.

440. Complainant J D testified that he asked for this call because Complainants had heard the District wanted to exit K and therefore wanted to ask Mr. Parks not to do so. *See* Transcript 648:8-11.

441. Complainants still lived within the boundaries of the District and classified K as a resident of their home. *See* Transcript 271:14-19.

442. Nonetheless, the District still “exited” and withdrew K from enrollment with the District in mid-May 2021. *See* Exhibits 176 and 177.

443. The Prior Written Notice Complainants received dated May 19, 2021, stated the District “stands ready, willing and able to conduct a [special education] evaluation for K D should the student return to USD 259. Parental consent not required.” *See* Exhibit 176.

444. K received grades of all “F” for his sophomore year at Chester Lewis Academy during the 2020-2021 school year, as reflected in his transcript; Chester Lewis Principal Mr. Parks stated as to why those grades were assigned to K, “I can only imagine that he hadn’t turned his work in or wasn’t working at all.” *See* **Exhibits 191** and **352**; Transcript 1140:25-1141:1.

BACKGROUND OF DECISION TO PLACE K AT LRA

445. On April 12, 2021, K’s psychiatrist, Dr. Mercedes Perales, wrote a recommendation letter that K attend blueFire as K needed a higher level of support, and he was still having issues with school. *See* Exhibit 261; Transcript 356:3-25, 357:1-6.

446. K was evaluated by Dr. Jeremy Chiles during K's time at blueFire, and in his report dated April 27, 2021, Dr. Chiles stated that "[K] evidenced lower than expected processing from the time he was young. This impacted his ability to stay caught up in school. It impacted his self-confidence. He needed a slower pace during middle school." *See* Exhibit 206, p. 4. Complainants' witness Ms. Tazim Merchant Salehani testified that Dr. Jeremy Chiles' psychological evaluation of K, Exhibit 206, was fundamental in the decision to recommend that K be placed at a residential program. *See* Transcript 152:12-15.

447. Dr. Chiles' report further stated, "As [K] moved into his high school years, he has not been able to keep up the pace with his peers as it involves social functioning or academics. He is immature. He has become increasingly overwhelmed, which manifested in dramatic behaviors, manipulation, and other ways to avoid expectations. He engaged in some self-harming behaviors in the form of cutting. He engaged in unhealthy interactions online. He lacks social etiquette and awareness into boundaries. In general, [K] lacks coping skills." *See* Exhibit 206, p. 4.

448. Dr. Chiles' report references that K "was hospitalized for psychiatric purposes. The first was February 24, 2020, through February 28, 2020. The second was August 11, 2020, through August 16, 2020." *See* Exhibit 206, p. 4.

449. In the "Strengths and Weaknesses" section of Dr. Chiles' report, it states, "[K] has processing delays that make traditional school and learning difficult for him. He lacks coping skills and he is not great at social relationships." *See* Exhibit 206, p. 5.

450. Dr. Chiles' report and testing found that K's "Processing Speed" was in the 13th percentile. *See* Exhibit 206, p. 6.

451. Dr. Chiles' report and testing demonstrated that K's academic fluency was at grade equivalent 6.5 and percentile rank 19, despite being in the tenth grade at the time of testing; Dr. Chiles wrote that this score "is below the range expected based on his age and grade placement, and well below the range expected from his Verbal Comprehension composite from the IQ test. Academic Fluency is a measure of how rapidly [K] can complete simple tasks in reading, writing, and math without making mistakes." *See* Exhibit 206, pp. 10-11; Transcript 146:5-8.

452. Dr. Chiles' report notes that on the *Millon Adolescent Clinical Inventory* (MACI) test, K's:

responses are similar to other people who are emotionally disconnected and difficult to get to know. They are likely to have difficulty making friends related to a lack of social/interpersonal skills. They are often characterized by others as

being reserved and guarded. They have difficulty understanding the nuances of social discourse. They have difficulty engaging with others, while evidencing limited self-awareness and insight into the impact of their behavior on others. They are often apprehensive, socially ill at ease, and withdrawn. They expect problems and difficulties will come their way.

[K's] responses on the MACI are similar to other people who experience frustration and agitation on a regular basis. They are quick to become overwhelmed and to feel that life is out of control. This may translate into them viewing life as hopeless and unlikely to get better in the future. They are often viewed by others as tired and apathetic. They present with a defeatist and fatalistic attitude. Pushing through obstacles and challenges is an arduous process. Their pessimism translates into low self-esteem and guilt regarding their inadequacies.

On the MACI, [K] responded consistent with people who have a history of demonstrating fluctuating moods, erratic behaviors, and other aspects of emotional instability. They are often viewed by others as defiant and argumentative. They are perceived as irritable and having difficulty managing their temper. This is especially evident when they feel depressed and hopeless. They harbor considerable anger and resentment toward significant others yet, at the same time, need to be close to the same people for support and guidance. Resentment may take various forms including procrastination, inefficiency, and obstinance. They often feel misunderstood and unappreciated. In many respects, they serve as their own worst enemy. This involves them behaving impulsively and being slow to learn from mistakes.

On the MACI, [K's] responses are consistent with other people who manifest poor self-esteem. They perceive themselves as weak, inadequate, and helpless. They harbor so many self-doubts that even when they do succeed, they tend to gradually undo their accomplishments. Success does not enhance their self-confidence, but instead sets in motion a tendency to increase expectations. This has the potential to trigger anxiety that may immobilize them. In relationships, these people take on inferior and subservient roles.

See Exhibit 206, pp. 11-12

453. Regarding the results of the *Minnesota Multiphasic Personality Inventory-Adolescent* (MMPI-A) test, Dr. Chiles wrote the following regarding K:

On the MMPI-A, [K's] responses suggest he is like other people who have difficulty containing their impulses. They are inclined to act without thinking ahead. This is related to them having difficulty with emotional regulation. It is rare that they think about the possible consequences of their actions either to themselves or others. These people have a history of feeling depressed and discouraged. A lack of energy, being unmotivated, and negative attitude often persist.

[K's] results from the MMPI-A yielded significant elevations on scales 2, 4, 6, 7, 8, and 0. [K's] responses are consistent with others who are impulsive and have difficulty delaying gratification of their impulses. They are frustrated with their own lack of accomplishment. They resent demands placed on them by other people. They are anxious, nervous, high strung, and tense. They worry excessively, while being vulnerable to real and imagined threat. They anticipate problems before they occur and overreact to minor stress. In addition to having a history of feeling hopeless and helpless, they evidence clinical symptoms of depression including slow personal tempo and lethargy. They are pessimistic about the world in general and, more specifically, about the likelihood of overcoming their problems.

On the MMPI-A, [K's] responses suggested he is similar to other people are inefficient when it comes to carrying out various responsibilities. They are rigid and inflexible when it comes to thinking and problem-solving. They often feel ineffective. They have difficulty being assertive. They come across as immature and at times childish. They are often self-centered and selfish. They are insensitive to the needs and feelings of others. They are often interested in others as it pertains to what they can do for them. They are likely to feel guilty about perceived failures. Withdrawal from everyday activities and emotional apathy are common. They feel more comfortable when alone or with a few close friends. These people are difficult to get to know. They are over controlled emotionally and not comfortable displaying feelings directly.
See Exhibit 206, pp. 12-13.

454. In the "Diagnostic Formulation" section of his report, Dr. Chiles wrote:

Attachment and the ability to develop and maintain strong connections with others has been difficult for [K].

While bonding and attachment issues are relevant for [K], he also experiences neurodevelopmental challenges that further impact his ability to accurately read and make sense of social cues and nuance, manage and understand his feelings and emotions, engage with others in give and take interactions, and evidence a level of interest in others that is typical for someone his age. In each of these areas, A D evidences considerable difficulty. A combination of attachment and autism spectrum issues are responsible for [K]'s past and present relationship struggles.

To expand, from an early age [K] evidenced behaviors and symptoms that were indicative of developmental challenges and had features of autism. [K] was rigid in his thinking, emotionally dysregulated, and prone to shutting down and escaping having to deal with challenges. It has been difficult for [K] to express his thoughts and feelings clearly. When [K] is stressed or overwhelmed, it is even harder for him to express himself. This is also the case when he has difficulty making sense of what is expected of him. Further, [K] has difficulty expressing himself clearly related to him having

difficulty understanding his feelings and emotions, the experiences of others, or the big picture of what is going on around him.

From an early age, problems with social relatedness were evident. At home and school, [K] often found himself alone or with a few people he connected with. He has difficulty connecting with others and he comes across as awkward. There are times he is interested in interacting with others, whereas other times he is fine being alone. [K] also has difficulty understanding the thoughts, feelings, and motivations of other people. As a child and during his years in school, [K] evidenced deficits involving executive functioning that made it even harder for him to express his thoughts and ideas clearly and accurately. He is a concrete thinker who experiences the world in black and white terms.

While [K] evidences strong verbal reasoning and nonverbal reasoning, working memory is average, and processing speed is well below average. Lower than expected processing speed combined with executive functioning challenges and neurodevelopmental challenges impact his ability to manage daily tasks. Further, anxiety and depression get in the way of [K] being able to think reasonably and rationally about the impact of his behaviors. Additionally, once information becomes complex or if there are more than simple steps to complete a task, [K] is quick to become overwhelmed. This is evident when it comes to A D being able to manage his feelings and emotions, cope with academic expectations, or manage interactions with others. His emotional volatility makes it difficult for [K] to manage interactions with others, deal with negative selftalk, follow through with basic expectations, and in general navigate various aspects of his daily life.

[K]'s challenges the last few years have been building, while becoming out of control since the pandemic. He has managed at times and felt out of control and discouraged other times. [K] is confused about his identity and to some degree, where he fits in with his family. Circumstances involving the pandemic have made things worse in that [K] does not know how to navigate the new normal as it involves distance and online learning. Related to features of neurodevelopmental disorders, [K] is prone to misunderstand situations and overreact to them. This has manifested in [K] losing his temper, lashing out, and ultimately becoming increasingly estranged and disconnected from family members. He looks to technology as a means of trying to escape his problems and challenges. When attempts were made by Mr. D and Mrs. Z to get him to follow through with academic and other expectations, [K] responded with increasingly anger and hostility.

Further awareness of the impact of anxiety and emotional dysregulation on [K]'s functioning is important to consider in relation to aspects of neurodevelopmental challenges. [K] ruminates and engages in irrational thinking often. Related to difficulty talking about and articulating how he feels when under stress or pressure, along with him being prone to lack awareness

into various emotions he experiences; fear, sadness, and frustration build. As mentioned above, this has the effect of [K] shutting down and looking to escape through electronics and technology.

From a diagnostic perspective, [K] meets criteria for an Other Specified Neurodevelopmental Disorder. Generalized Anxiety Disorder and Disruptive Mood Dysregulation Disorder are evident. [K] has difficulty sustaining focus and staying on task. He has difficulties with executive functioning impacting his organizational skills and ability to follow through. These issues are made worse by a neurodevelopmental disorder, anxiety, and mood Instability. These issues combine to make learning challenging for [K]. Of note, [K] does not evidence learning disorders in core academic subjects. He was underachieving in school related to shutting down and avoiding doing schoolwork. [K]'s knowledge of simple math facts is an area of weakness. He evidences deficits in handwriting. Processing speed as talked about previously has always been an issue for [K]. While [K] evidences executive functioning difficulties, a diagnosis of ADHD is not indicated. [K] does not evidence a substance use disorder. He does not evidence aspects of bipolar disorder nor is he dealing with psychosis.

See Exhibit 206, pp. 15-17.

455. Dr. Chiles' report gave "Specific Treatment Recommendations," including the following:

2. Following [K's] stay at Blue Fire Wilderness, it is recommended that he is placed in a residential therapeutic setting that works with students diagnosed with high functioning autism, neurodevelopmental challenges, problems and concerns involving attachment, demonstrating emotional difficulties, behaviors that impact his health and well-being, academic challenges, and lack of self-confidence and sense of self. Such a setting will provide [K] a combination of nurturance, therapeutic support, social development opportunities, opportunities to develop hobbies and interests, etc. Such a setting will provide him with ongoing support, structure, and nurturance to develop healthy coping skills, learn to express feelings and emotions effectively, develop mindfulness, find a direction to pursue in the future, and improve his overall interpersonal/relationship functioning. [K] should have access to individual, group, and family therapy. He should have access to a supportive peer culture and solid academic curriculum. This recommendation is given over [K] returning home due to the need for him to remain in a setting where there will be a level of structure to ensure he avoids harming himself and learns healthier means of coping besides avoiding and relying on electronics, learns to develop meaningful and lasting relationships, and continues to receive academic support, needed to help him become successful across all aspects of his life.

7. A will benefit by attending a school setting where he receives access to small class sizes and teachers who have time to work with each student to address their academic needs. A will benefit by being able to take tests in a

quiet environment with few distractions. He is in need of extra time (time and a half) when working on assignments, tests in class, and standardized exams. A will benefit by being taught in a multimodal manner that incorporates visual, oral, written, and hands-on strategies. Social distractions within the classroom should be kept at a minimum. In general, A is in need of developing study habits and improving organizational skills. This will involve him doing schoolwork and preparing for exams on a regular basis. Additional academic recommendations are provided below:

a. A needs to work on study skills, note taking, and self-monitoring. Specifically, he needs to learn how to effectively prepare for tests. A should be shown how to produce effective chapter outline, definitions and practice essays. Further, whenever possible, A needs to have instructions, examples and models written down to ensure that he comprehends what he is learning. In addition, it is critical that A understands the similarities, differences and connections to already learned material. He would also benefit from help keeping a planner with sections for daily assignments, as well as for weekly and monthly events.

b. A would benefit from having academic material introduced in an explicit, step-by-step, and sequential manner. Tasks need to be broken down into smaller, more manageable components, underscoring the relationship among component parts and identifying the overall concept being taught. Whenever possible, A needs to have instructions, examples and models written down (e.g., math and science formulas, writing strategies, etc.) to ensure that he comprehends what he is learning and can apply it at home. In addition, it is critical that A understands the similarities, differences and connections to already learned material.

c. A needs cues to help him plan and execute tasks. Visual and/or auditory cues should be provided at all times that remind him of where he should be, and what the goal is. Towards this effort, A should meet with his teachers on a regular basis and make sure that he understands the material being taught. He also needs to have instructions, examples and models written down (e.g., math and science formulas, writing strategies, etc.) to ensure that he comprehends what he is learning and can apply it at home. Further, it is important that he learns to break large projects into smaller tasks.

d. It is recommended that A receive extended time (100% extra time) when taking tests and quizzes in class and standardized exams.

See Exhibit 206, pp. 17-19; see also Transcript 146:25, 147:1-9, 273:24-25, 274:1-18.

456. Dr. Perales also testified that she would have no medical reason to disagree with a licensed psychologist's (Dr. Chile's) evaluation to recommend placement of K in a therapeutic boarding school. *See Transcript 357:14.*

457. The District used Dr. Chiles' report as the basis for the psychological testing portion of the special education evaluation, despite K not having been in person within the District as the District had been previously requesting. *See* Transcript 1137:12-18.

458. The District voluntarily reimbursed Complainants for Dr. Chiles' evaluation, indicating that the District found the evaluation to be substantiated. *See* Transcript 275:10-13.

459. However, the District did not abide by Dr. Chiles' key recommendation of a residential therapeutic boarding school placement. *See* Transcript 275:17-22.

460. On May 20, 2021, more than ten business days before K was placed at LRA, and one day after the District had informed Complainants that the District had officially exited K from the District, Complainants sent an email to District employee Mrs. Quincy that K would be attending LRA and that Complainants were "going after our public school district here to see if we can get them to pay for boarding school since they weren't able/refused to provide the accommodations he needed here." *See* Exhibit 177; *see* Transcript 825:23-826:12. Complainants decided that LRA would be the best placement for K after consulting with their educational consultant, Ms. Salehani, after seeing Dr. Chiles' evaluation, and after reaching out to each school and parental references; this decision was made carefully after multiple conversations on what Complainants and their consultant Ms. Salehani believed would be a good type of setting for K. *See* Transcript 148:8-25, 149:1-10, 821:14-25, 822:1-15.

461. This email was quickly forwarded to Amanda Chance, the District's Section 504 Coordinator, who stated "[t]his is the first I'm hearing of or seeing issues with this student." *See* Exhibit 177; Transcript 280:19-25, 281:1.

462. Mr. D testified that he gave the District notice on May 20 that K was going to LRA and that he was going to go after the District to pay for it. *See* Transcript 281:19-23.

463. Remarkably, despite K having been placed on a 504 Plan for three and a half years, and the catalog of problems K had experienced at school and with the ineffective 504 Plans, Ms. Chance—the District's Section 504 Coordinator—had no idea who K was and stated this was the first she was hearing of or seeing issues with K. *See* Exhibit 177; Transcript 281:2-11.

464. Additionally, no one from the Chester Lewis 504 Team reached out to Ms. Chance about K, either. *See* Transcript 1362:7-10.

DISTRICT AGREES TO MOVE FORWARD WITH EVALUATING K WITH SPECIAL EDUCATION.

465. The Hearing Officer finds that after the Complainants retained legal counsel that the District quickly agreed to move forward with evaluating K for special education and finding him eligible for special education.

466. On May 26, 2021, Mr. D signed a contract with Logan River Academy. Parent Exhibit 207 at 2.

467. Complainants' counsel sent a demand letter to counsel for the District on May 28, 2021, noting that the District had violated federal and state law, that K was still legally a student within the boundaries of the District and must immediately be "re-enrolled," and demanding that the District evaluate K for special education, and then prepare an IEP for K; this letter also demanded the District agree to placement of K at a private educational facility to meet his substantial needs. *See* Exhibit 179.

468. The Hearing Officer notes that specifically, it was only after Complainant's legal counsel sent the demand letter that the District allowed the special education evaluation to go forward; at that special education eligibility evaluation meeting, which took place on June 21, 2021, the Multidisciplinary Team found K eligible for an IEP despite not having evaluated him in person, which was the reason the District had earlier relied upon to justify refusing to conduct an evaluation of K while he was receiving treatment out of state. *See* Transcript 282:19-25, 283:1-3; *see also* Exhibit 192.

469. The District moved forward with evaluating K for special education despite K not having physically returned to Wichita prior to the decision of the District to move forward with evaluating K, further confirming that it was the retention of counsel and the threat of liability that finally prompted the District to evaluate K for special education. *See* Transcript 763:21-24, 766:17-25, 767:1-10.

470. On June 1, 2021, a contract commenced between Logan River Academy and Mr. D. Parent Exhibit 207 at 2.

471. On June 3, 2021, an extension of 60-school-day timeline for evaluation prepared. District Exhibit 336.

472. On June 8, 2021, Amy Godsey sends an email to IEP Team regarding information that is available for review for evaluation with the attached disciplinary records for K. Joint Exhibit

WW. Also on June 8, 2021, Mr. D signed a Consent for Extension of the Evaluation Timeline. District Exhibit 336.

473. On June 10, 2021, the Notice of Meeting to discuss the results of the evaluation was emailed to the parents. That meeting was set for June 21, 2021. District Exhibit 330. On the same date, a Notice of Meeting was emailed to the parents for the IEP meeting, which was set for June 23, 2021. District Exhibit 331.

474. On June 17, 2021, Chester Lewis Academy received a records request from Logan River Academy. Mr. Parks requested guidance from Amy Godsey and was told to send the records, just as they would for any other records request. (Transcript Vol. 5 at 1141, ln. 20-1142, ln. 10; District Exhibit 190.) Ms. Godsey also advised Mr. Parks to get anything that was needed of Synergy prior to 5:30 that day because Synergy would then be shut down for a couple weeks to rollover students. (Transcript Vol. 5 at 1142, ln. 10-1143, ln. 1).

475. On June 21, 2021, the meeting to discuss K's evaluation results was held with the parents. K was found eligible for special education services in the exceptionalities of OHINED. He was also found eligible for special education counseling services. Joint Exhibit YY at 9; District Exhibit 338.

476. On June 23, 2021, the first day of the IEP meeting was held. District Exhibit 331.

477. The Multidisciplinary Team Report, dated June 21, 2021, included some direct quotes from Dr. Chiles' evaluation, such as K's diagnoses of "Other Specified Neurodevelopmental Disorder, involving features of autism, lower than expected processing, cognitive rigidity, and executive functioning deficits. Generalized Anxiety Disorder, Disrupted Mood Dysregulation Disorder." *See* Exhibit 192; Transcript 830:1-11.

478. The Multidisciplinary Team Report, however, did not follow Dr. Chiles' recommendation that K be placed in a residential therapeutic setting for individuals with similar needs. *See* Exhibit 192.

479. The Report also stated "Despite being provided increasingly intensive interventions and supports, K is not demonstrating progress toward reaching grade level standards. The team may wish to consider providing Special Education support to help K develop the emotional, behavioral and academic skills to be successful in the school setting. *See* Exhibit 192; Transcript 831:1-16.

480. Mr. Anderson, the general education teacher member of K's Multidisciplinary and IEP teams, testified that the "increasingly intensive interventions and supports" that were not allowing K to demonstrate progress toward reaching grade level standards were the 504 Plans. *See* Transcript 1285:2-18.

481. The Multidisciplinary Report, in its "Determination of Eligibility," stated that the "evaluation team reached consensus that K exhibits the following exceptionality" and required specially designed instruction for them: "Other Health Impairment, Emotional Disturbance"; the Multidisciplinary Team Report then references that these exceptionalities were determined to be present in K "according to the criteria considered on the attached eligibility determination document." *See* Exhibit 192; Transcript 831:20-25, 832:1-3.

482. The eligibility determination document, setting forth the criteria and "indicators" for exceptionalities of Emotional Disturbance and Other Health Impairment that the Multidisciplinary Team members utilized to find K eligible for special education, was never provided to counsel for Complainants or the hearing officer, despite multiple references by District witnesses at the hearing to this document and "indicators" within it, creating an inference that this eligibility determination document is damaging to the District's case because it set forth criteria for Emotional Disturbance and Other Health Impairment that were readily observable in K from 2017 on, yet ignored by the District. *See* Transcript 1388:14-1389:2, 1398:4-1399:6, 1437:11-1438:9, 1467:1-7.

483. Holly Yager, a witness for the District, testified from memory regarding some of the "indicators" of Other Health Impairment and Emotional Disturbance, and those indicators align with the definitions of Other Health Impairment and Emotional Disturbance set forth in the relevant federal regulation defining those terms. *See* Transcript 1437:16-1439:24, 1467:11-20.

484. Again, the District did not identify K as a child in need of special education evaluation until Complainants requested such evaluation, as confirmed by Ms. Godsey. *See* Transcript 1572:12-15.

485. Complainant Ms. Z testified that all of the criteria set forth in the federal regulation defining "emotional disturbance" were present and observable in K well prior to March 2021. *See* Transcript 832:13-18; Exhibit 225.

486. Complainant Ms. Z further testified that the criteria for Other Health Impairment were present and observable in K prior to March 2021, including "specifically alertness – it's limited alertness...and including a heightened alertness to environmental stimuli that results in limited

alertness with respect to the educational environment that then adversely affects child’s educational performance...and then probably the other one, too. Due to Attention Deficit Disorder or Attention Hyperactivity Disorder [which] adversely affects the child’s performance.” *See* Transcript 832:19-833:15.

487. Catherine Dugan, social worker and member of K’s Summer 2021 special education evaluation/testing and IEP development teams, reviewed documents that Complainants provided and used information from Complainants to put together her portions of the Multidisciplinary Report and IEP found in Exhibits 333 and 344; Transcript 1381:3-15, 1383:2-8.

488. Ms. Dugan also used Dr. Chiles report to complete the majority of the “Social History” portion of the Multidisciplinary Report. *See* Exhibit 333; Transcript 1384:11-18.

489. Ms. Dugan’s portions of the IEP were also copied and pasted from the Multidisciplinary Report. *See* Exhibit 344; Transcript 1385:16-22.

490. Ms. Dugan testified that K had been struggling with regulation of his emotions since at least 2012. *See* Exhibit 333; Transcript 1395:5-11.

491. Ms. Dugan also testified that 49 writeups during middle school and failing grades grades would be an indicator for emotional disturbance and that “something needed to be looked at,” including special education for K. *See* Transcript 1400:10-1402: 12.

492. Member of the Chester Lewis Child Study Team and K’s Multidisciplinary and IEP Teams in Summer 2021 Tiffany Springob testified that she was in agreement with the team’s findings that K had the exceptionalities of Other Health Impaired and Emotional Disturbance “[b]ecause of all of the diagnosis he has and what’s been going on with him.” *See* Transcript 1325:23- 1326:18.

493. When asked on direct examination by the District’s counsel to be “more specific about what’s been going on with him,” Ms. Springob testified “The emotional aspects and the behavior. The 504 wasn’t meeting his needs[.]” *See* Transcript 1326:10-13.

494. The evidence adduced at the hearing established as a matter of fact that many of K’s diagnoses, emotional problems, academic problems, and behavioral problems have been known to the District and readily observable since 2017, well in advance of the District’s receipt of Dr. Chiles’ May 2021 evaluation report regarding K.

495. The District’s own witness, Tiffany Springob, a member of the Child Study Team at Chester Lewis during the 2020-2021 academic year, admitted under oath that the “signs were there”

that a special education evaluation was appropriate for K earlier in the 2020-21 academic year, “but it didn’t get done.” *See* Transcript 1365:4-6.

496. During the hearing, the District attempted to argue that the disciplinary write ups in the Student Discipline Report in Exhibit 12 were not actually disciplinary actions, however, it became clear through Ms. Dugan’s testimony that even “conferences” ended in some form of disciplinary action for K, usually in-school suspensions. *See* Transcript 1408:20-25, 1409:1-25, 1410:1-25, 1411:1-25, 1412:7-25, 1413:1-25, 1414:1-25, 1415:1-25, 1416:1-25, 1417:1-25.

497. To be clear, the District never requested nor completed a functional behavior assessment on K. *See* Transcript 939:16-23.

498. Had the District done a special education evaluation of K prior to March 2021, it also could have done a Functional Behavior Assessment. *See* Transcript 1592:19-22.

499. Additionally, prior to March 2021, Complainants had provided numerous evaluations, reports, medical records, and psychological records for K over the years to the District and there was never a special education evaluation conducted. *See* Transcript 941:9-15.

500. The IEP development meetings took place over the course of two days, June 23, 2021, and July 1, 2021. *See* Transcript 835:18-20, 837:9-10.

501. At the IEP development meetings, Complainants specifically requested that K be placed at LRA in the IEP. *See* Transcript 835:5-12.

502. Holly Yager, school psychologist for the District, was a member of the team that determined that K would be eligible for special education. Ms. Yager testified that the team decided that “over the time with all the reports that we had there, they definitely showed that he would meet eligibility under the Emotional Disturbance eligibility indicator due to having – there was some emotional concerns over time and to a marked degree. We know the hospitalizations just in 2020 would be one area and a variety of other things noted in the reports.” *See* Transcript 1439:14-24. Notably, as the evidence and testimony established, the District had most of these reports and information for years prior to the Summer 2021 IEP development meeting.

503. Ms. Yager testified that a psychiatric hospitalization for suicidal ideation would be a sign of pervasive mood of unhappiness or depression. *See* Transcript 1468:17-21.

504. Many of the District’s witnesses showed intransigence and evasiveness in answering questions about whether the District had made a mistake in not evaluating K for special education prior to February 2021, including Ms. Yager, who refused to directly answer a question of whether it

was a mistake for the District not to have evaluated K for special education after his psychiatric hospitalization in February 2020. *See* Transcript 1469:1-25.

505. Moreover, while Ms. Yager testified that a psychiatric hospitalization for suicidal ideation would be a sign of pervasive mood of unhappiness or depression, that K had been hospitalized in such a fashion in February 2020, and that K coming to talk to Southeast school nurse Regan Carlstrom twice about self-harm ideas was a sign of severe depression, Ms. Yager also contradictorily testified that in order to state that a special education evaluation prior to February of 2021 was appropriate for K, she would “like to have seen the accommodations in place, make sure we have fidelity, make sure we were communicating with parents.” *See* Transcript 1468:22-25, 1472:17-20, 1481:13-15.

506. In any event, the Hearing Officer finds as a matter of fact the evidence establishes that all three factors cited by Ms. Yager were present to one degree or another since 2017, and that those 504 Plans were not effective for K.

507. Ms. Yager testified that if the situation had to be done over again, she would have reevaluated the 504 Plan. *See* Transcript 1483:3-13. However, the evidence is clear that the 504 Plan *was* reevaluated several times and was ineffective in allowing K to receive FAPE.

508. During the second day of the IEP meeting, the District proposed that K be placed at Sowers, which Complainants adamantly disagreed with at the IEP meeting since K would be removed from the general education population 100 percent of the time, Sowers only has normal school hours of operations, no services would be provided on the weekend, and general concerns surrounding the rest of the school population. *See* Exhibit 188; Transcript 283:4-25, 284:1-5, 837:9-12.

509. Complainants had also been told on November 7, 2019, by Mr. Agnew at Southeast that there was “not the normal population of kids at Sowers” and it was clear to Complainants that the 504 Team did not think Sowers was the appropriate placement for K. *See* Transcript 839:1-16.

510. The District has continued to insist that Sowers can provide FAPE to K and meet his significant needs; however, Ms. Springob’s testimony regarding Sowers was unpersuasive as she admitted she knows very little about Sowers and has never visited Sowers before nor had contact with any of the counselors at Sowers. *See* Transcript 1369:7-13.

511. Ms. Yager was notably one of the only District witnesses to provide substantive information about Sowers and the services that are offered there. *See* Transcript 1450:7-25, 1451:1-12,

1455:8-15. No one from Sowers testified at the hearing to provide more information about what services are provided.

512. Ms. Godsey made the final decision as to K's placement at Sowers. *See* Transcript 1578:12-14.

513. Ms. Yager also acknowledged that no child is "typical" and every "situation is different," but that even though Dr. Chiles' recommended a residential therapeutic setting, the District chose to reject that suggestion. *See* Transcript 1464:5-12, 1465:21-25. 1466:1.

514. Ms. Yager testified that a student is not typically immediately placed into a residential placement upon being initially evaluated for special education because "[w]e look at the least restrictive environment for each student meaning that we want the student to have access as much as possible to their general education peers." *See* Transcript 1459:10-19.

515. This testimony contradicts the District's chosen placement for K at Sowers, as K would be removed from the general education population 100 percent of the time at Sowers, but he is not removed from the general education population at LRA. *See* Transcript 851:10-13.

516. Ms. Yager's conclusions are based on never having worked directly with K, nor having ever met with or spoken to K. *See* Transcript 1463:17-22.

517. However, Ms. Yager agreed that there were significant behavioral and academic problems "over years" with K, as well as increasingly significant interventions that did not work to allow K to make academic progress over the course of years. *See* Transcript 1464:17-22, 1465:3-7.

518. Complainants also received a Prior Written Notice for Identification Initial Services, Placement, Change in Services, Change of Placement, and Request for Consent ("PWN"), dated July 1, 2021, *See* Exhibit 197, Transcript 841:19-24.

519. The PWN stated that K "has an exceptionality and needs specially designed instruction and therefore is eligible for special education." *See* Exhibit 197; Transcript 842:7-10.

520. The PWN also stated that the Instructional Setting for special education services would be "Alternative School," or in other words, Sowers. *See* Exhibit 197; Transcript 843:3-10.

521. Moreover, the PWN also states that "[t]he proposed setting in which to implement the IEP is an alternative school setting with an emphasis in therapeutic support for social and emotional needs," which K already receives at LRA. *See* Exhibit 197; Transcript 843:17-25, 844:1-9.

522. The PWN also rejected Complainants' request to place K at a residential treatment facility because the District "has yet to be able to implement the proposed services" despite having at

least three years to try and put services like the proposed services into place. *See* Transcript 844:13-20, 846:4-10.

523. Complainants signed and returned the PWN on July 12, 2021 through counsel, within the deadline given by the District to do so, rejecting the District’s proposed placement at Sowers and instead insisting on placement at LRA. *See* Transcript 847:23-25, 848:1-7, 875:19-21; *see* Joint Exhibit CCC.

524. At the IEP development meetings, Complainants rejected placement of K at Sowers. *See* Transcript 837:1-838:25.

525. The IEP documents, dated July 1, 2021, describe the “Impacts of Exceptionality” within the general education curriculum, but these impacts have been present in K since at least seventh grade, with no effort by the District to evaluate K for special education until June 2021, and only after Complainants retained counsel. *See* Exhibits 196 and 197; Transcript 849:2-25, 850:1- 15.

526. The IEP and PWN call for K to be out of the general education environment 100 percent of the time. *See* Exhibits 196 and 197; Transcript 851:10-13.

527. At LRA, K is educated with students in the general education environment, which is actually a less restrictive environment than what the District is proposing. *See* Transcript 875:1-11.

528. Ms. Springob also based her opinion of LRA being more restrictive on what she knows about “least restrictive environment in my opinion right now is being closer to your neighborhood school is least restrictive than to be three states away is more restrictive.” *See* Transcript 1334:4-7.

529. Ms. Springob’s opinion is confusing in light of her testimony that LRE analysis “is maximizing to the maximum extent appropriate children with disabilities being educated with children who are not disabled,” yet the IEP proposes that K be placed 100% of the time out of the general education classroom and away from non-disabled students at Sowers. *See* Transcript 1365:18-25, 1366:1-12. LRA keeps K in a general education classroom.

530. Ms. Springob also testified that she believed Sowers was the appropriate placement for K, but that she was only “[a] little familiar” with Sowers and did not know what kind of counseling services were available at Sowers, and again, she had never even visited Sowers, and she had never had contact with counselors at Sowers. *See* Transcript 1332:17-1333:2, 1369:7-13.

531. Similarly, Ms. Dugan testified that the proposed IEP, including placement at Sowers, would provide FAPE to K, yet Ms. Dugan had only visited Sowers twice in seventeen years working for the District, had only spoken to counselors at Sowers twice and neither instance was regarding K, and she provided only very generic information about the services Sowers offers to students such as K. *See* Transcript 1390:7-1391:20, 1405:9-1406:2.

532. While Ms. Springob testified that she believed K was just refusing to do his work and that is not necessarily a sign that special education was indicated for K, she also testified that she never contacted any of K's providers to learn whether K's refusal to do schoolwork was connected with a disability, and as such, she did not know whether K's refusal to do work was connected with a disability. *See* Transcript 1378:15-24.

533. The IEP also discussed K's low mathematic abilities, which were below the range expected from his age and grade level, and which the District was aware of as early as the beginning of K's freshman year of high school when K was sent for private tutoring at Sylvan Learning Center. *See* Exhibit 196; Transcript 852: 11-25, 853:1-6.

534. A major portion of the IEP stated problems that the Complainants and the District already knew existed as to K for years, which is why Complainants had requested an IEP for K on multiple occasions. *See* Exhibit 196; Transcript 856:1-25, 857:1-25, 858:1-18, 863:3-12.

535. The IEP proposed by the District states that it "is calculated to provide FAPE/educational benefit to K[en] in light of his circumstances." Exhibit 196.

536. Complainant S Z testified that she has no faith or trust in the District to implement the Annual Goals in the IEP based on prior experience and how the 504 Plans failed to result in any improvement for K. *See* Transcript 864:6-16, 865:9-16.

537. Complainants also disagreed with the District's characterization of 504 Plan accommodations being "successful in avoiding power struggles and behavioral outbursts." *See* Exhibit 188; Transcript 284: 11-14, 18-25. The evidence clearly supports the opposite proposition.

538. Ms. Springob, school nurse at various schools within the District (including Chester Lewis) and a member of the IEP development team, admitted that the 504 Plan for K, which had been in place for many years with little change, was not meeting K's needs. *See* Transcript 1326:10-18.

539. Ms. Springob testified the District has not had a chance to "try anything here" with respect to the IEP, which is why she disagreed with placement of K at LRA being set forth in the

IEP, however, Ms. Springob stated the reason the District was not able to try anything here was because the District had previously been “without a plan and without being identified Special Education with a plan and a therapeutic environment here on a plan and trying that[.]” *See* Transcript 1328:20-1329:13.

540. Ms. Springob also testified that she would disagree with the notion that the many of the features set forth in the IEP had already been tried through the ineffective 504 Plans because the District was “remote most of that” time; however, when presented with evidence of K’s 504 Plans and when they were created, Ms. Springob conceded that K did have 504 Plans in place from September 2017 through March 2020 before the District went to remote learning, and that all of the September 2017 504 Plan accommodations carried forward through the final 504 Plan revision in November 2020. *See* Transcript 1353:11-1355:2.

541. Remote learning did not create a safe harbor for the District to not abide by Child Find; the District conceded through testimony that its Child Find obligations remained in place even during remote learning. *See* Transcript 1368:22-24, 1495:19-1496:1.

542. Ms. Springob herself testified that “The District has an obligation under Child Find to identify students who may have exceptionalities and may be in need of Special Education; correct? A: Yes,” that it is not incumbent on parents to request an IEP for their child, and that part of the reason for the existence of the Child Study Team is to identify kids who need Special Education and create interventions for them that work and allow them to make academic progress, and it’s not up to parents to figure out the educational problems for their kids with the District. *See* Transcript 1348:7-20, 1357:10-19.

543. Ms. Godsey also agreed that if 504 Plan Re-Evaluations did not resolve characteristics of Emotional Disturbance and those characteristics persisted despite 504 Plan re-evaluations, that a District would have an obligation under Child Find to evaluate that student for special education. *See* Transcript 1569:11-15.

544. Although K has not had the “benefit” of a therapeutic setting within the District, Complainants requested that the District evaluate K for special education for over four years, with the District refusing to do so. *See* Transcript 1331:1-4. The District had plenty of time to give K the “benefit” of a therapeutic setting within the District but chose not to do so, despite a litany of signs that was necessary.

545. Furthermore, the District's proposed services of 60 minutes of counseling, 20 minutes, three times a week in the District setting is not adequate for K to be able to come out of dysregulation, shutdowns, and make progress, even if those proposed services are just the "minimum." *See* Transcript 868:7-25.

546. K's deteriorating academic performance, behavioral problems, shutdowns, health and mental wellness problems, and the failure of the increasingly intensive interventions and supports were known to the District for at least the last three years. *See* Transcript 834:3-9.

547. The IEP includes numerous Supplementary Aids and Services that are similar or identical to accommodations listed on K's prior 504 Plans which were unsuccessful in allowing K to make adequate educational progress. *See* Transcript 870:1-25, 871:1-25, 872:1-25, 873:1-25, 874:1-8, 1291:14-25, 1292:1-19, 1293:1-6, 1367:3-11, 1367:13-25, 1368:1-11; Exhibits 11, 33, 44, 88, 124, 196.

548. The IEP states that K moving schools may be another potential harmful effect, despite the District proposing that K move from LRA to Sowers. *See* Exhibit 196; Transcript 875:13-18. This is contradictory.

549. Additionally, no accommodations were set forth in the IEP for evening or weekend services for K. *See* Exhibit 344; Transcript 874:9-12, 1579:15-18.

550. Furthermore, the webpage for The Sowers Alternative High School Evening Program, a program which is not mentioned once in the IEP but which was touted by the District during the hearing as a possible location for evening services for K, states that students arrive at Sowers at 3:30pm and leave at 5:30pm. *See* Transcript 1616:5-10.

551. Indeed, at the hearing, the District's own witnesses could not even identify the hours during which the "Sowers Evening Program" operates, and additionally, the Hearing Officer notes that evidence was discussed that the Sowers Evening Program only operates from 3:30pm to 5:30pm on weekdays, which the District's own witnesses could neither confirm nor deny. *See* Transcript 1616:5-10.

552. Mr. Anderson testified that the IEP proposed by the District would provide K with a FAPE based on what he witnessed in the classroom, but his testimony also demonstrated that Mr. Anderson did not witness a lot of behaviors in his classroom. *See* Transcript 1251:21-22.

553. Mr. Anderson also testified, on direct examination by the District's counsel, that he believed the IEP team saw "a need for . . . consistency from all the teachers" and that the IEP created

in June and July 2021 “provides more information as well as more . . . meat to help a staff meet K where he was at tha[n] the 504 at that time was not able to meet.” *See* Transcript 1224:23-24, 1251:22-25, 1252:1-6, 1285:13-18.

554. This testimony reinforces what Mr. Anderson wrote in the Multidisciplinary Report compiled for K in June 2021, regarding the efforts to educate K in the General Classroom, including via the 504 Plans: “These interventions have been successful in avoiding power struggles and behavioral outbursts, but they have not been successful in increasing K’s completion of assignments or academic success.” *See* Exhibit 333, p. 1.

555. Regarding the 504 Plans having allegedly “been successful in avoiding power struggles and behavioral outbursts,” at the hearing, Mr. Anderson testified that “refusing to do work is a classroom behavior,” an acknowledgment that the 504 Plans were not effective in resolving K’s behavioral problems which seriously negatively impacted his learning. *See* Transcript 1277:21-24.

556. At the hearing Mr. Anderson also testified that the 504 Plans “were not improving academic success” for K. *See* Transcript 1279:3-4.

557. This testimony from Mr. Anderson, a witness called by the District and part of K’s IEP team in Summer 2021, and his written contribution to the Multidisciplinary Report regarding K, confirm that the 504 Plan that had been in place for several years (with very minor changes) was ineffective and that an IEP in place for K well prior to July 2021 would have meant more “staff to meet K where he was at tha[n] the 504 at that time was not able to meet,” an admission from the District’s own witness that special education was needed for K to be able to make adequate educational progress. *See* Transcript 1295:15-1296:1.

558. Mr. Anderson also based his testimony that LRA and residential placement were not the appropriate placement for K based on the admittedly little that he saw of K in his classroom, and in spite of not being a special education teacher nor a special education expert. *See* Transcript 1252:17-25, 1280:1-6, 1287:10-17.

559. Ms. Godsey testified that she believed the IEP was designed to meet K’s academic, social/emotional, and behavioral needs because “all the people that came together for the evaluation process and the development of that IEP with parents’ input, with parents’ experts’ inputs and all the school based team members’ input . . . we worked ten and a half hours developing this IEP . . . [i]t’s a very detailed IEP.” *See* Transcript 1533:9-25, 1534:1-8.

560. However, an IEP being “very detailed” does not necessarily mean that it provides a student with FAPE.

561. K ended his tenth-grade year at Chester Lewis with straight F’s. *See* Exhibit 191; Transcript 285:10-15.

562. Despite numerous attempts by Complainants to plead with the District to agree to placement at LRA, even so far as the District’s attorney requesting information about how LRA would ensure that services identified in the IEP would be delivered to provide K with FAPE, they were unsuccessful. *See* Exhibit 199; Transcript 286:19-25, 926:6-25, 927:1-25, 928:1-25.

TESTIMONY FROM EXPERTS AND TREATMENT PROVIDERS FOR K

563. Dr. Mercedes J. Perales, M.D., a psychiatrist with 33 years of treating adolescent patients, testified at the hearing that she began treating K on May 3, 2017, and stopped treating him on March 13, 2021. *See* Transcript 344:5-7, 344:14-19.

564. From 1988 through 2009, Dr. Perales ran the adolescent psychiatric service for Kansas University Medical School inpatient, and with that she saw inpatients for evaluation and treatment which was crisis and higher level care. She also did a partial day program for adolescents that did not need to be hospitalized or were coming out of the hospital, and she also did consultation on the medical floors for children and adolescents; Dr. Perales has a great deal of experience treating adolescent psychiatric patients. *See* Transcript 343:15-25, 344:1-7.

565. Dr. Perales saw K 39 times between 2017 and 2021. *See* Transcript 364:22-25, 365:1-4.

566. Dr. Perales first diagnosed K with unspecified anxiety disorder, but eventually diagnosed him with anxiety, depression, and attention deficit disorder. *See* Transcript 345:1-4.

567. Dr. Perales testified that Complainants were very involved in K’s treatment. *See* Transcript 347:23-25, 348:1-3.

568. Dr. Perales testified that the conditions she diagnosed in K sometimes affect a child’s learning, and can affect a child’s academic progress, including the impact of anxiety causing distraction and inability to focus in the classroom, and with K specifically, his anxiety would cause an emotional reaction to where he would escalate if he got frustrated and would not be able to understand what was going on around him, and that K’s depression caused an impact on his learning due to lack of motivation, lack of energy, feeling sad. *See* Transcript 348:8-25, 349:1-7.

569. Dr. Perales further testified that these conditions diagnosed in K can affect a child's behavior at school. *See* Transcript 349:8-13.

570. Dr. Perales testified that K's conditions affected his behavior by way of low energy, low motivation, emotional escalation with reminders, issues with inattentiveness, impulsivity, daydreaming, issues with organization, being easily distracted, forgetful, at times he would interrupt others, decreased performance, moody, easily frustrated, preoccupied with social relationships that would distract him from his work. *See* Transcript 349:19-25, 350:1-5, 350:17-23.

571. Dr. Perales treated K via prescription medication. *See* Transcript 346:25, 347:1-10.

572. Dr. Perales testified that it was reported that K had chronic exposure to being bullied at school. *See* Transcript 346:15-16.

573. Dr. Perales testified that she was aware that another treatment provider of K's, Mary Hotze, LCMFT, who had referred K to Dr. Perales, had at one point been working with District teachers. *See* Transcript 344:14-17, 351:21-23, 352:4-22. This is further evidence that the District was well aware of K's diagnoses.

574. In her treatment of K, Dr. Perales came to believe that K had problems with interpersonal relationships while he was at school, that he exhibited inappropriate behavior at school, that he exhibited inappropriate behavior at home at times, and that he had a general mood of unhappiness and depression. *See* Transcript 354:1-10, 364:5-11.

575. Dr. Perales testified that she supported K's placement at Blue Fire, because "we were looking at a child who has had therapy ongoing, different types of therapy, cognitive behavioral therapy, Diatical Behavioral Therapy, medication management and parents very involved, that it was time for him to have a higher level of care that would be helpful to him and that it was medically necessary at this time. So I supported that because I felt that we were at that place – oh, and he had had two hospitalizations[.]" *See* Transcript 356:21-25, 357:1-6.

576. Dr. Perales testified that if a licensed psychologist at Blue Fire recommended placement of K at a therapeutic boarding school, she would have no medical reason to disagree with that assessment. *See* Transcript 357:7-13.

577. Prior to K starting at Chester Lewis, James Todd Hawkins, licensed master double social worker and therapist, first began treating K on July 29, 2020, including through therapy

sessions that generally occurred weekly. *See* Exhibit 262; Transcript 103:16-18, 106:23-25, 107:1-21, 109:14-18.

578. Mr. Hawkins testified at the due process hearing that school was K's primary source of stress, and he had "quite a bit" of anxiety relating to school. *See* Transcript 104:10-11, 120:3- 5; *see also* Exhibit 262 for records stating the same.

579. During Mr. Hawkins' treatment of K, Mr. Hawkins discerned that being at school or being made to do schoolwork sometimes made K feel suicidal and engage in self-harming behavior such as cutting himself using different materials he had in the home. *See* Transcript 105:4-6.

580. K had an inability to build or maintain satisfactory interpersonal relationships with others according to Mr. Hawkins' treatment of K, and such inability manifested itself at school. *See* Transcript 118:5-11.

581. While Mr. Hawkins testified that K had anxiety in other settings as well, his testimony was clear that K experienced problems at home directly as a result of school and stress associated with school. *See* Transcript 120:3-9, 104:10-11, 124:10-13; *see also* Exhibit 262 for records stating the same.

582. Mr. Hawkins diagnosed K with generalized anxiety disorder and disruptive mood dysregulation disorder, and that those conditions affected his learning and behavior at school. *See* Transcript 105:14-16, 107:22-25, 108:1-17; Exhibit 262.

583. Mr. Hawkins's treatment of K also demonstrated that K had a really difficult time with interpersonal relationships, and that those difficulties contributed to his behavior at school. *See* Transcript 105:22-23, 108:3-17; Exhibit 262.

584. Mr. Hawkins testified that he was aware that K "really struggled with academics." *See* Transcript 110:10-11; 116:5-24.

585. Mr. Hawkins supported Complainants' placement of K at Blue Fire. *See* Transcript 116:25, 117:1-20.

586. Complainants' mixed fact and expert witness Ms. Tazim Merchant Salehani testified that Dr. Jeremy Chiles' psychological evaluation of K, Exhibit 206, was fundamental in the decision to recommend that K be placed at a residential program. *See* Transcript 152:12-15.

587. Ms. Salehani's expertise is as a therapeutic consultant who works with families that are in need of higher level of care, often therapeutic level of care because local efforts were not working, and she provides case management and advocacy for families who are trying to figure out

what protocol they will use and what their treatment plan will be; she has been in this field for about fifteen years, owns her own business in this field, and has worked with hundreds of families and kids who are in very difficult circumstances to locate treatment options and placements appropriate for the kids who need help. *See* Transcript 128:11-25, 129:1-10.

588. Ms. Salehani testified that she looks for the appropriate placement for each child individually and tailors her recommendations based on her understanding of the needs of the child, including the child's clinical needs, which encompasses medical, academic, and family needs. *See* Transcript 131:21-25, 132:1-7.

589. Ms. Salehani testified that it was "surprising to hear that" K had not been placed on an IEP. *See* Transcript 134:1-3.

590. Per Ms. Salehani, throughout K's time at blueFire, it became even more evident that K had executive functioning issues. *See* Transcript 143:8-24.

591. Ms. Salehani testified that a therapeutic boarding school, in which therapists, clinicians, master-level therapists are on-site to help intervene during academic and non-academic hours, would provide K with the attention and help needed to guide him in being successful in all aspects of his life; Ms. Salehani further stated that "Therapeutic boarding schools are going to be able to provide an academic support first and foremost to the child to be able to make sure that they're in a setting where we believe they're going to be successful[.]" *See* Transcript 150:12-16, 151:1-6, 151:15-20, 152:5-11.

592. Ms. Salehani further stated that boarding schools like LRA have therapists, clinicians, master-level therapists on-site who are going to be there to be able to help the child, and they can mitigate a lot of these things a lot quicker and as they're happening so that a determination can be made as to what needs to be done to make tweaks academically and therapeutically, which go hand in hand. *See* Transcript, 151:1-25, 152:1-2.

593. Ms. Salehani reached a point where she felt that K needed the type of attention and help at a therapeutic boarding school to be able to be successful in all of the aspects of his life, and this conclusion was reached by K's treatment team, including Dr. Chiles, in the Spring of 2021. *See* Transcript 152:3-15.

594. Ms. Salehani recommended three boarding schools to Complainants for K to attend, and it was determined that LRA, where K was ultimately enrolled, would be the most appropriate placement for him. *See* Transcript 152:19-20, 153:1-25, 154:1-15, 156:14-16.

595. Ms. Salehani testified that LRA fits a lot of the criteria set forth in Dr. Chiles' report in terms of what K needed academically and therapeutically and would be able to allow K to succeed in the academic environment, and LRA provides the type of services that K needs to be able to make academic progress in light of his unique circumstances. *See* Transcript 153:6-25, 154:1-25, 155:1-7.

596. Ms. Salehani testified that LRA combines academics and therapy for K. *See* Transcript 155:8-25, 156:1-16.

597. Ms. Salehani testified that emotional support and therapy for K in the academic setting are crucial. *See* Transcript 157:3-25, 158:1-25, 159:1-11.

598. Ms. Salehani testified that in her opinion K's emotional support needs were not being addressed by the District. *See* Transcript 159:2-14.

599. Ms. Salehani further testified that in her opinion these emotional and therapeutic needs for K do not stop at the end of the school day. *See* Transcript 159:15-19.

600. Ms. Salehani further testified that in her opinion the District cannot provide K with the level of academic and emotional support to enable him to make any sort of academic progress. *See* Transcript 159:20-25, 160:1-12.

601. Dr. Chiles, who evaluated K in Spring 2021, set forth his findings in his report, discussed at length above, and entered into evidence in this matter as Exhibit 206.

INFORMATION REGARDING LRA AND K'S EXPERIENCE AT LRA

602. Complainants determined that LRA would be the best placement for K and decided his start date at LRA would be June 4, 2021. *See* Exhibit 177; Transcript 278:22-25, 279:1-2, 825:12-13.

603. As of that date, Complainants had not been informed that K had been "reenrolled" or "reactivated" as a student with the District. *See* Transcript 825:16-22, 827:10-19.

604. Complainants decided that LRA would be the best placement for K after consulting with their educational consultant, Ms. Salehani, after seeing Dr. Chiles' evaluation, and after reaching out to each school and parental references; this decision was made carefully after multiple conversations on what Complainants and their consultant Ms. Salehani believed would be a good type of setting for K. *See* Transcript 148:8-25, 149:1-10, 821:14-25, 822:1-15.

605. LRA charges a total of \$11,900.00 per month for services rendered to K, and has done so since June 4, 2021, through its contractual arrangement with Complainants. *See* Exhibit 207 at pp. 2-3; *See* Transcript 382:9-18.

606. Kirk Farmer, principal at LRA where K is currently enrolled, described LRA as a “residential treatment program in Northern Utah that’s been in existence for a little over 21 years . . . Our school program runs from seventh grade through 12th grade. . . . We have students that struggle in school settings and then a variety of clinical diagnoses that a student would have. We have clinicians here that each of the students have so that they have therapy while they’re here, and then we have a full school day that starts at 8:30 in the morning and goes ‘til 3:00 in the afternoon Monday through Friday that we take the students through our curriculum. We’ve got nine full-time teachers that are licensed in each of their area of expertise that take the students through that curriculum. Average length of stay is somewhere between 10 to 12 months, or I think about it in school terms . . . and they actually live right here at the facility and this is where the treatment they get and the education that they receive all happens here at our school.” *See* Transcript 372:2-25, 373:1-3.

607. LRA is state accredited through Cognia, a group that accredits all schools in the State of Utah. *See* Transcript 373:4-10; *see also* Exhibit 210.

608. LRA is also accredited as a special education school through the Utah State Board of Education and through California CDE. *See* Transcript 373:12-21; *see also* Exhibit 210.

609. The District presented no evidence rebutting the fact that LRA is a state-accredited secondary school.

610. The LRA student body was fifty-one (51) students at the time of the due process hearing, but LRA has capacity of sixty-five (65). *See* Transcript 373:22-25, 374:1. LRA typically averages between fifty-five (55) and sixty-five (65) students at a time. *Id.*

611. The students at LRA may be on the autism spectrum, or may have depression, anxiety, trauma-related issues, and other related issues, including emotional dysregulation. *See* Transcript 374:6-15, 375:18-22, 424:15-23.

612. At the time of the hearing, twenty-one (21) students at LRA were being funded by their local public-school districts. *See* Transcript 375:13-17.

613. Therapeutic services and education go hand-in-hand at LRA as each student’s therapist is available throughout the week, and trained mentors/counselors are in the hallway to assist students if they become dysregulated during class time, so that they can work through whatever concerning issues

they have and then they can get back into the class as quickly as possible. *See* Transcript 376:2-19, 377:12-19; 426:17-25, 427:1-25.

614. The therapeutic services and education going hand-in-hand at LRA extends to nights and weekends, as well. *See* Transcript 377:20-22.

615. During the day at LRA, there are residential staff that are available to students if they become dysregulated in class; clinicians meet with residential staff to help them understand what the students are working on. *See* Transcript 393:14-25.

616. Residential staff have no educational requirement but must be at least twenty-one (21) years old and pass a background check. *See* Transcript 416:2-3, 457:1-2.

617. On the evenings and weekends, students are provided with therapy as needed and social activities to assist them in their socialization skills and other skills that are necessary for being successful at both school and beyond, along with educational support from their residential counselors. *See* Transcript 395:1-25, 396:1-10.

618. Evening and weekend services for K are important for him to be able to make progress in the curriculum and in educational advancement. *See* Transcript 396:18-24.

619. LRA provides specialized education and attention to students who struggle in school by assigning paraeducators, developing goals around a student's anxiety and depression, allowing students frequent monitored breaks, and other accommodations that a student may need. *See* Exhibit 210; Transcript 379:21-25, 380:1-23.

620. LRA designs its curriculum to help and support students who have particular diagnoses that would allow the school to help education them in a way that would help them be more successful in gaining the skills that they need to be successful once they leave LRA, and that is LRA's goal. *See* Transcript 378:21-25, 379:1-5.

621. The therapeutic educational plans and strategies are individualized for each student at LRA, and each student receives individualized attention and help. *See* Transcript 379:6-14.

622. Each student at LRA, whether they are on a formal IEP or not, receives that type of individualized attention. *See* Transcript 381:13-17, 428:13-17.

623. K's curriculum at LRA is based on his unique needs and circumstances. *See* Transcript 386:21-25, 387:1-5.

624. Each class at LRA is taught by licensed teachers and paraeducators to provide extra help and support in the classroom. *See* Transcript 404:6-10.

625. LRA was provided with K's health records and mental health evaluation reports, including Dr. Chiles' evaluation, educational records, as well as other pertinent information regarding K during the admissions process into LRA. *See* Exhibit 207; Transcript 382:24-25, 383:1-25, 384:1-7.

626. LRA made educational and therapeutic decisions and plans for K based on the documentation and information it had been provided; these decisions and plans were made specifically about K based on K's individual academic needs and circumstances. *See* Transcript 384:12-16, 385:1-3, 385:10-25, 386:1-25, 387:1-5, 432:13-22.

627. K is in teacher-directed classes at LRA which mean that the teacher is in the class and "follows the standards that are outlined by the State of Utah and they're teaching the students that curriculum, providing instruction, providing evaluation, providing classroom management to students and support individually and then collectively as a class in that setting." *See* Transcript 388:6-13.

628. K receives traditional classroom instruction at LRA from 8:30am through 3:00pm, Monday through Friday. *See* Transcript 388:25, 389:1-5.

629. In the evenings, K receives direct help with his homework from LRA staff if needed, to help provide instruction and support in helping navigate and finish any incomplete work. *See* Transcript 389:6-25, 390:1-3.

630. LRA provides K with individualized attention and focus in terms of his learning and educational advancement. *See* Transcript 390:10-13.

631. LRA personnel testified that based on their experience with K, his education and mental health needs are not separable, and LRA works on the clinical issues, and they translate that into the classroom. *See* Transcript 391:3-17, 434:17-24.

632. While there is no formal written IEP for K at LRA, Mr. Farmer testified that LRA staff has and uses previous information that was provided upon admission and that they are aware of K's academic challenges and LRA works on those in each of his individual classes. *See* Exhibit 208; Transcript 392:5-13.

633. Mr. Farmer testified that LRA is not following K's formal, written IEP provided by the District since they are not funded by the District. *See* Transcript 406:5-14.

634. However, Mr. Farmer testified that LRA uses the District's IEP as a framework to guide LRA staff in educating K. *See* Transcript 405:23-25.

635. Further, LRA has a master treatment plan for K that includes information on K's behavioral plan. *See* Transcript 476:4-12.

636. Since K has been enrolled at LRA, he has shown progress and educational advancement, and ended his fall 2021 semester with high 60s, low 70s, and mid 70s in his classes. *See* Transcript 396:25, 397:1-25, 398:1-21. Importantly, K has become more engaged in class and had a better attitude surrounding school. *See* Transcript 398:15-21.

637. While K has had behavioral difficulties and shutdowns at LRA, LRA's therapeutic model comes into play by helping sort through these behaviors and understanding the root of the problem. *See* Transcript 398:22-25, 399:1-8.

638. Kathleen Burke, LCSW, therapist at LRA for about three years, helps LRA students with significant disruption in family relationships and helps students in working on their social skills and activities of daily living. *See* Transcript 425:1-12.

639. LRA's psychological team and academic team work together to help students find where their strengths lie and how to build them up so that they can find success in both the academic and the social setting. *See* Transcript 425:18-25, 426:12-25, 427:1-25, 428:1-2.

640. The connection between therapy and academics at LRA has rung true for K D; they are "pretty tied together." *See* Transcript 428:3-8; 431:9-15, 434:13-24.

641. Ms. Burke has worked with K since he arrived at LRA in June 2021. *See* Transcript 428:9-12.

642. While students at LRA must meet certain requirements in order to enjoy certain privileges, requirements are specially tailored to each student and their individualized needs. *See* Transcript 429:1-18.

643. The therapeutic and educational plans and strategies are individualized for K at LRA, and these individualized strategies extend to K's behavior, including addressing K's struggles with peer relationships. *See* Transcript 428:13-25, 429:1-25, 430:1-4.

644. Ms. Burke's therapy plan for K was based in part on the documents that had been provided to LRA by Complainants and others when K was enrolled. *See* Transcript 432:13-22.

645. Ms. Burke has a behavioral plan for K at LRA. *See* Transcript 476:3-12.

646. Ms. Burke, K's therapist, works closely with K's teachers, and the teachers' comments regarding K help inform Ms. Burke's therapeutic strategy and approach with K. *See* Transcript 431:1-8.

647. K and Complainants undergo family therapy once a week with Ms. Burke. *See* Transcript 431:16-19.

648. K struggles with activities of daily living and he receives support with his activities of daily living in the evening and on weekends, including navigating peer relationships and help with classwork on a tutoring basis. *See* Transcript 433:3-25, 434:1-6.

649. Ms. Burke also testified that should a student need intervention during the evenings and weekend, she can be contacted to help come up with a solution. *See* Transcript 444:22-25, 445:1-7.

650. Ms. Burke testified that the residential milieu at LRA is important for K, and he benefits from it, as his problems do not disappear in the afternoon, and at this point in time, he requires 24-hour, seven-day-a-week care and the structure provided by LRA's residential therapeutic model. *See* Transcript 435:15-25, 436:1-10.

651. In the residential setting, LRA builds on treatment and progress because the student is there 24/7, and there is no avoidance of issues, meaning the student, K in particular, does not just go to school and then that school period gets erased when he's home and vice versa. *See* Transcript 478:25, 479:1-10.

652. Further, K's frustrations and depressive symptomology that happen in school also happen outside school. *See* Transcript 478:14-19.

653. Ms. Burke testified that K has demonstrated some growth in her therapeutic, clinical advancement since coming to LRA. *See* Transcript 443:18-25, 444:1-10.

654. K has had behavioral incidents since coming to LRA but is continuing to work on learning better ways to approach conflict. *See* Exhibit 213; Transcript 457:3-25, 458:1-25, 459:1-25, 460:1-25, 461:1-7.

655. Further, K's behavioral incidents have become less frequent as time has passed. *See* Transcript 479:20-22.

656. Toward the beginning of K's time at LRA, an incident resulted in a physical hold being put on K to prevent him from leaving the LRA campus. *See* Exhibit 213; Transcript 438:1-25, 439:1-6.

657. Respondent has expressed concern over the use of physical holds by LRA staff.

658. LRA staff's strategy during an escalation of behavior is to remove the student from the situation, help them deescalate, and then process what happened and figure out what should happen next time to prevent escalation. *See* Transcript 475:10-19.

659. LRA staff members are trained in the NPI method of restraint. *See* Transcript 448:20-25, 449:1-7

660. Complainants have made it clear to LRA staff that holds should be use only if necessary and note that they did their due diligence when choosing LRA for K. *See* Transcript 784:12-25, 785:1-20.

661. Complainants testified that it is their belief based on their experience that LRA is a better environment for K. *See* Transcript 786:25, 787:1-4.

662. The District asked Complainant Ms. Z questions regarding K banging his head at LRA, and despite the District arguing at the hearing that there were “no recent reports of [K] banging [his] head against the wall at school...none from high school,” K actually did have two disciplinary incidents , including one at Southeast, related to him banging his head on his desk, which lends itself to the conclusion that K’s behavior at LRA is not worse than his behavior within the District as the District suggests. *See* Exhibit 12; Transcript 912:1-3, 937:4-938:15.

663. Even after these incidents with K banging his head on his desk, including one in which the classroom had to be evacuated, the District did not evaluate K for special education. *See* Transcript 938:20-24.

664. Complainants testified that they trust LRA more than the District to deal with K’s behavioral problems, especially in light of the emails exchanged between District personnel showing a callous attitude towards K and Complainants. *See* Transcript 787:21-25, 788:1-25, 789:1-2.

665. Mr. Farmer testified that he has no knowledge of any sexual abuse of LRA students. *See* Transcripts 420:5-8.

666. K’s social studies teacher at LRA, Alisha Argyle, testified that LRA “put[s] forth a lot of effort to give aid and more close one-on-one or one-on-three or four small classroom size in order to help those, however, most of the students we see do need that extra help,” and that includes K. *See* Transcript 482:7-14.

667. Ms. Argyle has been a teacher at LRA for five years, and has worked regularly with K on a one-on-one basis to assist her in class and outside of class. *See* Transcript 481:7-13, 483:7- 20, 486:21-25, 487:1-24.

668. Ms. Argyle testified that the same type of one-on-one teaching and interaction was happening in K’s other classes at LRA. *See* Transcript 484:4-11, 486:2-4.

669. Ms. Argyle's training has involved gearing her towards helping individual students and working one-on-one with them where appropriate, and many of her students need that one-on-one help, including K. *See* Transcript 486:6-20.

670. Ms. Argyle testified to one incident with K where he was drawing on his sketch pad instead of doing his assignment and she stated "I simply just walked over and said, hey, do you need help getting started . . . and really what it came down to is that she needed me to go through the instructions again and kind of get a better understanding of what I was after and then she did the assignment after that." *See* Transcript 487:2-11.

671. Ms. Argyle testified that K needs a lot of attention and help in staying on task and focusing on his work, and that kind of individualized attention on K helps. *See* Transcript 488:2- 13.

672. Ms. Argyle also testified that K's learning and educational advancement in her class is tailored for K in that his unique difficulties and issues are trying to be addressed for him according to his unique needs and circumstances, and that she does her best to work one-on-one with K to fix that need and get the work done and learn the concept. *See* Transcript 492:11-24.

673. Ms. Argyle also testified that when working one-on-one with K, her teaching of K is based on the unique circumstances and unique needs of K, including helping read questions, chunking work, breaking up assignments and breaking up questions so that K can understand them more wholly, and that K's needs change daily. *See* Transcript 503:1-6, 504:24-25, 505:1-19.

674. The therapeutic model of LRA ties in very well to the work Ms. Argyle does with her students, as she works closely with the student's therapists and aid her in helping to know the students better, to see what the students need to better their education. *See* Transcript 493:1-19

675. Mr. Farmer, Ms. Burke, Ms. Argyle, and Complainants all spoke of the importance of the residential milieu of LRA, where K receives academic assistance in the evenings and on the weekends; Ms. Burke also spoke about how the residential milieu allows K to continue to build on progress and that with the residential milieu, he cannot just ignore the problems he faces academically and therapeutically. *See* Exhibit 210; Transcript 391:13-17, 393:2-25, 394:1-19, 433:15-20, 434:4-6, 434:17-24, 435:15-25, 436:1-10, 478:14-19).

676. K needs frequent interventions by the therapy staff at LRA, and the education and mental health needs of K are closely intertwined. *See* Transcript 494:13-25.

677. When K is in a decreased state of doing schoolwork, it helps to have the all-encompassing support from therapists, teachers, and residential staff at LRA to try to regulate that to some degree. *See* Transcript 496:12-17.

678. Mr. Farmer estimates that by August 2022, LRA should have a better idea about how much longer K needs to stay at LRA. *See* Transcript 399:16-25, 400:1-19.

GoFundMe

679. Complainants created a GoFundMe to help them with costs associated with Ks stay at Blue Fire and LRA, raising approximately \$25,000 at the time of the due process hearing. *See* Joint Exhibit VV; Transcript 654:22-25.

680. When asked if a donation or gift was used to pay for blueFire Wilderness Camp, Mr. D admitted that it was. He testified that blueFire Wilderness Camp cost approximately \$55,000.00. As indicated in his text messages with Tazim Salehani, Mr. D stated that he had a “rich uncle” who gave them \$60,000.00 to cover the costs of blueFire, which left another \$5,000.00 that could be used for something else. (Transcript Vol. 3 at 658, ln. 22-659; ln. 11).

681. Complainants used these donations to cover a variety of the costs that have come along with the entire process and have placed the donations into an account used to keep up with expenses. *See* Transcript 655:23-25, 656:1-5.

682. The account is kept separate from Complainants’ personal finances. *See* Transcript 658:7-12.

683. Complainants received help in paying for Ms. Salehani’s educational consultant fees and Blue Fire. *See* Transcript 658:17-25, 659:1-4.

684. Other donations or assistance from family or the GoFundMe helped pay for legal fees as well as some of the tuition at LRA. *See* Transcript 659:18-25, 660:1-3, 660:15-17.

III. CONCLUSIONS OF LAW.

LEGAL STANDARDS

1. The Hearing Officer has jurisdiction to decide the issues before him pursuant to K.S.A. 72-9720.

2. The burden of proof and the burden of persuasion lie with the party challenging the IEP. *Schaffer ex. rel. Schaffer v. Weast*, 546 U.S. 49, 56-58 (2005); *Johnson v. Indep. Sch. Dist. No. 4 of Bixby, Tulsa County, Okla.*, 921 F.2d 1022, 1026 (10th Cir.1990).

3. The party seeking relief bears the burden of proving the appropriateness or inappropriateness of the education. *L.E. v. Ramsey Bd. of Educ.*, 435 F.3d 384, 391 (3rd Cir.2006).

4. In this matter, the Complainants are the party seeking relief and bear the burden of proof. The Complainants are the party challenging the current IEP and are asserting violation of the Child Find Provisions.

5. "The IDEA is a comprehensive statute enacted to ensure that all children with disabilities have access to a free and appropriate public education designed to meet their unique needs." *LB. v. Nebo Sch. Dist.*, 379 F.3d 966, 968 (10th Cir. 2004).

6. The Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq., establishes a substantive right to a "free appropriate public education" ("FAPE"). *Board of Ed. of Hendrick Hudson Central School Dist., Westchesteray. v. Rowley*, 458 U.S. 176 (1982).

7. "Free appropriate public education" (or "FAPE") 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. 20 U.S.C. §1401(9).

8. A FAPE includes both "special education" and "related services". 20 U.S.C. § 1401 (9). "Special education" is "specially designed instruction...to meet the unique needs of a child with a disability." 20 U.S.C. § 1401.

9. The U.S. Supreme Court expanded this definition in the *Rowley* case (cited below) holding that a district satisfied this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.

Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP.

10. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. *Bd. Of Educ. Of the Hendrick Hudson Cent. Sch. Dist. V. Rowley*, 458 U.S. 176, 203-04 (1982).

11. The U.S. Supreme Court in *Rowley* set forth a two-part test to determine whether the district has complied with federal special education law: First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? *Id.* at 206-07.

12. In reviewing such cases to determine whether the above requirements have been met, the U.S. Supreme Court cautioned that the courts must be careful to avoid imposing their view of preferable educational methods upon the States. The primary responsibility for formulating the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child.

13. The U.S. Supreme Court reviewed the standard the Tenth Circuit Court of Appeals had applied to the second prong of the *Rowley* test and found the Tenth Circuit's de minimis benefit test lacking. Instead, the Supreme Court held that "a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F. v. Douglas County Sch. Dist.*, 137 S. Ct. 988, 999 (2017).

14. The Supreme Court went on to explain that: 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. (*Id.* Internal citations omitted.)

15. In *Endrew F.*, the Supreme Court reiterated *Rowley's* deference to school authorities with respect to educational policy, stating: We will not attempt to elaborate on what

“appropriate” progress will look like from case to case. It is in the nature of the Act and the standard we adopted to resist such an effort: The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created. This absence of a bright-line rule, however, should not be mistaken for “an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.” *Andrew F.*, 137 S. Ct. at 1001 (quoting *Rowley*, 458 U.S., at 206, 102 S. Ct. 3034.)

16. As modified by *Andrew F.* the two-prong *Rowley* test is now properly stated as: First, has the school complied with the procedures set forth in the Act? And second, has the school offered an IEP reasonably calculated to enable the child to make progress appropriate in light of the child’s circumstances? (137 S.Ct. 988, 999, 2017).

17. The IDEA provides a very specific definition of the meaning of “child with a disability.”

The term “child with a disability” means a child--

- ⓪ with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as “emotional disturbance”), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and
- ⓫ who, by reason thereof, needs special education and related services.

20 U.S.C. §1401(3)(A). This is a very different eligibility standard than there is under Section 504.¹

¹ Handicapped person—

(1) Handicapped persons means any person who (i) has a physical or mental impairment which substantially limits one or more major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment.

(2) As used in paragraph (j)(1) of this section, the phrase:

(i) Physical or mental impairment means (A) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genito-urinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(ii) Major life activities means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(iii) Has a record of such an impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(iv) Is regarded as having an impairment means (A) has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation; (B) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (C) has none of the impairments defined in paragraph (j)(2)(i) of this section but is treated by a recipient as having such an impairment.

34 C.F.R. § 104.3(j).

18. “Specially designed instruction” means adapting, as appropriate to the needs of each exceptional child, the content, methodology, or delivery of instruction for the following purposes:

- (1) To address the unique needs of the child that result from the child's exceptionality; and
- (2) to ensure access of any child with a disability to the general education curriculum, so that the child can meet the educational standards within the jurisdiction of the agency that apply to all children.

K.A.R. § 91-40-1(III).

19. “Free appropriate public education” (or “FAPE”) 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.

20 U.S.C. §1401(9).

20. The U.S. Supreme Court expanded this definition in the Rowley case, holding that a district:

satisfied this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.

Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 203-04 (1982).

21. The U.S. Supreme Court went on to set forth a two-part test to determine whether the district has complied with federal special education law:

First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?

Id. at 206-07. In reviewing such cases to determine whether the above requirements have been met, the U.S. Supreme Court cautioned that:

courts must be careful to avoid imposing their view of preferable educational methods upon the States. The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child.

Id. at 207.

22. In 2017, the U.S. Supreme Court reviewed the standard the Tenth Circuit Court of Appeals had applied to the second prong of the *Rowley* test and found the Tenth Circuit's *de minimis* benefit test lacking. Instead, the Supreme Court held that "a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Andrew F. v. Douglas County Sch. Dist. RE-1*, ___ U.S. ___, 137 S. Ct. 988, 999 (2017).

23. The Supreme Court further explained that:

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.

Id. (internal citations omitted).

24. In *Andrew F.*, the Supreme Court reiterated *Rowley*'s deference to school authorities with respect to educational policy, stating:

We will not attempt to elaborate on what "appropriate" progress will look like from case to case. It is in the nature of the Act and the standard we adopt to resist such an effort: The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created. This absence of a bright-line rule, however, should not be mistaken for "an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review."

Andrew F., 137 S. Ct. at 1001 (quoting *Rowley*, 458 U.S., at 206, 102 S. Ct. 3034).

25. The Tenth Circuit follows the *Daniel R.R.* test for determining whether a district has violated the least restrictive environment mandate. *L.B. ex rel. K.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 977 (10th Cir. 2004). The *Daniel R.R.* test has two parts, in which the court: (1) determines

whether education in a regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily; and (2) if not, determines if the school district has mainstreamed the child to the maximum extent appropriate. *Daniel R.R. v. Bd. of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989).

26. With respect to least restrictive environment (LRE), the federal regulations require:

(2) Each public agency must ensure that—

(i) To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and

(ii) Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

34 C.F.R. §300.114(a)(2).

27. Much like the federal regulation, Kansas defines the least restrictive environment as:

(l) “Least restrictive environment” and “LRE” mean the educational placement in which, to the maximum extent appropriate, children with disabilities, including children in institutions or other care facilities, are educated with children who are not disabled, with this placement meeting the requirements of K.S.A. 72-976, and amendments thereto, and the following criteria:

(1) Determined at least annually;

(2) based upon the student's individualized education program; and

(3) provided as close as possible to the child's home.

K.A.R. 91-40-1(l)

28. When considering placement, schools must also comply with the following federal regulation:

In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that—

(a) The placement decision—

(1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and

- (2) Is made in conformity with the LRE provisions of this subpart, including §§ 300.114 through 300.118;
- (b) The child's placement—
 - (1) Is determined at least annually;
 - (2) Is based on the child's IEP; and
 - (3) Is as close as possible to the child's home;
- (c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled;
- (d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and
- (e) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.

34 C.F.R. §300.116.

STATUTE OF LIMITATIONS

29. Under 20 U.S.C. § 1415(f)(3)(C), a “parent shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint.” See also K.S.A. §72-3415(a)(1)(A).

30. However, the two-year timeline described in 20 U.S.C. § 1415(f)(3)(C) does not apply to a parent if the parent was prevented from requesting the due process hearing due to “specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint.” 20 U.S.C. § 1415(f)(3)(D)(i). The District asserts that any evidence beyond the two-year period prior to the filing of Complainant’s due process complaint in September 2021 should not be considered by the Hearing Officer.

31. The District asserts that any evidence beyond the two-year period prior to the filing of Complainant’s Due Process Complaint in September 2021, should not be considered by the Hearing Officer. In order to be excused from the two-year statute of limitations, the Complainants must show that the school “intentionally mislead them, or knowingly deceived them, regarding their child’s progress.” *D.K. v. Abington School District*, 695 F.3d 233, 249 (3rd Cir. 2012).

32. The Hearing Officer permitted presentation of evidence beyond the two-year period preceding the filing of the due process complaint, with the Hearing Officer further ruling before the hearing began on this issue that Complainants' claims "may date back to the entire deprivation period, even if that period is much greater than two years." See Hearing Officer's Order dated February 2, 2022.

33. There is evidence in the record that specific misrepresentations were made by the District, by omission. Specifically, in 2018, in response to Complainants' request for an IEP for K, District personnel stated that K would "probably not" qualify for an IEP, and further, that a progress report would show "a move in a better direction. Since K has moved to a different science class we have seen social/behavioral improvements as well. He seems to be engaging in a much fuller way. These are good things. I believe that if we compared the K we knew a year ago to the K we know now we would see comparatively remarkable improvements. Even though we still see challenges for him here at times, I feel, the big picture is better." (Exhibit 15; Transcript 50:25, 51:1-4).

34. The Hearing Officer has previously determined in the Findings of Fact (above) that the School Administrator, Mr. Flickinger, had access to academic records, behavioral profiles, the 504 Plan and teacher progress reports. Rather than inquiring further when K father requested an IEP, it appears that this School Administrator chose to "bury his head in the sand," and choose to make no examination of K's academic or behavioral status. The Hearing Officer finds that the failure to conduct a screening using observations, instruments, measures and techniques to disclose any potential exceptionality or to refer K for a Special Education Evaluation after receiving Complainants' request regarding an IEP in April 2018 was a material error. This, coupled with the frequency of K's disciplinary write-ups, his poor grades and behavioral problems triggered the District's Child Find responsibilities. See Findings of Fact 46.

REIMBURSEMENT FOR PRIVATE SCHOOL PLACEMENT*

(*Note: To provide clarity and consistency, the Hearing Officer has chosen to adopt the majority but not all of the Complainants Proposed Conclusions of Law relating to private school placement.)

35. Under 34 C.F.R. § 300.104, "[i]f placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the

child.” *See also* 34 C.F.R. § 300.115 (continuum of alternative placements must be available to meet needs of children with disabilities for special education and related services); K.A.R. § 91-40-21.

37. The Hearing Officer finds that the evidence adduced in this matter establishes that a private residential program is necessary to provide K with FAPE, including special education and related services. The record in this matter, including Dr. Chiles’ evaluation (Exhibit 206), demonstrates the need for K to be placed in a private residential facility.

38. In this case, Complainants enrolled K at LRA without the consent of the District, though at the time of this enrollment at LRA, the District had officially “exited” K from the District.

39. Complainants were expressly permitted by IDEA and Kansas state special education law to unilaterally enroll K at LRA and then seek reimbursement from the District for the costs of this placement; per 34 C.F.R. § 300.148(c), “[i]f the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private preschool, elementary school, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate.” (emphasis added).

40. Parents are entitled to reimbursement under the IDEA if: (1) the school district violated the IDEA; and (2) the education provided by the private school is reasonably calculated to enable the child to receive educational benefits. *L.B. ex rel. K.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 978 (10th Cir. 2004) (citing *Florence County School Dist. Four v. Carter By and Through Carter*, 510 U.S. 7, 11, 15 (1993) and *Sch. Comm. of Burlington v. Dep’t of Educ.*, 471 U.S. 359, 370 (1985)).

41. Importantly, a “parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA and LEAs.” *See* 34 C.F.R. § 300.148(c); *see also Florence County*, 510 U.S. at 12-13.

42. Additionally, IDEA “authorizes reimbursement for private special education services when a public school fails to provide a FAPE and the private-school placement is appropriate, regardless of whether the child previously received special education services through the public school.” *Forest Grove School Dist. V. T.A.*, 557 U.S. 230, 247 (2009); *see also Burlington*, 471 U.S. at 369-371 (holding, “Congress meant to include retroactive reimbursement to parents as an available

remedy in a proper case...Reimbursement merely requires the [school district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP.”).

43. The Hearing Officer finds that, in this case, the District failed to conduct Child Find in April 2018. Nonetheless, Complainants are permitted to see reimbursement for their placement of K at LRA given the Supreme Court opinions cited directly supra.

44. In the Tenth Circuit, there are four elements that a special education due process hearing officer must find have been established by parents by a preponderance of the evidence to order a local education agency to reimburse parents who unilaterally place their child in a private school without the consent or referral by the school district. *Jefferson County School Dist. R-1 v. Elizabeth E. ex rel Roxanne B*, 702 F.3d 1227, 1232 (10th Cir. 2012).

45. First, a hearing officer must determine whether the school district provided or made a free appropriate public education (“FAPE”) available to the disabled child in a timely manner; if it did, the unilateral parental placement is not reimbursable. *Elizabeth E.*, 702 F.3d at 1232; 20 U.S.C. § 1412(a)(10)(C)(ii).

46. Second, a hearing officer must determine whether the private placement is a state-accredited elementary or secondary school; if not, the placement is not reimbursable. *Elizabeth E.*, 702 F.3d at 1232; 20 U.S.C. §§ 1412(a)(10)(C) (ii), 1401(27);

47. Third, a hearing officer must determine whether the private placement provides special education, i.e., “specially designed instruction...to meet the unique needs of a child with a disability”; if the placement provides no such instruction, it is not reimbursable. *Elizabeth E.*, 702 F.3d at 1232; 20 U.S.C. § 1401(29)(A).

48. Finally, if the private placement provides additional services beyond specially designed instruction to meet the child’s unique needs, it must be determined whether such additional services can be characterized as “related services” under the Act, i.e., “transportation, and such developmental, corrective, and other supportive services ... as may be required to assist a child with a disability to benefit from special education,” excepting medical services which are not for diagnostic and evaluation purposes. *Elizabeth E.*, 702 F.3d at 1232; 20 U.S.C. § 1401(26). If the additional services cannot be so characterized, they are not reimbursable. *Elizabeth E.*, 702 F.3d at 1232.

49. The burden of proof in a “reimbursement case” is that the parents must prove all four elements only by a preponderance of the evidence. *Elizabeth E.*, 702 F.3d at 1232; *see also*

Morrison v. Los Lunas Pub. Sch., No. CV 12-143 JCH/RHS, 2013 WL 12330019, at *8, 11, 15, and 17 (D.N.M. May 28, 2013).

50. The Hearing Officer finds that all four elements stated in *Elizabeth E.* have been established by Complainants in this matter by a clear preponderance of the evidence, therefore, Complainants are entitled to reimbursement by the District of all expenses related to K’s enrollment at LRA.

ELEMENT 1: THE DISTRICT FAILED TO MAKE A FAPE AVAILABLE TO K IN A TIMELY MANNER AFTER FAILING TO CONDUCT PROPER AND LEGALLY SUFFICIENT CHILD FIND.

51. The Hearing Officer finds that there is significant, substantial, and voluminous evidence of the District failing to make a FAPE available to K in a timely manner, including by violating the “Child Find” requirement under IDEA and Kansas state special education law over a period of several years, thus satisfying the first element of the *Elizabeth E* reimbursement test.

52. Most basically, multiple District witnesses provided testimony effectively admitting that the District violated Child Find as to K, including Dr. Loren Hatfield and Tiffany Springob, both of whom were members of the Child Study Team at two different schools which K attended in ninth and tenth grade, with the District failing to even evaluate K for special education during those grades. (Transcript 1081:25-1082:11, 1365:4-6).

53. Other District witnesses testified that it was clear the 504 Plans were ineffective and not working for K, with a District witness admitting this to be true as early as December 2019, and the District’s own documentation—including emails and its own Multidisciplinary Report compiled in June 2021—concedes the same to be true as early as November 2019; yet the District did not even evaluate K for special education until June 2021, and only after Complainants retained counsel and the District received a demand letter on this point. (*See* Transcript 605:5-17, 1279:3-4; Exhibits 56 and 333)

54. Each exceptional child is entitled to a FAPE from his local educational agency, under IDEA and Kansas state special education law; a “local educational agency” is a public school district. 20 U.S.C. §§ 1401(19), 1413, 1414(b); K.S.A. § 72-3410; K.A.R. § 91-40-2; *Andrew F. ex rel. Joseph F. v. Douglas County School Dist. RE-1*, 137 S.Ct. 988, 993-94 (2017).

55. “FAPE” is defined as “special education and related services that meet the following criteria:

- (1) Are provided at public expense, under public supervision and direction, and without charge;
- (2) Meet the standards of the state board;
- (3) Include an appropriate preschool, elementary, or secondary school education; and
- (4) Are provided in conformity with an individualized education program.”

K.S.A. § 72-3404(p); K.A.R. § 91-40-1(z); 20 U.S.C. § 1401(9).

57. In order to provide FAPE to a disabled child, a school district must create and implement “an educational program reasonably calculated to enable a child to make progress in light of the child’s circumstances.” *Andrew F.*, 137 S.Ct. at 1001.

58. “Special education” is defined as “specially designed instruction provided at no cost to parents to meet the unique needs of an exceptional child, including:

- (1) Instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and
- (2) Instruction in physical education.”

“At no cost means that all specially-designed instruction is provided without charge, but does not preclude incidental fees that are normally charged to nondisabled students or their parents as a part of the regular education program.” K.S.A. § 72-3404(i); K.A.R. § (kkk); 20 U.S.C. § 1401(29); 34 C.F.R. § 300.39.

59. “Specially designed instruction” means adapting, as appropriate to the needs of each exceptional child, the content, methodology, or delivery of instruction for the following purposes:

- (1) To address the unique needs of the child that result from the child's exceptionality; and
- (2) to ensure access of any child with a disability to the general education curriculum, so that the child can meet the educational standards within the jurisdiction of the agency that apply to all children.

K.A.R. § 91-40-1(III); *see also Andrew F.*, 137 S.Ct. at 1000.

60. “It is through the IEP that the free appropriate public education required by the Act is tailored to the unique needs of a particular child.” *Andrew F.*, 137 S.Ct. at 1000.

61. IDEA requires “an educational program reasonably calculated to enable a child to make progress in light of the child’s circumstances.” *Id.* at 1001 (internal citations omitted).

62. Provision of FAPE to an exceptional child requires compliance with the “Child Find” obligations imposed upon LEAs such as the District. 34 C.F.R. § 300.111.

63. The District was required by Child Find to identify and evaluate for special education all children with disabilities who are in need of special education and related services, including K. 20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111.

64. The District advanced K from grade to grade from 2018 through 2021. However, per 34 C.F.R. § 300.111(c)(1), Child Find must also include “[c]hildren who are suspected of being a child with a disability under § 300.8 and in need of special education, even though they are advancing from grade to grade.”

65. “When a school board violates its Child Find obligation by not evaluating a child suspected of being disabled, it necessarily fails to provide that student a FAPE.” *Greenwich Bd. of Educ. v. G.M.*, No. 3:13-CV-00235 (CSH), 2016 WL 3512120, at *8 (D. Conn. June 22, 2016) (emphasis supplied).

66. Moreover, “authorities have approved reimbursement for costs of private placements for ‘child find’ violations, if a child is subsequently determined to be eligible for IDEA services.” *Dep’t of Educ., State of Hawaii v. Cari Rae S.*, 158 F. Supp. 2d 1190, 1195–96 (D. Haw. 2001) (citing *Doe v. Metropolitan Nashville Public Schools*, 133 F.3d 384, 388 (6th Cir.1998)).

67. In Kansas, school districts must “have policies and procedures in effect to ensure that all children with exceptionalities (those who have disabilities and those who are gifted) and who are in need of special education and related services are identified, located, and evaluated.... Schools in conjunction with parents use these processes to locate, evaluate, and identify children who may need special education and related services. Children in need of special education services should be identified as young as possible, and also as soon as possible after the concern is noted....The earliest possible identification of educational or behavioral concerns will diminish the impact of the concerns on the child’s education...If it appears that the child's needs require interventions that involve intense or sustained resources beyond those available in the general education environment, and if the team suspects the child may have an exceptionality, the team must make a referral for an initial evaluation.” See Kansas Special Education Process Handbook, Kansas State Department of Education, Chapter 2: Screening and General Education Intervention (Child Find), <https://www.ksde.org/Portals/0/SES/PH/PH-Ch02.pdf?ver=2019-05-21-102539-847>, at pages 21, 31).

68. A federal Court of Appeals has held that a school district has an “independent duty” to identify students with special needs within a reasonable time period, and that this Child Find

duty is “a profound responsibility, with the power to change the trajectory of a child’s life.” *Ligonier*, 802 F.3d at 625.

69. “A school district’s child find duty is triggered when the district ‘had reason to suspect [the child] had a qualifying disability.’ Although there is no bright-line rule, a school district generally has sufficient notice if it is aware of facts suggesting the child has a disability and that the child is struggling academically.” *D.C. v. Klein Indep. Sch. Dist.*, 860 F. App’x 894, 900–01 (5th Cir. 2021).

70. The reasonableness of a school district’s delay in evaluating a child for special education is measured by whether during the intervening time period, the District took proactive steps to comply with its child find duty. *Id.* at 901.

71. One of the “proactive steps” a district should take during the intervening time period include “requesting and gathering information on the student in an effort to classify her and determine [the district’s] obligations.” *Spring Branch Indep. Sch. Dist. v. O.W. by Hannah W.*, 961 F.3d 781, 793 (5th Cir. 2020).

72. “A time period [i.e., the district’s delay in evaluating a student for special education] is unreasonable when the district fails to take proactive steps throughout the period or ceases to take such steps.” *Id.*

73. “§ 504 accommodations are not a substitute for an evaluation [for special education] once a school district is ‘on notice of acts or behavior likely to indicate a disability.’” *Id.* at 794.

74. A federal Court of Appeals has held that a delay of three months and seven days to conduct a special education evaluation, “where the district chose to continue implementing Section 504 accommodations instead of pursuing a special education evaluation,” was unreasonable, untimely, and in violation of Child Find. *Klein Indep. Sch. Dist.*, 860 F. App’x at 901 (citing *Spring Branch Indep. Sch. Dist.*, 961 F.3d at 793-95).

75. “‘All children with disabilities ..., regardless of the severity of their disabilities, and who are in need of special education and related services, are [to be] identified, located, and evaluated.’ This is the so-called child-find obligation, which imposes an affirmative obligation on the school district. The duty ‘is triggered when the [school] has reason to suspect a disability, and reason to suspect that special education services may be needed to address that disability.’” *Wiesenberg v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 181 F. Supp. 2d 1307, 1310–11 (D. Utah 2002).

76. Furthermore, “[k]nowledge of a disability may be inferred from written parental concern, the behavior or performance of the child, teacher concern, or a parental request for an evaluation.” *Id.*

77. The Hearing Officer finds that the evidence adduced in this matter establishes by a preponderance that each of the above inferences occurred to a marked degree—repeatedly—for years, with no action by the District to evaluate K for special education, despite clearly deteriorating academic performance and achievement, as well as continuing significant behavioral problems, all of which served to violated Child Find and deny K FAPE, causing a clear and undeniable deprivation of educational benefits to K, and causing significant and substantive harm to K’s parents and family.

PARENTAL REQUESTS FOR AN EVALUATION.

78. The Hearing Officer finds that the evidence establishes there were multiple parental requests for special education evaluations of K made by Complainants to the District over the course of multiple years, with the District refusing to comply with Child Find and evaluate K for special education for until Complainants retained counsel and the District was threatened with liability for violating IDEA, and these requests by Complainant create a clear inference that the District had knowledge that K was a child with a disability, and they further created a reasonable suspicion that K was in need of special education to address that disability.

79. First, on April 15, 2018, during K’s seventh-grade year, Complainants expressed concerns about K’s performance in school and stated, “I don’t know if that means we need to adjust the plan itself or move up to a full IEP.” (Exhibit 15).

80. This request for an IEP was denied, with the District personnel who responded stating that K “probably” did not qualify for an IEP anyway, and that his performance was improving; following that statement, K had an additional 35 disciplinary writeups in middle school and K finishing eighth grade with nearly straight “F” grades.

81. On November 4, 2019, during K’s ninth-grade year, Complainants emailed Southeast Assistant Principal Dr. Hatfield stating, “[w]e think it might be time for an IEP and would like to start looking into that,” while also recounting the difficulties K had experienced with school that would make an IEP appropriate for K (Exhibit 42). Later in the email thread, Complainants

confirmed this email was their “formal request to explore SPED/IEP for K[en].” (*Id.*) This email also constitutes written parental concerns by Complainants to the District.

82. Despite the litany of problems K had experienced, and brutal comments about K’s status from his teachers gathered in response to this request for an IEP evaluation, the District refused to even evaluate K for special education in November 2019, and things kept deteriorating for K.

83. On February 25, 2021, during K’s tenth-grade year, and after many more obvious problems with K’s academic and behavioral performance, Complainants sent an email to Chester Lewis staff stating “[w]e’d like to revisit getting an IEP put into place for K. When can we meet to start that process?” (Exhibit 145).

84. While the District initially agreed to such an evaluation, when it learned that K had been taken to an out-of-state wilderness therapy and treatment program, it quickly made the decision to unilaterally “exit” K from the District and refused to conduct a special education evaluation until K’s parents retained counsel in late May 2021.

85. The Findings of Fact established that parental requests for an evaluation were submitted to the District multiple times over a period of years, with no evaluation for exceptionality and special education by the District.

WRITTEN PARENTAL CONCERNS

86. The record in this matter establishes that there were dozens of written parental concerns to the District that provided the District with either a clear inference of knowledge, or actual knowledge, of K’s disabilities and his severe and ongoing academic and behavioral problems, and which created a reason to suspect that K was in need of special education to address those disabilities, and the ongoing failure of the District to evaluate K for special education despite these teacher concerns constituted a violation of Child Find by the District, resulting in denial of FAPE for K.

87. Below is a non-exhaustive list of these concerns which create an inference of, or demonstrates actual, knowledge by the District that K was a student with a disability, and the District had a reason to suspect that he was in need of special education to address that disability.

88. In November 2016, Complainants emailed District personnel with sixty-two (62) pages of K's treatment and evaluation records, containing diagnoses and references to his low processing speed (Exhibits 4 and 8).

89. An August 2017 email from Complainants to District personnel regarding getting K on a 504 Plan also constitutes a written parental concern to the District. (Exhibit 6). Additionally, K's first 504 Plan includes a "Parent Input for Section 504 Evaluation" section in which Complainants specifically stated that K would benefit from "one-on-one assistance from teachers," "supplemental tutoring, especially in writing/grammar/spelling," and "small groups emphasizing social skills with peers." (*Id.*)

90. Furthermore, mental health evaluations and other medical, psychological, and testing reports of K were provided to the District, as evidenced by the fact that the District provided such documents during discovery (Exhibit 8). These evaluations and reports most definitely provided the District with knowledge of K's disabilities.

91. In April 2018, Complainants sent an email to District personnel regarding problems that K was encountering at school and looking for solutions (Exhibit 15).

92. In August 2019, Complainants emailed District personnel at Southeast that K was behind, had no foundation, was not doing well reading or following instructions, and that he needed a tutor who was equipped to work with a kid who is not always going to be cooperative (Exhibit 25).

93. In October 2019, Complainants emailed K's 504 Plan Coordinator at Southeast and asked for changes to the 504 Plan, including the addition of access to a one-on-one para (Exhibit 37). No para was ever provided to K, and during the hearing, K's 504 Plan Coordinator likened Complainants' request for a para for K to asking for Jeff Bezos' super yacht (Transcript 731:15-25, 732:1-4).

94. In October 2019, Complainants emailed one of K's ninth-grade teachers to state in relevant part, "regular school does not seem to be working for him and hasn't been for quite some time." (Exhibit 41). Shortly after sending this email is when Complainants requested an IEP for K. (Exhibit 42).

95. There is also evidence of many emails between December 2019 and January 2020 in which Complainants made it known to District personnel that K was not performing

adequately, that K was unable to keep up with assignments, and that Complainants were uncertain as to what could be done for K (Exhibits 60, 62, 66).

96. On February 25, 2020, after K was hospitalized for nearly attempting suicide, Complainants also let District personnel know of this hospitalization (Exhibit 72). This written parental concern should have made it crystal-clear to the District that K was in need of special education services.

97. In September 2020, Complainants emailed multiple District personnel at K's new school, Chester Lewis, about K's difficulties and needs, as well as about K's significant processing delay (Exhibits 89, 93, 96, 98). The same issues continued through October 2020 with no District personnel suggesting that K be evaluated for special education (Exhibits 108, 118, 120).

98. More written parental concerns were emailed to District personnel by Complainants through February 2021 as well, echoing the same sentiments they had been expressing for years (Exhibits 130, 133, 143).

99. The Findings of Fact establish that voluminous written parental concerns regarding K were sent to the District over the course of several years, with no evaluation for exceptionality and special education by the District.

100. The evidence is abundantly clear that there were numerous, consistent, and explicit written parental concerns expressed to the District for years that gave the District knowledge of K's disability and his need for special education services; regardless of this knowledge, the District did not conduct proper Child Find.

TEACHER CONCERNS

101. The Hearing Officer finds that there were also dozens of teacher concerns expressed about K's behaviors and academic progress since K's enrollment in the District, which creates a clear inference that the District had knowledge that K was a student with a disability, and these frequent concerns also created a clear reason to suspect that K was in need of special education to address that disability, and the ongoing failure of the District to evaluate K for special education despite these teacher concerns constituted a violation of Child Find by the District, resulting in denial of FAPE for K, as a matter of law.

102. Below is a non-exhaustive list of these teacher concerns which create an inference of, or demonstrates actual, knowledge by the District that K was a student with a

disability, and the District had a reason to suspect that he was in need of special education to address that disability.

103. From the first 504 Plan in September 2017, the “Teacher Input” section had comments from teachers reflecting significant problems with K staying on task and focusing, not paying attention, not doing assignments, not being interested at all in schoolwork, having “melt downs,” stating that K does much better in a quiet, focused, one-on-one setting (Exhibit 6). Indeed, multiple District personnel stated this.

104. Teacher concerns about K were expressed in K’s Student Discipline Profile, which reflected nearly constant behavioral problems with K while in middle school and with severe behavioral problems continuing into high school. (Exhibit 12).

105. On August 21, 2019, days after K started high school, his algebra teacher at Southeast expressed concern that K was reading comic books most of the hour, refusing to get into groups or even with a partner, and that he did not get any of the in-class work done (Exhibit 26).

106. In a similar email on September 4, 2019, K’s French teacher at Southeast emailed parents stating, “I just wanted to let you know that K[en] has homework tonight because he chose to do other things in class instead of his work. I tried to get him to write one sentence for each picture and started with focusing on just one picture, but he just did not do anything. He needs to look at each picture and write one sentence using his vocabulary. If you have any suggestions on how best to keep him focused and on task, I would appreciate the input” (Exhibit 30).

107. Multiple emails through October 2019 expressed the exact same concerns about K’s performance in class, yet no IEP was ever considered for K (Exhibit 35, 39, 40, 41).

108. When Complainants formally requested an IEP for K in November 2019, the Southeast school psychologist and member of the Child Study Team sought more information from K’s teachers about his classroom functioning; in response to this request, the same significant, fundamental concerns were expressed by each teacher – that K has a difficult time focusing in class, that he refuses to do any work, that he does not turn in his work, that he does not show any interest in improving his grades, and more (Exhibit 46, 47, 49, 50, 51).

109. Despite these significant concerns, Claimant’s request for a special education evaluation was denied, without the District reviewing or even requesting information from K’s healthcare and psychological providers.

110. Only one day after the request for special education evaluation was denied by the District, K's algebra teacher expressed the same concerns to District personnel (Exhibit 53, 55, 56) and to Complainants (Exhibit 54).

111. In response to these teacher concerns, the 504 Manager for K, Mr. Joe Nelson, conceded that "you've tried all the strategies listed in his 504" and re-attached K's 504 Plan for the algebra teacher, with Southeast administrator and member of the Child Study Team Dr. Hatfield copied on this message (Exhibit 53).

112. In response to these concerns from the algebra teacher, various other Southeast administrators and personnel made disparaging comments about K, including by Southeast school nurse Regan Carlstrom, a member of the Child Study Team which had just denied Complainants' request for special education evaluation, with Ms. Carlstrom stating it was her "personal opinion" that K was making a "CHOICE to not do anything. I do not believe this has anything to do with anxiety or 504 disability...My suggestion for her: offer what is needed on 504 and then let him be." (Exhibit 55).

113. Ms. Carlstrom made these comments without reviewing any medical or psychological documentation about K, and without contacting any of K's providers; Ms. Carlstrom is also not trained in the field of emotional dysregulation nor has any formal training or certification in the field of neurodevelopmental disorders in students. See Transcript 598:14-19.

114. Mr. Agnew then added his comments about these teacher concerns, stating that he can "tell the teacher is very frustrated and I believe he [K] can bring that spirit out of most people. Ms Bano is a very supportive teacher. I do see that the power struggle is present in her email. Sadly our systems are set up to support many of these excuses. Unfortunately, I did not attend his 504 meeting but I understand through discussions with others that attended that his therapist has told the parents not to challenge him about his academics and to allow us to be the people to push educational and evidently parental expectations. We are not doing this young man any favors or preparing him for the bigger world. We need to clearly identify what is 504 issues and what is defiance. We need to assure that his accommodations are in place for his disability but guide this young man with rewards and consequences for choice behaviors that are disruptive to his success and others in his classes. We must send a clear message of what is okay and not okay." (Exhibit 55).

115. Mr. Nelson then forwarded to the algebra teacher the comments from Ms. Carlstrom, who was a member of the Child Study Team which had just denied Complainants' request

for special education evaluation, with those comments stating, “offer what is needed on 504 and then let him be.” (Exhibit 56).

116. In response, the algebra teacher stated “I have done this [sic] accommodations all this time. No result as of yesterday...This strategy is not working.” *Id.*

117. Indeed, in response to these comments from the algebra teacher, Ms. Carlstrom replied “[a]ll you legally have to do is offer and attempt his 504 accommodations.” (Exhibit 56). This reply not only ignored the algebra teacher’s statements that the 504 accommodations had been tried and were not working, but it is also a complete misstatement of what is legally required of a public school district pursuant to Child Find under IDEA.

118. The Hearing Officer finds that the commentary from Southeast personnel—including from a member of the Child Study Team—in response to the algebra teacher’s concerns, betrays a flippant disregard of what IDEA, and Child Find in particular, legally requires.

119. The response email from Algebra teacher Ms. Bano-Rizzo references K’s behavior in her course causing a “Domino effect in the classroom” with the other students, showing K’s behaviors causing a negative impact on the other students in the course. (Exhibit 56).

120. Concerns by teachers continued into 2020, expressing the exact same serious concerns that had been previously expressed by many of Ks teachers. (Exhibit 64, 66, 67, 71, 73, 75).

121. In September 2020, one of K’s teachers at Chester Lewis shared concerns about K with Chester Lewis’ special education teacher, stating in one of these emails that she “really think[s] he needs assistance” and “this baby is going to need some help” still, no special education evaluation was considered for K (Exhibit 93, 94, 100).

122. Instead, K’s teacher was advised to double check the 504 Plan (Exhibit 94). Rather than evaluate K for special education, the District’s decision was to try to place its responsibilities on Complainants and to change the due date in the school’s grading system (Exhibit 98).

123. One of K’s teachers at Chester Lewis even specifically requested a para for K, a special education accommodation, without any action taken by the District to act upon that request, nor to evaluate K for special education. (Exhibit 101).

124. Teacher concerns for and about K continued through the remainder of 2020, again expressing the same concerns about K not participating in class or finishing his schoolwork (Exhibit 105, 107, 110).

125. Further, regarding K's October/November 2020 504 Plan Re-Evaluation, in the "Teacher Input for Section 504 Evaluation" sections, teachers expressed the same concerns that had been present and readily observable in K for years (Exhibit 114, 115).

126. Starting in the beginning of 2021, teachers shared more concerns about K's refusal to engage with teachers and issues of control (Exhibit 131, 136, 137, 138).

127. Rather than evaluate K for special education, as was clearly indicated by these nearly constant teacher concerns, one teacher was instead simply told to re-read the 504 Plan. (Exhibit 131).

128. At one point, District personnel stated that K has "a 504 and we have ZERO choice but to follow it. I agree; boundaries and expectations must be set but beyond that there is not much we can do." (Exhibit 138). The Hearing Officer finds that the District should have evaluated K for special education.

129. Another of K's teachers emailed a member of the Chester Lewis Child Study Team to suggest that K was the only student with a 504 Plan who did not "buy in" to the 504 Plan which this teacher and former school administrator had ever encountered, yet even this did not prompt a special education evaluation request or referral for K. (Exhibit 141).

130. On February 4, 2021, one of K's teachers expressed concern to Complainants and requested information from Complainants to help her try to connect with K (Exhibit 140). The teachers and staff with the District were still, years later, struggling with K, and yet nobody with the District evaluated K for special education, and in fact, multiple requests by Complainants for that evaluation were refused by the District.

131. There is evidence that teacher concerns continued to be shared throughout February 2021, in which K was not completing any assignments, that he sits on his phone and talks to others, and that he shuts down when pushed to do *anything* (Exhibits 141, 142, 143). In particular, it was even acknowledged that for K "academics is not going forward." (Exhibit 143).

132. The Findings of Fact establish that there were numerous voluminous teacher concerns expressed about K over a period of years, giving rise to a reasonable suspicion that K

was disabled and in need of special education and related services, with no evaluation for exceptionality and special education by the District.

**KNOWLEDGE OF A DISABILITY CAN BE INFERRED BY THE BEHAVIOR OR
THE PERFORMANCE OF THE CHILD**

133. The *Wiesenberg* federal district court opinion, which is cited frequently in cases within the Tenth Circuit discussing Child Find, also stated that knowledge of a disability may be inferred by the behavior or the performance of the child. *Wiesenberg*, 181 F. Supp. 2d at 1310-11.

134. The Hearing Officer finds that the record in this matter contains ample evidence that the District had knowledge of K's chronic serious behavioral problems and seriously negative academic performance, and the ongoing failure of the District to evaluate K for special education despite its knowledge of these ongoing serious behavioral problems and very poor academic performance by K constituted a violation of Child Find by the District, resulting in denial of FAPE for K.

135. Below is a non-exhaustive list of these behavioral problems and very poor academic performance exhibited by K which create an inference of, or demonstrates actual, knowledge by the District that K was a student with a disability, and the District had a reason to suspect that he was in need of special education to address that disability.

136. Before K's 504 Plan was put into place in September 2017, K had fifteen (15) disciplinary write-ups (Exhibit 12). After the 504 Plan was put into place, K received thirty-five (35) additional write-ups through the end of eighth grade (*Id.*).

137. These write-ups reflect constant, serious behavioral problems with K not focusing in class, distracting other students, refusing to stay on task, physical conflict with other students, regular insubordination and backtalking at teachers, cussing at teachers and other students, ripping up work in class, storming out of class without permission, and several other behavioral problems (*Id.*).

138. The Hearing Officer specifically finds that these disciplinary write-ups and K's consistent, long-term behavioral problems created a reasonable inference that K could have an exceptionality that required evaluation for special education, and the District's failure to

conduct such an evaluation constituted a violation of Child Find, resulting in denial of FAPE for K.

139. Two employees of the District acknowledged in their testimony that the amount of writeups K received, even before starting high school, was a very high number (Transcript 726:11-25, 727:1-4, 1027:9). Despite K's behavioral problems being very evident, there was no evaluation of K for special education during middle school, and as noted above, the District refused to evaluate K for special education despite Complainants asking for an IEP during K's seventh-grade year.

140. The behavior problems did not stop when K entered high school, as reflected in the voluminous written parent concerns and teacher concerns. K had meltdowns, shutdowns, ignored teachers, and refused to do work.

141. On February 6, 2020, during K's ninth-grade year, several months after the District refused to evaluate K for special education, K was written up again for refusing to do any work and was told by his teacher to leave class to go to the office, and the write-up stated that K "began to bang his head on his desk. The classroom had to be evacuated and security had to escort him out of the classroom." (Exhibit 12).

142. Indeed, Complainant Ms. Z testified that she had been told by District personnel that four security personnel had to carry K out of the classroom kicking and screaming (Transcript 902:7-12, 937:4-25, 938:1-15), and Mr. D testified that K "had an outburst or a meltdown and was asked to leave the classroom, wouldn't do it, and security was called and they picked him up and carried him out of the room," (Transcript 333:17-21), but still there was no special education evaluation of K.

143. The District was fully aware of K's nearly week-long psychiatric hospitalization for suicidal ideation in February 2020. (Exhibits 70-75).

144. The Hearing Officer finds it significant that Dr. Hatfield herself—a Vice Principal at Southeast and member of the Child Study Team during the 2019-2020 academic year—testified under oath at the hearing that K exhibited the characteristics of Emotional Disturbance in Spring 2020, at the time of his psychiatric hospitalization.

145. In response to questioning regarding mental health issues in K that could be seen as or reflected as "emotional disturbance," Dr. Hatfield stated that "later in" the 2019-2020 school year, "I think there's evidence that it was there." *See* Transcript 1081:25-1082:11.

146. The Hearing Officer finds that this was a clear admission by a District employee and agent, who was on the Southeast Child Study Team during the 2019-2020 academic year, that the District failed to meet its obligations under Child Find to evaluate K for special education during the 2019-2020 academic year.

147. Yet as the evidence establishes, not only was there no special education evaluation done at that time, but Ms. Maddux—a member of the Southeast Child Study Team—testified that K was never even discussed by the Southeast Child Study Team again during the 2019-2020 academic year following the November 2019 refusal by District to evaluate K for special education, and there is zero evidence contradicting that statement (Transcript 977:13-20, 978:21-23).

148. The Hearing Officer finds this was a violation of Child Find by the District, resulting in denial of FAPE for K.

149. Further, the Hearing Officer finds that K's grades themselves are evidence of his academic struggles and exceptionality, and his need for special education (Exhibit 13).

150. The record establishes that in the final semester of K's eighth-grade year, he received grades of straight F's and one C. *See* Exhibit 13, Transcript 56:13.

151. The record establishes that in K's first semester of ninth-grade year, in Fall 2019, K received seven (7) "F" grades, a single "B" grade in Physical Education, and a "P" in Seminar. *See* Exhibit 13.

152. These grades were assigned K in the same semester that the District refused to evaluate K for special education. *See* Exhibit 13; Exhibit 45.

153. While K's grades showed some improvement by the end of the spring semester of K's freshman year, Spring 2020, which the District used to argue that a special education evaluation was not merited, the Hearing Officer finds the evidence adduced establishes this improvement was the result of (1) the pandemic grade freeze policy put into place in approximately March 2020, and (2) K's father working one-on-one in intensive fashion with K every school day to work on and complete school assignments (Exhibits 84, 85); *see* Transcript 211:20-25, 212:1- 10, 215:9-25, 216:1-13, 622:1-11, 773:19-778:9, 1067:24-1068:11.

154. K's final grades at Chester Lewis were straight F's (Exhibit 191). The Hearing Officer finds that while the District insinuated at the hearing that these F grades were somehow inaccurate, (1) the grades were input by District personnel on the District-generated

transcript (Exhibit 191), and (2) Mr. Parks, the principal of Chester Lewis, personally ordered that these F grades be placed in K’s transcript (Exhibit 190), after a staff member at Chester Lewis said “not one teacher gave him a grade for this year,” and this exchange and entry in K’s transcript came after numerous emails, spread over months, from and between Chester Lewis personnel about K’s monumental struggles at the school.

155. The Findings of Fact establish that the District had either actual knowledge, or knowledge that can be inferred, that K was a child with a disability and in need of special education and relates services, with no evaluation for exceptionality and special education by the District.

156. As demonstrated by the above and the record as a whole in this matter, each of the four inferences set forth in the *Wiesenberg* case are present in this case, establishing by a preponderance of the evidence that the District had knowledge of K’s disabilities and had reason to suspect that special education services may be needed to address that disability, yet the District failed and refused to evaluate this child for special education.

K WAS A CHILD WITH A DISABILITY AND IN NEED OF SPECIAL EDUCATION FOR SEVERAL YEARS PRIOR TO THE DISTRICT’S INITIAL EVALUATION IN JUNE 2021, WHEN THE DISTRICT FINALLY CONDUCTED AN UNTIMELY SPECIAL EDUCATION EVALUATION

157. The Hearing Officer finds by a preponderance of the evidence that K was a child with a disability and in need of special education services for several years prior to the District’s initial evaluation for special education in June 2021, and this information was either actually or constructively known by the District, which failed to evaluate K for special education in a timely fashion.

EMOTIONAL DISTURBANCE.

158. K qualified for special education based on the definition of Emotional Disturbance found in the IDEA regulation entitled “Child with a disability” set forth at 34 C.F.R. § 300.8(c)(4)(i):

“Emotional disturbance means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

- (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
- (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
- (C) Inappropriate types of behavior or feelings under normal circumstances.
- (D) A general pervasive mood of unhappiness or depression.
- (E) A tendency to develop physical symptoms or fears associated with personal or school problems.

159. The Hearing Officer finds, by a preponderance of the evidence, that the documentary evidence present in this case, and the testimony at the hearing from Complainants, expert witnesses, treatment providers, and District personnel, confirms that every one of these characteristics of ED was clearly observable in K to a marked degree at the District for years, and caused severe adverse effects on K's educational performance over that same time period, yet the District made no effort to evaluate K for special education, even going so far as to refuse to evaluate K for special education despite multiple and repeated requests by K's parents for an IEP.

160. Furthermore, K's providers and the expert witnesses in this matter, including a psychiatrist who has worked in the field of child psychiatry for years, testified that K exhibited these characteristics over a long period of time, and these witnesses also testified as to the adverse effects to K's academics because of his conditions.

161. The District did not provide any expert testimony or provider testimony rebutting these statements by K's providers and expert witnesses.

162. In fact, the District's own witness, Dr. Hatfield, an administrator at Southeast and a member of the Child Study Team there during the 2019-2020 academic year, testified that K showed signs of Emotional Disturbance in Spring 2020 at the time of his psychiatric hospitalization for suicidal ideation, yet no special education evaluation was done at that time, and in fact, the Child Study Team did not even discuss K at that time, per Child Study Team member Ms. Maddux (Transcript 977:13-20, 978:21-23).

163. This admission by a District employee and agent, a member of the Southeast Child Study Team during the 2019-2020 academic year, establishes that the District violated Child Find as to K, as the District had actual or constructive knowledge of K's disability under IDEA and Kansas state special education law, and that the District had reason to suspect that special

education may be necessary to address that disability, but the District did not even evaluate K for special education during the 2019-2020 academic year, much less furnish him an IEP.

164. The Hearing Officer also notes District's own witness, Tiffany Springob, a member of the Child Study Team at Chester Lewis during the 2020-2021 academic year, admitted under oath that the "signs were there" that a special education evaluation was appropriate for K earlier in the 2020-21 academic year, "but it didn't get done." (Transcript 1365:4-6).

165. This is a clear admission by the District's own witness that the District violated Child Find, as the District had actual or constructive knowledge of K's disability under IDEA and Kansas state special education law, and that the District had reason to suspect that special education may be necessary to address that disability, but the District did not even evaluate K for special education during the 2020-2021 academic year, much less furnish him an IEP.

166. According to the definition of "Emotional Disturbance," a child's condition must exist over a "long period of time." 34 C.F.R. § 300.8(c)(4)(i).

167. Regarding what constitutes a "long period of time" in that definition of Emotional Disturbance, a federal district court within the Tenth Circuit has cited a letter from the U.S. Department of Education Office of Special Education Programs as stating that the term "over a long period of time" is defined as "a range of from two to nine months, assuming preliminary interventions have been implemented and proven ineffective during that period." *Morrison*, 2013 WL 12330019 at *15.

168. The Hearing Officer finds by a preponderance that the evidence has established that these characteristics of Emotional Disturbance were visible to a marked degree for *years* with K, since at latest his seventh-grade year.

169. The Findings of Fact established that K exhibited one or more of the characteristics of Emotional Disturbance over a long period of time and to a marked degree that adversely affected his educational performance, with no evaluation for exceptionality and special education by the District.

PRELIMINARY INTERVENTIONS WERE INEFFECTIVE

170. As set forth in the *Morrison* case, the Hearing Officer further finds by a preponderance that the evidence in this matter establishes that the "preliminary interventions" by the District as to K, consisting of the 504 Plans which the District created and implemented, were

ineffective for the same length of time they were in existence, as evidenced by K’s academic and behavioral performance during this time period, and by documents and statements generated by the District’s own witnesses.

171. For instance, the District itself confirmed that the 504 Plans were ineffective for a lengthy period of time in its Multidisciplinary Team Report (Exhibit 333, p. 1) as to academic performance, and as to behavioral issues, as noted in (*e.g.*, Exhibits 54, 56, and 141.), and as confirmed by testimony from Southeast school nurse Regan Carlstrom, a member of the Child Study Team during the 2019-2020 academic year, who testified that the 504 Plan for K was not working in December 2019. (Transcript 605:5-17).

172. At the hearing Mr. Anderson also testified that the 504 Plans “were not improving academic success” for K. (Transcript 1279:3-4).

173. Moreover, K’s algebra teacher stated in emails in November 2019, one day after the District refused to evaluate K for special education in order to “give this new 504 plan time to further develop to see if it can meet his needs in his least restrictive environment,” that she had tried all of the accommodations in K’s 504 Plan and “NOTHING HAS WORKED” (*see* Exhibit 54) and later stating “I have done this [*sic*] accommodations all this time. No result as of yesterday. . . This strategy is not working” (*see* Exhibit 56), with K’s 504 Plan manager Mr. Nelson replying that “Sounds like you’ve tried all the strategies and accommodations listed in his 504” (*see* Exhibit 53), and Ms. Carlstrom, the Southeast nurse and member of the Child Study Team at that time, telling the algebra teacher in a reply email that the algebra teacher was “TRYING everything,” without any success (*see* Exhibit 56).

174. As noted above, “§ 504 accommodations are not a substitute for an evaluation [for special education] once a school district is ‘on notice of acts or behavior likely to indicate a disability.’” *Spring Branch Indep. Sch. Dist.*, 961 F.3d at 794.

175. Moreover, “where the district chose to continue implementing Section 504 accommodations instead of pursuing a special education evaluation,” this was unreasonable, untimely, and in violation of Child Find. *Klein Indep. Sch. Dist.*, 860 F. App’x at 901 (citing *Spring Branch Indep. Sch. Dist.*, 961 F.3d at 793-95).

176. The Hearing Officer finds that the District chose to rely on an obviously ineffective preliminary intervention—the 504 Plans—for years. The 504 Plan created and distributed by the District in September 2017 (Exhibit 11) did not provide special education for K but put into

place general education interventions that would remain largely the same for the next 3+ years, with increasingly disastrous results for K.

177. The Hearing Officer notes that the record establishes that K's behavioral problems significantly worsened, with an additional thirty-five (35) disciplinary write-ups during middle school (Exhibit 12), *after* the implementation of the September 2017 504 Plan, and K's grades continued deteriorating without any further changes to the 504 Plan or special education evaluation by the District.

178. The Hearing Officer notes that despite K coming to high school at Southeast with approximately 50 write-ups from middle school, and despite K finishing middle school with very poor grades, the District made only the most cosmetic of changes to K's 504 Plan for his freshman year, in particular to give K more time with "bell work" (10 minutes instead of 5), stating that many of K's assignments will be on a USB drive due to written assignments on computer, having preferential seating, and generic comments about K being more successful when having a good relationship and trust with the teacher and needing firm redirection and not an angry power struggle (Exhibit 33). The "Individual Crisis Plan" did not change, whatsoever.

179. The Hearing Officer finds that these minor changes were ineffective and did not deliver FAPE to K.

180. The Hearing Officer finds that the record establishes that in October 2019, Complainants requested three new accommodations (Joint Exhibit E) which were never added to the 504 Plan. After Complainants made their November 2019 request for a special education evaluation, only one accommodation was added to K's 504 Plan: "K[en] will work weekly with his 504-case manager, counselor and seminar teacher to work towards 11/07/2019 progress on grades. If he has D's and/or F's will work towards increasing by 3% each week." (Exhibit 44). However, the evidence adduced established that K's 504-case manager did not work with K weekly (Transcript 737:21-25, 738:1-3).

181. Ms. Maddux, of the Child Study Team at Southeast that refused to evaluate K for special education in November 2019, testified that the Child Study Team refused to evaluate K because of this cosmetic change to the 504 Plan (Transcript 976:24-25, 977:1-8), which was not even followed by Southeast, and was unsuccessful on its face.

182. The Hearing Officer finds that special education law holds that revisions to a 504 Plan are *not* an excuse or a "safe harbor" for a district to violate IDEA's Child Find requirement, a

reality confirmed by the District's own witnesses during the hearing. *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F. Supp. 2d 918, 947–48 (W.D. Tex. 2008); *see* Transcript 1368:22-24, 1495:19-1496:1.

183. The Hearing Officer notes that the District's proffered reason for not evaluating K in Nov. 2019 for special education was that "K's 504 plan was just updated on 11/07/19 and has not had time to be implemented yet to see if it can meet his needs in his least restrictive environment." (Exhibit 45). The Hearing Officer finds that this reasoning was not credible and not in accordance with IDEA and Kansas special education law—the same basic 504 Plan had been in place for over two years at that point, with increasingly disastrous results for K, making abundantly clear that the 504 Plan and general education interventions were not working and that special education to address K's problems at school, or at minimum evaluation for special education, was necessary and appropriate.

184. The Hearing Officer notes that, significantly, Ms. Carlstrom, Southeast school nurse and member of the Child Study Team, admitted in her testimony that the 504 Plan *was not working* as of December 2019, when she was presented with evidence that K finished that semester with straight Fs except a B in Physical Education and a Pass in Seminar (Transcript 605:5-17).

185. Despite this admission, and the obvious fact that the 504 Plan was simply not working, and that the new minor revision was not even being followed by Southeast as confirmed by Mr. Nelson's testimony, the Hearing Officer finds that the District made no effort to evaluate K for special education for the remainder of the 2019-2020 school year.

186. The Hearing Officer notes that, in fact, at the start of the Spring 2020 semester, Mr. Nelson, the 504 coordinator for K, sent out to K's teachers the wrong, older version of the 504 plan to K's teachers (Exhibit 63). The Hearing Officer finds that this error did not make much difference, since the November 2019 minor revision was (1) ineffective, and (2) not even being rigorously followed by Southeast personnel.

187. The Hearing Officer finds that after K's week-long psychiatric hospitalization, on March 2, 2020, Ms. Carlstrom sent out the November 7, 2019, 504 Plan to K's teachers, with no new additions or revisions (Joint Exhibit Z).

188. The Hearing Officer finds that the District violated Child Find when even after K's psychiatric hospitalization for suicidal ideation and plans, the Child Study Team at Southeast

did not even discuss K nor whether a special education evaluation would be appropriate, as confirmed by Ms. Maddux’s testimony. (Transcript 977:13-20, 978:21-23).

189. The Hearing Officer finds that as of March 2020, K’s grades were 4 Fs, 2 Ds, a C, a B, and an A in Seminar (home room) (Exhibit 79); at the hearing, the District strangely sought to portray this as improvement worth celebrating and some evidence that the 504 Plan was “working,” despite Mr. Nelson plainly testifying that he was not following the minor November 7, 2019 revision to the plan, as he was not working weekly with K, and in fact testified that he only had a few meetings with K after November 7, 2019 through the end of that school year.

190. Regardless of whether the District followed the 504 Plans for K to the letter, the reality remains that the District created and attempted to implement those plans, and they were plainly ineffective for K for a period of years, in turn meaning that K should have been evaluated for special education; it would be a strange and wholly inequitable system if the District were able to escape liability under IDEA and the Kansas state special education law analogs for failing to provide FAPE to K simply because the District chose not to fully comply with its own 504 Plans.

191. K’s grades showed marginal improvement by the end of the Spring 2020 term, but again, the Hearing Officer finds that it has been established through documentary evidence and testimony that (1) those marginally improved grades were the result of the pandemic grade freeze policy adopted by the district in March 2020, and (2) K’s father working intensely with K one- on-one every school day from March 2020 through May 2020, when the District was in a remote format (Transcript 212:6-9, 216:3-4, 1068:8-11).

192. The Hearing Officer finds that upon transferring to Chester Lewis in the Fall 2020 semester, no changes were made to K’s November 7, 2019, 504 Plan except placing certain accommodations “ON HOLD WHILE LEARNING REMOTELY” (Exhibit 88). The “Individual Crisis Plan” had still not changed since September 2017, despite behavioral problems, particularly shutdowns and ignoring teachers, continuing for years.

193. The Hearing Officer finds that there is also no evidence that the minor addition to the 504 Plan made on November 7, 2019 (K’s 504 coordinator, counselor, and seminar teacher) was ever even attempted at Chester Lewis—there is zero evidence that K’s 504 coordinator at Chester Lewis or the counselor worked weekly with K to improve his grades.

194. Despite the litany of emails from Complainants and teachers about K’s significant difficulties at Chester Lewis, no effort whatsoever by the District to evaluate K for special education.

195. The Hearing Officer finds that the District knew K had been placed in psychiatric hospitalization—again—in August 2020, yet no effort was made by the District to evaluate K for special education. (Exhibit 1, p. 6, RFA 22).

196. In the November 2, 2020, revisions to K’s 504 Plan, the only changes were that K would “check in each hour for attendance but may not necessarily work on that particular class if he is focused and trying to finish another project or assignment. He can either check in via Teams or send an email to you” and “K[en] has not only requested to be called by the pronouns they/them, they would like to be called A” (Exhibit 324).

197. The first change was geared toward remote learning, per Complainant S Z and Chester Lewis principal Mr. Parks, and made clear by the reference to “Teams” which was the District’s remote learning platform. Mr. Parks even testified that this accommodation was something that K could already do through the Edgenuity remote learning platform; as such, this was not a true “change” to K’s 504 Plan (Transcript 1101:18-22, 1176:8-22).

198. When K returned to school in-person in the Spring 2021 term, he requested that this accommodation cease, yet no update was made to the 504 plan (Exhibit 142, email from Chester Lewis 504 case manager Holly Smith to Chester Lewis staff, stating, “[a]lso, one thing I changed is A wants to NOT be able to work on other classes. He wants to have the structure of having to work on the class he is in.”)

199. Additionally, this change was requested by K’s parents in response to the work done with K by Ms. Danita White, a one-on-one tutor hired and compensated by K’s parents, with the full knowledge of the district.

200. As reflected in K’s grades at Chester Lewis and the litany of problems that continued there, this revision was entirely ineffective, yet no special education evaluation was even suggested by District personnel.

201. It is also unclear why the pronoun and name change was even mentioned in this 504 Plan, as it is not really an “educational intervention.”

202. As demonstrated by the above, the 504 Plans were simply a failure; the District knew they were a failure yet made zero effort to evaluate K for special education.

203. Remarkably, in late May 2021, when the District was “exiting” K from the District because he was receiving treatment out-of-state, in violation of IDEA, when District special education and 504 leadership received Mr. D’s May 20, 2021, email recounting that parents were placing K at LRA and would be seeking reimbursement from the District, the District’s “Section 504 Coordinator” stated “[t]his is the first I’m hearing of/seeing issues with this student.” (Exhibit 177). The Hearing Officer finds that this is an astonishing admission, given the years-long history of problems that K experienced at the District, with 504 Plans in place the entire time.

204. The Findings of Fact established that the District’s “preliminary interventions” for K were ineffective.

THE CHARACTERISTICS OF EMOTIONAL DISTURBANCE WERE PRESENT IN K AND VISIBLE TO A MARKED DEGREE AND ADVERSELY AFFECTED HIS EDUCATIONAL PERFORMANCE

205. The *Morrison* court, in determining whether emotional disturbance was present in the child in question in that case well in advance of the defendant district evaluating for special education, further followed the guidance that the U.S. Department of Education guidance and definition of “to a marked degree that adversely affects educational performance,” stating “OSEP takes the position that it generally refers to the frequency, duration, or intensity of a student’s emotionally disturbed behavior in comparison to the behavior of peers and can be indicative of either degree or acuity and/or pervasiveness.” 2013 WL 12330019 at *15.

206. The Findings of Fact established that the characteristics of emotional disturbance were present in K and visible to a marked degree and that they adversely affected his educational performance.

207. The Hearing Officer finds by a preponderance that the record in K’s matter is replete with years-long, frequent, and intense behavioral and social problems and misconduct that fits each of the characteristics of Emotional Disturbance to a marked degree and which adversely affected K’s educational performance, as set forth in the regulation. As evidenced multiple times in the findings of fact above, the documentary evidence, K’s treatment providers, experts, Complainants, and even the District’s own witnesses confirmed same.

OTHER HEALTH IMPAIRMENT

208. The Hearing Officer also finds by a preponderance that the evidence in the record establishes that K also had, during the relevant time period, since at least 2016, an “Other Health Impairment” (“OHI”) as defined in 34 C.F.R. § 300.8(c)(9):

Other health impairment means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that—

- (i) Is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and
- (ii) Adversely affects a child's educational performance.”

209. The Findings of Fact established that the District had either actual knowledge, or knowledge that can be inferred, that for several years K was a child with the disability of other health impairment and in need of special education and relates services, with no evaluation for exceptionality and special education by the District during that time period.

210. The Hearing Officer finds by a preponderance that the characteristics of OHI were visible and obvious in K for years while a student with the District, overtly adversely affecting K’s educational performance, and Complainants even provided the District with evaluation reports diagnosing K with ADHD (Exhibits 4 and 8) as early as 2016, yet despite K “shutting down” at school over and over and over, adversely affecting his educational performance, the District refused to evaluate K for special education.

DISTRICT’S UNTIMELY SPECIAL EDUCATION EVALUATION AND FAILURE TO COMPLY WITH CHILD FIND AS TO K PRIOR TO JUNE 2021

211. The Hearing Officer finds that the evidence in this matter establishes by a preponderance that the District’s special education evaluation for K in June 2021 was untimely, and that the delay in conducting this evaluation constituted a violation of Child Find and caused a denial of FAPE for K, who was not furnished an IEP nor special education and related services by the District for several years after it was obvious, he needed special education.

212. The Hearing Officer finds it notable that in June 2021, after K had not been attending school within the District for more than three months, the District found K eligible for

special education in its much-delayed eligibility evaluation, by finding that K had the exceptionalities of emotional disturbance and OHI (Exhibit 192; Transcript 831:20-25, 832:1-3).

213. The District has argued that it was Dr. Chiles' evaluation (Exhibit 206) that caused this change in position and its conclusion in the June 2021 MTR that found K eligible for special education due to having the exceptionalities of Emotional Disturbance and OHI; however, the Hearing Officer finds by a preponderance of evidence that this explanation lacks credibility, as the characteristics of both emotional disturbance and OHI were present to a marked degree in K and clearly observable and known to the District from 2016 on—the District did not need Dr. Chiles' evaluation to make this determination, as the evidence adduced in this matter establishes that the data regarding K's problems with behavior and academic performance were present and readily observable in K for the District to see that entire time.

214. The Hearing Officer finds that the District's position on this point is further undercut by the fact that the District rushed to "re-enroll" K and conduct the special education evaluation the moment it received the initial demand letter from Complainants' counsel—Dr. Chiles' evaluation had no bearing on the fact that K was still physically out-of-state, and the District re-enrolled him, despite the District's earlier internal emails stating that K had to be "exited" from the District because he was out-of-state.

215. The Hearing Officer finds by a preponderance of the evidence that the District did nothing to evaluate K for special education until it received a demand letter from an attorney; fear of liability is what motivated the District to finally evaluate K for special education.

216. The Hearing Officer finds by a preponderance of the evidence that instead of evaluating K for special education, as was required by Child Find, the District continued tinkering with a 504 Plan that very obviously was not working and not providing FAPE to K, and this approach not only violated IDEA, it caused serious, substantive harm to K and Complainants.

217. The Hearing Officer notes that the District knew K was disabled, as it put into place a series of 504 Plans that identified K as disabled, yet despite those 504 Plans being entirely ineffective (a fact the District later admitted in June 2021), the District made no effort to evaluate K for special education; this was a violation of Child Find. *Spring Branch Indep. Sch. Dist.*, 961 F.3d at 793-95.

218. The Child Find regulations require districts to conduct screening of students using "observations, instruments, measures, and techniques that disclose any potential exceptionality

and indicate a need for evaluation” K.A.R. § 91-40-7(b)(2); *see also* Kansas Special Education Process Handbook, Kansas State Department of Education, Chapter 2: Screening and General Education Intervention (Child Find), <https://www.ksde.org/Portals/0/SES/PH/PH-Ch02.pdf?ver=2019-05-21-102539-847>, at page 23 (stating that “Kansas screening laws require that schools utilize observations, instruments, measures and techniques that disclose any potential exceptionality and indicate a need for evaluation, including hearing and vision screening, and age-appropriate assessments for school-aged children designed to identify possible physical, intellectual, social or emotional, language, or perceptual differences...In Kansas, this screening is conducted, in part, through the required implementation of general education intervention (GEI). The purpose of GEI is to intervene early for any child who is presenting academic or behavioral concerns. This early intervention leads to a better understanding of the supports children need in order to be successful in the general education curriculum and school setting. Additionally, the data collected during GEI assists school personnel in determining which children may be children with potential exceptionalities who need to move into initial evaluation for special education. Collaboration between special education and general education staff is an important part of the general education intervention process. Both special education and general education personnel must be involved in this building-level, school-wide activity (K.A.R. 91-40-7(c))[.]”

219. The Hearing Officer finds that the District has produced *zero* evidence that it did the above for K prior to June 2021; the evidence adduced establishes that, in response to Complainants’ request for an IEP for K, there was a single Child Study Team meeting at Southeast in early November 2019, in which significant and extremely negative comments from K’s teachers about K and his academic and behavioral performance were ignored, the Child Study Team made no notes of their reasoning, and Child Study Team member Ms. Maddux admitted they did not bother to contact any of K’s providers nor look at any of K’s treatment and evaluation records before deciding to refuse to evaluate K for special education.

220. Instead, Ms. Maddux testified that in November 2019, as the basis for the District’s decision to refuse Complainants’ request for special education evaluation for K, at a November 7, 2019, 504 Plan re-evaluation meeting, she “observed people seemed to be happy with what the 504 team was presenting . . . and people were agreeable. That’s what I was there to observe is how things were going and everybody seemed to be in agreement and happy with the plan that people were putting forth.” (Transcript 968:7-969:2, 971:23-25, 972:1-6).

221. The Hearing Officer finds as a matter of law that “people” seeming “to be happy” with a 504 Plan is not in alignment with the assessment techniques required by Child Find under federal and state special education law. K.A.R. § 91-40-7(b)(2).

222. Additionally, the Hearing Officer notes when one of K’s teachers contacted a special education teacher at Chester Lewis early in the 2020-2021 school year, seeking a special education service for K (a para), the special education teacher replied to state that she is the special education teacher and she does not provide accommodations for students with 504 plans; the special education teacher Ms. Hansen advised the teacher requesting help for K, Mrs. Quincy, that she needed to follow K’s 504 Plan and to direct questions or concerns about “same” to Holly Smith, social worker at Chester Lewis. See Exhibit 93; Transcript 222:19-25, 223:1-3.

223. This was a failure by the District’s special education teacher to engage in the collaboration between special education and general education required by Kansas law to identify students with exceptionalities in need of special education.

224. Similarly, the Hearing Officer finds that there is *zero* record of the District complying with other regulations designed to identify exceptional students in need of special education. K.A.R. § 91-40-8(a) states that each district “shall ensure that a full and individual evaluation is conducted for each child being considered for special education and related services” and in conducting that evaluation for each child “being considered for special education and related services,” the District was required to comply with a host of evaluative processes set forth in K.A.R. § 91-40-9 and, if necessary, K.A.R. § 91-40-11.

225. The Hearing Officer finds that there is no debate that K was “being considered for special education” in November 2019, due to Complainants’ request for an IEP, and that fact is confirmed by the District’s Prior Written Notice refusing to evaluate K for special education dated Nov. 13, 2019 (Exhibit 45), but there is *no record whatsoever* that the District complied with any of the evaluative steps set forth in K.A.R. § 91-40-9 for students “being considered for special education” beyond the school psychologist at Southeast sending an email to K’s teachers asking for their observations of him. In any event, those observations were brutal and clearly evinced a need for, at minimum, evaluation for special education, yet the District refused to take even *that* minimal step.

226. Further, the Hearing Officer finds that the document the District has sought to portray as “meeting minutes” of that November 2019 Child Study Team meeting is not “meeting

minutes” (Exhibit U); instead, it is nothing more than the teachers’ responses to Mr. Luebbe, copied and pasted into a single document, as confirmed by Ms. Maddux; there is no original input from the members of the Child Study Team, no reflection whatsoever of any review that took place by the Child Study Team in November 2019, nor is there any indication that any of the assessments and instruments mentioned in K.A.R. § 91-40-9 were ever even discussed, much less administered on K.

227. The Hearing Officer finds that the evidence adduced establishes there was never any evaluation by the District for emotional disturbance or OHI by the District, either in November 2019, or at any other time, until June 2021. The District also failed to ever conduct a functional behavior assessment of K, at any time (Transcript 1592:19-22).

228. Despite Mr. Parks’ testimony that he believed the Chester Lewis Child Study Team “discussed” K throughout 2020-2021 academic year (Transcript 1164:4-17), the Hearing Officer notes that there is *zero* record of those alleged discussions in any of the documents the District has produced in this matter.

229. The Hearing Officer further notes that K’s teacher, Mr. Anderson, testified he was never once contacted by the Chester Lewis Child Study Team seeking observational information about K in connection with evaluation for special education (Transcript 1298:19-25, 1302:1-13), and the plain fact remains that K was not evaluated by the District for special education in any respect until June 2021, after Complainants retained counsel.

230. The Findings of Fact establish that the District’s special education evaluation for K in June 2021 was untimely, and that the delay in conducting this evaluation constituted a violation of Child Find and caused a denial of FAPE for K, who was not furnished an IEP nor special education and related services by the District for several years after it was obvious he needed special education.

**CASE LAW CONSTRUING ANALOGOUS CHILD FIND MATTERS CONFIRMS
THE DISTRICT VIOLATED CHILD FIND IN THIS MATTER, RESULTING IN
DENIAL OF FAPE TO K.**

231. The District’s many violations of Child Find set forth herein are analogous to numerous federal court opinions finding and upholding the same, confirming that the District did indeed violate Child Find and deny FAPE as to K.

232. In *Morrison v. Los Lunas Pub. Sch.*, No. CV 12-143 JCH/RHS, 2013 WL 12330019 (D.N.M. May 28, 2013), the Court held that the finding by the due process hearing officer

that the Los Lunas school district “failed in its affirmative duty to evaluate A.M. for possible emotional disturbance is supported by more than a preponderance of the evidence.” *Id.* at *11. In *Morrison*, child A.M. was evaluated one time, seven years before the due process hearing, by the district for emotional disturbance; however, the Los Lunas district’s psychologist who conducted that evaluation stopped short of diagnosing the child A.M. with emotional disturbance because “as of 2005, A.M. had not exhibited any of the characteristics of emotional disturbance ‘over a long period of time and to a marked [enough] degree’ that his educational performance was yet affected.” *Id.*

233. The Court in *Morrison* found that the Los Lunas district’s obligation to evaluate the child A.M. again “for emotional disturbance was not rendered moot by its one-time evaluation.” *Id.*

234. Strikingly similar to K’s case, the Court found that:

On the contrary, the record shows that A.M.’s characteristics of emotional disturbance only worsened over time, as evidenced by his increasing difficulties with completing tasks and maintaining attention in the classroom; increasing isolation in school, culminating in reports of bullying by his peers; repeated diagnoses of anxiety and depression from both District and independent evaluators; and expression of suicidal thoughts beginning in 2009. While *Morrison* did not specifically raise the specter of A.M.’s possibly suffering from emotional disturbance as defined in the IDEA in any of her petitions to the District, the Court finds that her repeated expressions of concern and requests for a special-education evaluation, in combination with A.M.’s behavior and the diagnoses of both his independent evaluators and Dr. Bradley-Askren, were sufficient to put the District on direct notice that A.M. should be identified and evaluated for possible emotional disturbance. *Id.*

235. The Los Lunas district in the *Morrison* case argued that the student A.M.’s “behaviors were not unusual or atypical for the most part,” and further argued “that none of the psychological evaluations performed prior to the due process hearing specifically diagnosed A.M. with emotional disturbance as defined by the IDEA.” *See Id.* at *10. The Hearing Officer and Court rejected the Los Lunas district’s argument.

236. Additionally, in the *Morrison* case, student A.M. was “was verbalizing suicidal thoughts at school and to his therapist, Dr. Sims. He was further observed to be socially withdrawn, neglecting his schoolwork, scratching himself, crying, and angry about ongoing bullying by peers. The District responded by contacting police and emergency medical personnel and then conducting an intervention for A.M., at which he signed a ‘no suicide contract.’ The District’s suicide intervention

interviewer found that A.M. had pressure at school from bullies, felt hopeless, was neglecting his schoolwork, was withdrawn and unwilling to communicate, had a tendency to cry, had unusual thoughts and perceptions, and self-mutilated by scratching.” *See Id.* at *5.

237. The Los Lunas District refused to provide an IEP for student A.M. *Id.*

238. The Hearing Officer finds the fact pattern in *Morrison* is remarkably similar to K’s situation, with the only notable difference being that the school district in the *Morrison* case actually did conduct a single emotional disturbance evaluation of the student, which the District failed to do at all in K’s case, despite years of data and first-hand knowledge of K meeting all of the characteristics of emotional disturbance as defined by IDEA.

239. Ultimately, the Court in *Morrison* upheld the due process hearing officer’s decision that:

1. The school district violated the student’s procedural rights under IDEA by failing to evaluate him for “emotional disturbance,” a disability under the Act,
2. The district violated the student’s substantive right to a FAPE by failing to find that the student suffered from two disabilities—emotional disturbance and other health impairment (ADHD), and consequently that
3. The district further violated the student’s right to a FAPE by failing to provide him with special education services targeted to meet his unique needs, relating to both ED and OHI.

Id. at *1.

240. The *Morrison* court set forth that a child “demonstrates a need for special education and related services” where his disability requires him to receive “specially designed instruction in order to:

- (a) Be involved in and make progress in the general education curriculum ;
- (b) Participate in extracurricular and other nonacademic activities; and/or
- (c) Be educated and participate with other children with disabilities and nondisabled children....

In determining whether a student has a need for special education services, the Court must evaluate the unique facts and circumstances of the case in issue, by considering “a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child’s physical condition, social or cultural background, and adaptive behavior.....”. 34 C.F.R. § 300.306(c)(1)(I) (outlining procedures for determining “eligibility and educational need”).”

241. The Hearing Officer notes that the first three factors were pulled from the New Mexico Public Education Department Team Technical Evaluation and Assessment Manual, and that the Kansas Special Education Process Handbook has the same language, at Chapter 5, which is derived from K.S.A. § 72-3429(c)(4).

242. The *Morrison* court also found that student A.M.'s educational performance was adversely affected by ADHD, "as manifested in his difficulties focusing in the classroom, failure to complete class assignments, disruptive behavior, and inability to connect or participate with other children," making special education necessary for the student. *Id.* at *14 (emphasis added).

243. The *Morrison* court found the same for student A.M.'s emotional disturbance, agreeing with hearing officer that the student "required special assistance for emotional disturbance in order to progress academically and participate with other students." *Id.* at *16.

244. In a case from the Second Circuit considering Child Find, *Mr. P v. W. Hartford Bd. of Educ.*, a second hospitalization of student M.P. for emotional issues, which was student "M.P.'s second since he began having problems in December—created a reasonable suspicion that M.P. might require special education, and the [district's special education evaluation team] began the initial evaluation." *Mr. P v. W. Hartford Bd. Of Educ.*, 885 F.3d 735, 751 (2d Cir. 2018) (emphasis added).

245. The Court in that matter held that the school district did not violate its Child Find obligations under IDEA where it initiated the special education evaluation of the student only days after the student's second psychiatric hospitalization, and that district had also ordered a psychological evaluation and psychiatric consult when the student's troubles persisted. *Id.* at 751-52.

246. In contrast, the Hearing Officer finds that in K's case, the District knew of K's psychiatric hospitalization for suicidal ideation in February 2020, yet made no effort to evaluate K, despite the "reasonable suspicion" that such a psychiatric hospitalization created that K might require special education. The District was also aware of K's August 2020 psychiatric hospitalization for suicidal ideation and still refused to request or conduct a special education evaluation.

247. In another federal district court case that is apposite to this matter, the Court in *El Paso Indep. Sch. Dist. v. Richard R.* held that "[a]ccording to the evidence, the October 2005 STAT committee [committee formed to evaluate parents' request for special education evaluation] chose to forgo special education testing in favor of a recommendation that included modifying RR's section 504 accommodations, additional tutoring, and attendance at Saturday tutoring camps... The Child Find duty

is triggered when the local educational agency has reason to suspect a disability coupled with reason to suspect that special education services may be needed to address that disability. When these suspicions arise, the local educational agency ‘must evaluate the student within a reasonable time after school officials have notice of behavior likely to indicate a disability.’” *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F. Supp. 2d 918, 947–48 (W.D. Tex. 2008) (internal citations omitted)).

248. The *El Paso* Court also set forth a two-part inquiry in determining whether a local educational agency has complied with its Child Find obligations: “[f]irst, the Court must examine whether the local educational agency had reason to suspect that a student had a disability, and whether that agency had reason to suspect that special education services might be needed to address that disability. Next, the Court must determine if the local educational agency evaluated the student within a reasonable time after having notice of the behavior likely to indicate a disability.” *Id.* at 950.

249. In *El Paso*, the student in question “displayed ‘continuing difficulties in reading, math, and science’ which the SEHO found to be ‘clear signals that an evaluation was necessary and appropriate.’ When confronted by this reality at the October 2005 STAT meeting, EPISD chose not to evaluate RR for special education services.” *See Id.* at 951.

250. Importantly, the *El Paso* Court stated the following: “Instead of evaluating RR, the October 2005 STAT committee recommended modifications to RR's section 504 accommodations, additional tutoring, and attendance at Saturday tutoring camps. Why EPISD's STAT committee would have suggested these measures, knowing that RR had undertaken each of these steps in the past three years and that none had helped him achieve passing TAKS scores, simply baffles this Court.” *Id.*

251. The Hearing Officer in this matter concurs with this reasoning and finds the same as to the District’s actions of continuing to make minor adjustments to K’s 504 Plans, which were not effective, instead of conducting a special education evaluation of K—the District’s conduct in this regard “baffles” the Hearing Officer.

252. Further, the Court stated that when “[f]aced with three years of repeated failure, the Court agrees with the SEHO's finding that ‘[a] special education evaluation would have clearly indicated whether RR had a disability that was affecting his educational progress.’ Further, the Court concurs in the finding that EPISD's ‘reliance on a purported agreement to continue RR in section 504 and not send the parent's referral to the special education department reflected a mistake on [EPISD's] part.’” *See Id.*

253. The Hearing Officer finds this is precisely what happened in K’s case.

254. The *El Paso* Court also stated that “[i]n following the majority of federal courts that have considered the issue, this Court finds that the thirteen months that passed between RR's request for evaluation and EPISD's offer of evaluation was unreasonable” and quoted other federal court decisions finding that a delay of as little as six months by a district to evaluate a student for special education constituted a Child Find violation. *See Id.* at 951-52.

255. The Hearing Officer notes that in K's case, the delay in the District conducting a legally required special education evaluation was measured in years, not months, causing substantive and serious harm to K, his educational performance, and his family.

256. In another analogous case, quoted and cited above, the Fifth Circuit upheld a Child Find violation found by a hearing officer; in this case, the student was not exhibiting behaviors typical of boys his age, had been moved between schools in an attempt to respond to his unique educational needs, had used vulgar language and made lewd gestures in the middle of the classrooms, disrupted class by yelling obscenities, hurled derogatory insults at the principal and a teacher, and engaged in other forms of misconduct that resulted in him being removed from the classroom on a daily basis. *Spring Branch Ind. Sch. Dist.*, 961 F.3d at 794.

257. The school district attempted to provide both positive and negative reinforcements, frequent redirections, and consequences for the child's behavior, yet they had no effect, and based on the severity of the child's behavior, “it was not reasonable to try intermediate measures to determine whether special education testing was appropriate” for the child, and the school district “was more than reasonably ‘on notice of acts or behavior likely to indicate a disability’” and therefore required to evaluate the child for special education. *Id.*

258. The Hearing Officer found in that case that a delay of three months and seven days between the implementation of a § 504 Plan and the initial special education evaluation referral by the district was unreasonable and a violation of Child Find, when the child had approximately seven disciplinary incidents and “his grades had dropped,” and thus the District had failed to provide the child FAPE because it did not timely fulfill its Child Find duties, a finding the federal district court upheld on summary judgment, which the Fifth Circuit likewise upheld. *Id.* at 786-87, 789, 795.

259. The facts in the preceding case are analogous to the facts in K's case, except the behavioral problems exhibited by K were more frequent than the child in question in the *Spring Ind. Sch. Dist.* case following the creation of a § 504 Plan, and the District in our matter waited nearly *four years* to conduct an evaluation for special education after serious and consistent behavioral

problems were apparent in K, far in excess of the three month delay found unreasonable and a violation of Child Find in the *Spring Ind. Sch. Dist.* case.

260. In another analogous case, in which private school placement by parents and reimbursement by the school district was upheld by the court, it was found that even though testing “did not reveal a learning disability or other sensory or health defect,” the student:

demonstrated inappropriate, defiant and disobedient behavior at home and in school that interfered substantially with his ability to build or maintain personal relationships with peers or teachers and showed signs of inappropriate behavior and feelings under normal circumstances...He rarely smiled and seldom made eye contact with adults....The administrative record supports the officers' findings and sufficiently shows that M.S. exhibited several of the characteristics of an emotionally-disturbed child as defined by the regulations. The Court, therefore, concludes that the [hearing] officers appropriately determined that M.S. was a child with a disability under the IDEA.

New Paltz Cent. Sch. Dist. v. St. Pierre ex rel. M.S., 307 F. Supp. 2d 394, 399 (N.D.N.Y. 2004).

261. The *New Paltz* case is similar to K’s case, including K demonstrating (1) significant and ongoing inappropriate, defiant, and disobedient behavior at school and home, (2) an inability to build or maintain relationships with peers and teachers, which Southeast staff (including a member of the Child Study Team acknowledged in writing multiple times during the 2019-2020 school year (*see* Exhibit 75)), (3) showing signs of inappropriate behavior and feelings under normal circumstances (including his frequent “shutdowns” during school), and (4) not making eye contact with adults; one key difference with the *New Paltz* case is that testing by K’s providers *did* diagnose K with ADHD and anxiety, which are sensory and health defects, and both of which were known by the District as early as 2016.

262. In another federal district court case similar to K’s matter, a due process hearing officer found a violation of the Child Find provisions and:

reasoned that the State had, or should have had, reason to suspect by the Student's Fall semester of 1997 (the beginning of her junior year) that she had a disability and that special education services may be needed to address that disability. The officer was cited to, and the record reflects, numerous incidents or ‘warning signs’ of an emotional impairment. For example, the Student's parents asked her guidance counselor about private tutoring and the Sylvan Learning Center after the Student failed a class in the ninth grade There were many other ‘behavioral referrals’ by the end of the sophomore year. During the first semester of her junior year, the counselor testified that the Student was ‘in danger of failing everything ... at this time we realized there was a real problem.

See Dep't of Educ., State of Hawaii v. Cari Rae S., 158 F. Supp. 2d 1190, 1195–96 (D. Haw. 2001).

263. The Hearing Officer notes that in K's case, Complainants specifically discussed with Southeast personnel taking K to Sylvan Learning Centers for tutoring near the start of his freshman year, and even placed the Sylvan tutor in contact with a Southeast teacher. Complainants also hired a "one-on-one" tutor for K in the 2020-2021 academic year as a result of K's lack of progress at school, which was likewise known to the District, without the District conducting a special education evaluation.

264. Further, as the evidence adduced at the hearing, and also discussed exhaustively herein, established, there were numerous behavioral and academic problems experienced by K that were clearly known to District personnel for years, with no effort to evaluate K for special education.

265. The Hearing Officer notes that regarding the threshold for a local education agency to have "suspicion" of a student's disability, in *Dep't of Educ., State of Hawaii*, it was noted that the threshold is "relatively low, and that the inquiry was not whether or not she actually qualified for services, but rather, was whether she should be referred for an evaluation. (As set forth earlier, the State ultimately determined in May of 1998 that the Student did in fact have an emotional impairment; the State prepared an appropriate IEP and provided educational and related services at a residential program at Castle Hospital.)" *See Id.* at 1195.

266. Further, the Court in the *Cari Rae* case held that "[t]he record amply supports the hearing officer's conclusion that the State had numerous warning signs much earlier than March 12, 1998, that the Student should be evaluated. It had 'reason to suspect a disability, and reason to suspect that special education services may be needed to address that disability.' It violated the 'child find' provisions by failing to evaluate the Student earlier." *Id.* at 1196-97.

267. The Hearing Officer notes that the *Cari Rae* case provides pertinent authorities for the reimbursement for costs of private placements for Child Find violations, citing to *Doe v. Metropolitan Nashville Public Schools*, 133 F.3d 384, 388 (6th Cir.1998), where it was held that "[i]n cases where the lack of dialogue stems from the school district's failure to conduct sufficient 'child-find,' reimbursement may be appropriate," and also citing to *Hoffman v. East Troy Comm. Sch. Dist.*, 38 F.Supp.2d 750, 761–62 (E.D.Wisc.1999), where reimbursement was authorized for unreasonable

violations, including Child-Find violations, but concluding under those facts that violation was not sufficiently serious to deny FAPE.

268. In yet another federal district court case construing Child Find, it was held that awareness of a suicide attempt by a local school agency would put the agency on notice of need to evaluate for special education, and failing to do so constituted a violation of Child Find: “[b]ecause R.P.’s suicide attempt put Potomac on notice that he was potentially suffering from a disability that would qualify him for services under the IDEA, Potomac’s failure to reevaluate R.P. at that time violated the Child Find provision of the IDEA.” *See Horne v. Potomac Preparatory P.C.S.*, 209 F. Supp. 3d 146, 158 (D.D.C. 2016); *see also Integrated Design and Elec. Acad. Pub. Charter Sch. v. McKinley*, 570 F.Supp.2d 28, 35 (D.D.C. 2008) (holding that student’s suicide attempt at school triggered Child Find obligation).

269. The Hearing Officer again notes that K’s suicidal ideation and weeklong psychiatric hospitalization clearly put the District on notice in February 2020 that he was potentially suffering from a disability that would qualify him for services under the IDEA, and the District’s failure and refusal to evaluate K violated Child Find, just as in the *Horne* case.

270. Beyond student R.P.’s suicidal ideation in the *Horne* case, the following was present:

In addition, the record evidence also supports a finding that R.P. was unable to build or maintain satisfactory interpersonal relationships with peers and students and that he generally had a pervasive mood of unhappiness. R.P. had thirty-one documented incidents of behavioral problems at school from September 2013 to February 2015. Most of these incidents demonstrate R.P.’s inability to build or sustain interpersonal relationships. For example, in October 2013, R.P. was suspended for ten days for physically attacking a teacher when R.P. was in the library without permission. R.P. twisted the teacher’s hand behind her back, scratched her arm, and pushed her into a bookshelf. In February 2014, R.P. pushed a teacher, hit a student over the head with a three-hole puncher, and pushed another student to the ground. In April 2014, R.P. had to be physically restrained multiple times for repeatedly assaulting another student throughout the day. Several incidents also reflect a pervasive mood of unhappiness. R.P. first tried to commit suicide in March 2014. R.P. attempted to jump out of a window at school and had to be physically restrained. After the incident, R.P. stated that “he wanted to die.” In February 2015, during a meeting about R.P.’s suspensions, R.P. stated, “I want to kill myself and I hate my life.”

See Horne, 209 F. Supp. 3d at 159.

271. The Hearing Officer notes again, that in this case, K had over 50 disciplinary/behavioral write-ups in his District disciplinary file, many involving interpersonal relationship issues. The District knew of his psychiatric hospitalization due to suicidal ideation with a plan, going so far as to tie a scarf around his neck. After that hospitalization, in March 2020, Mr. Agnew, the Southeast social worker, said K “definitely struggles with social interactions” (Exhibit 71), confirmed by the school nurse and member of Child Study Team Ms. Carlstrom (Exhibit 75). Ms. Carlstrom also confirmed that K came to her twice to discuss “self-harm ideas” (Transcript 1472:17-20). Again, the Hearing Officer notes that there was no special education evaluation in response to any of that; a clear violation of Child Find.

272. In the Tenth Circuit case which sets forth the elements that a due process hearing officer must find are established in order to reimburse parents who unilaterally place their child in a private school without the consent or referral by the school district, *Jefferson County School Dist. R-1 v. Elizabeth E. ex rel Roxanne B*, 702 F.3d 1227, 1232 (10th Cir. 2012), parents initially placed the student at an out-of-state psychiatric treatment facility.

273. The Colorado school district took the position that because parents unilaterally placed student at a Utah psychiatric assessment facility for treatment, the student “is not a District student, and the District has no on-going responsibility to [student] under the IDEA.” *See Id.* at 1232. The student’s parents then enrolled student at therapeutic boarding school in Idaho and informed district that they intended to seek reimbursement for cost of placement. *Id.*

274. As a result, the school district in the *Elizabeth E.* case told parents that because student was out-of-state, the district did not presently have an obligation to evaluate, convene IEP team meetings for, or otherwise serve student under IDEA, stating that “the District stands ready, willing, and able to evaluate and provide [student] with a free appropriate education upon her return to the District.” *Id.*

275. The Tenth Circuit in *Elizabeth E.* upheld the due process hearing officer’s decision that timely FAPE was denied and that parents’ placement at out-of-state boarding school was reimbursable by the school district. It also held that the school district’s position that it owed no obligation to the student because she was physically out-of-state was “erroneous” and “legally untenable,” quoting case law stating that “under the IDEA a child’s residence is the same as that of the child’s parents.” *Id.* at 1241.

276. As discussed at length during the hearing, the District refused to evaluate K for special education in Spring 2021 when it learned he had been taken out-of-state for treatment, exiting him as a student from the district, and stating on May 19, 2021, precisely as in the *Elizabeth E.* case that it “stands ready, willing, and able to conduct an evaluation for K D should the student return to USD 259.” (See Exhibit 176).

277. The Hearing Officer finds this action by the District of exiting K as a student because he was receiving treatment outside the District, while his legal residence was still with Complainants within the District’s boundaries, was clearly erroneous and a violation of IDEA, as noted in the *Elizabeth E.* case.

STANDARD FOR DETERMINING DENIAL OF FAPE IN CONTEXT OF CHILD FIND VIOLATION; CONCLUDING THAT K WAS DENIED FAPE BY THE DISTRICT IN THIS MATTER

278. In another federal district court case within the Tenth Circuit, it was stated that “[a]lthough a child-find violation appears to be procedural, the ultimate determination—whether [a student] was denied a FAPE—remains the same regardless of how the violation is characterized. If the violation is procedural, then this Court ‘inquire[s] whether the violation resulted in the denial of a FAPE,’ specifically by analyzing whether the procedural violation caused (1) ‘substantive harm’ to [the student] or his parents, (2) a deprivation of an IEP for [student], or (3) the loss of an “educational opportunity.” If a FAPE denial is not found under this ‘procedural’ inquiry, or if the child-find violation is not considered procedural, the Court may nevertheless still find a FAPE denial under its ‘substantive’ inquiry. Under this inquiry, the Court asks whether the school met ‘its substantive obligation ... [to] offer an IEP reasonably calculated to enable [the student] to make progress appropriate in light of [his] circumstances.’” See *Boutelle v. Bd. of Educ. of Las Cruces Pub. Sch.*, No. CV 17-1232 GJF/SMV, 2019 WL 2061086, at *9–10 (D.N.M. May 9, 2019) (internal citations omitted).

279. The Hearing Officer finds that in K’s case, each of these elements is established by a preponderance of the evidence.

280. First, the Hearing Officer finds that “substantive harm” to K and his parents as a result of the District’s failure and refusal to conduct legally adequate Child Find as to K, resulting in the District failing to identify K as a student with a disability in need of special

education and related services to address that disability, and in turn the District failing to provide special education and related services to K, can be seen throughout the record in this matter, including but not limited to K's deteriorating grades/academic achievement, behavior, mental health, and home life, all documented in detail through documentary evidence and testimony in this matter, resulting in K's placement in an out-of-state wilderness therapy supported by his treating psychiatrist and psychologist, all of which clearly establishes "substantive harm" to K.

281. Similarly, the Hearing Officer finds by a preponderance that substantive harm was visited on Complainants—K's parents—by the District's failure and refusal to abide by Child Find and to evaluate K for special education and provide him with a timely IEP and special education; Mr. D testified at length as to the substantive harm that he, K's stepmother, and their entire family endured due to K's condition, which Mr. D and the treatment providers directly connected back to the problems K experienced at school.

282. For further facts establishing that the District's violation of Child Find caused substantive harm to K and his parents, see Findings of Fact paragraphs 48-49, 79, 97, 138, 198, 216-218, 220, 225-226, 260, 263, 270-271, 385-386, 421, 425, 485, 529, and 549, above.

283. Second, the Hearing Officer finds by a preponderance of the evidence that K was deprived of an IEP during the crucial time in question, a period of several years preceding K's placement at blueFire and then LRA, as no IEP was even developed by the District until June-July 2021.

284. The Hearing Officer reiterates that the District refused to even *evaluate* K for an IEP until June 2021, more than four years after the District sent a letter to K's parents about his behavioral problems (Exhibit 269), and also after countless emails noting serious concerns with K's behavior and academic performance/progress, dozens of disciplinary write-ups, very poor grades, near-constant concerns expressed by Complainants and teachers, multiple iterations of an ineffective 504 Plan, two psychiatric hospitalizations, and many other clear signs that K was a disabled student and needed special education.

285. For further facts establishing that the District's violation of Child Find caused a deprivation of an IEP for K, see Findings of Fact paragraphs 50, 68, 76, 97, 138, 152, 198, 249- 250, 259, and 327, above.

286. Third, the Hearing Officer finds by a preponderance of the evidence that because of the District's failure to conduct legally adequate Child Find as to K, and the resulting failure by

the District in evaluating K for special education and creating and implementing an IEP, K lost years' worth of educational opportunities, as detailed in the evidence presented throughout the hearing. For example, special education interventions, including potentially one-on-one work with a paraeducator, which was even requested for K by one of his teachers at Chester Lewis but never provided, among other special education interventions, could have made a significant difference for K. No such special education interventions were forthcoming, despite repeated requests from K's parents, and so K's grades and academic achievement and learning continued to deteriorate, leaving him very far behind his peers at this point, due to the District's failures.

287. For further facts establishing that the District's violation of Child Find caused the loss of an educational opportunity for K, see Findings of Fact paragraphs 48-49, 198, 200, 260, 387-388, and 529, above.

288. Moreover, under K.S.A. § 72-3416(g)(2), "[p]rocedural violations of IDEA and Kansas state analogs are found to be substantive if they: (A) Impede the child's right to a FAPE, or . . . (C) Caused a deprivation of educational benefits." As noted, both of these standards are easily satisfied by the evidence adduced in K's case.

CONCLUSION AS TO ELEMENT 1 OF THE ELIZABETH E. REIMBURSEMENT TEST.

289. The Hearing Officer finds that the evidence establishes that the District, through its Child Find violations, deprived K of FAPE for years (including the 2017-2018, 2018-2019, 2019-2020, and 2020-2021 school years), satisfying element one of the *Elizabeth E* reimbursement test. The District's agreement to evaluate K for special education in June 2021, and its agreement that he has an exceptionality and need for special education, and its subsequent development of an IEP, was significantly untimely.

290. The District knew and had reason to suspect that K had a disability and it likewise knew or had reason to suspect that special education may have been needed to address K's disabilities, yet took no action to even evaluate K for special education, much less offer him an IEP and special education and related services, until receiving a demand letter from counsel for Complainants in late May 2021, significantly later than the District was legally required to evaluate K for special education under Child Find (Exhibit 101).

291. Most basically, the Hearing Officer finds that the District failed to provide K an educational program reasonably calculated to enable him to make progress in light his circumstances. *Andrew F.*, 137 S.Ct. at 1001.

ELEMENT 2 OF *ELIZABETH E* REIMBURSEMENT TEST: LOGAN RIVER ACADEMY IS A STATE-ACCREDITED SECONDARY SCHOOL.

292. The second element of the *Elizabeth E.* test for reimbursement of parents for a private school placement states that a hearing officer must determine whether the private placement is a state-accredited elementary or secondary school; if not, the placement is not reimbursable. *See* 702 F.3d at 1232; 20 U.S.C. §§ 1412(a)(10)(C) (ii), 1401(27).

293. The principal of LRA, Mr. Kirk Farmer, who has worked at LRA for twenty-one years, testified at the hearing that LRA is state accredited by Utah and California, as well as by Cognia, a group that accredits all schools in the State of Utah. (Transcript 371:18-22, 373:4-10, 373:12-21; *see also*

294. Documents entered into evidence confirm that LRA is a state-accredited secondary school. *See* Exhibit 210 at pp. 4, 15, 24.

295. The District did not challenge that LRA is a state-accredited secondary school; the District presented no evidence rebutting the fact that LRA is a state-accredited secondary school, nor did the District ask any questions of any witnesses about that fact.

296. For further facts establishing that LRA is a state-accredited secondary school, see Findings of Fact paragraphs 575-577, above.

297. The Hearing Officer finds by a preponderance of the evidence that LRA is a state-accredited secondary school, which satisfies the second element of the *Elizabeth E.* test.

ELEMENT 3 OF *ELIZABETH E.* REIMBURSEMENT TEST: LOGAN RIVER ACADEMY PROVIDES K D SPECIAL EDUCATION THROUGH SPECIALLY DESIGNED INSTRUCTION.

298. The third element of the *Elizabeth E.* reimbursement test states that a hearing officer must determine whether the private placement provides special education, i.e., “specially designed instruction ... to meet the unique needs of a child with a disability”; if the placement provides no such instruction, it is not reimbursable. *See* 702 F.3d at 1232; 20 U.S.C. § 1401(29)(A).

299. The Hearing Officer finds by a preponderance of the evidence that LRA provides K special education through specially designed instruction.

300. “Special education” is defined by IDEA as meaning the following:

...specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including—

- (A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and
- (B) instruction in physical education.

See 20 U.S.C. § 1401(29); *Elizabeth E.*, 702 F.3d at 1235.

301. “Specially designed instruction” is defined as:

adapting, as appropriate to the needs of each exceptional child, the content, methodology, or delivery of instruction for the following purposes:

- (1) To address the unique needs of the child that result from the child's exceptionality; and
- (2) To ensure access of any child with a disability to the general education curriculum, so that the child can meet the educational standards within the jurisdiction of the agency that apply to all children.

See K.A.R. § 91-40-1(III).

302. Mr. Farmer, Ms. Burke, and LRA teacher Ms. Argyle confirmed that K is receiving instruction that is specially designed for K, to address K’s unique needs flowing from his exceptionality, and that LRA is providing an education curriculum to K that is geared towards Kansas’ standards (Transcript 379:21-25, 380:1-23, 381:13-17, 386:21-25, 387:1-5, 428:13- 17, 429:1-18, 486:6-12, 492:11-19, 851:10-13)

303. Mr. Farmer stated in his testimony and in writing that the instruction provided to K has also been designed and particularized for K based on the admissions materials for K provided to LRA, including evaluation reports which included Dr. Chiles’ evaluation which made numerous recommendations regarding how K’s education should be structured. (Exhibit 208; Transcript 382:24-25, 383:1-25, 384:1-7, 384:12-16, 432:13-22).

304. Mr. Farmer, Ms. Burke, and Ms. Argyle of LRA all spoke of the work that they do with K that is individualized and specific to K’s needs, that are designed to permit K to make reasonable academic progress in light of his unique needs (Transcript 379:21-25, 380:1-23, 381:13-17, 386:21-25, 387:1-5, 428:13-17, 429:1-18, 486:6-12, 492:11-19).

305. Mr. Farmer, Ms. Burke, Ms. Argyle, and Complainants all spoke of the importance of the overlapping therapeutic services with K's academics, noting that K cannot make progress without such intensive therapeutic services; Dr. Chiles' evaluation report states the same (Exhibit 206; Transcript 376:2-19, 377:12-19, 391:13-17, 426:17-25, 427:1-25, 434:17-24, 435:15-25, 436:1-10).

306. Mr. Farmer, Ms. Burke, Ms. Argyle, and Complainants all spoke of the importance of the residential milieu of LRA, where K receives academic assistance in the evenings and on the weekends; Ms. Burke also spoke about how the residential milieu allows K to continue to build on progress and that with the residential milieu, he cannot just ignore the problems he faces academically and therapeutically (Exhibit 210; Transcript 391:13-17, 433:15-20, 434:4-6, 434:17-24, 435:15-25, 436:1-10, 478:14-19).

307. As established by a preponderance of the evidence, LRA provides "special education" to K, through specially designed instruction for K.

308. The District argued that because LRA does not have a written IEP that it uses for K that LRA does not provide K special education through specially designed instruction. However, the Hearing Officer notes that Mr. Farmer testified that LRA only uses written IEPs in conjunction with school districts which actually fund students at LRA (Transcript 406:5-14).

309. Further, Mr. Farmer testified that even though LRA does not have a written IEP for K, LRA staff uses the District's proposed IEP as a framework to guide LRA staff in educating K (Transcript 405:23-25).

310. The District's argument further fails because there is zero requirement under IDEA that LRA must have a written IEP for K in order for K's placement there to qualify for reimbursement.

311. Indeed, the regulations and case law make this clear. Under 34 C.F.R. § 300.148(c) "Reimbursement for private school placement" – it is specifically stated, in relevant part, that "[a] parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA and LEAs."

312. Equally as important, in *Florence County School Dist. Four v. Carter By and Through Carter*, the Supreme Court held that IDEA's requirements for "FAPE" are **not** applicable to parental placements at private schools. 510 U.S. at 12-13.

313. In the *Florence County* case, the school district argued that the private school placement by parents was not reimbursable because the private school “employed at least two faculty members who were not state-certified **and that it did not develop IEPs.**” *Id.* at 14 (emphasis supplied). However, the Supreme Court squarely rejected this argument, finding that IDEA’s requirements for state educational agencies’ standards “do not apply to private parental placements” and that the parents’ private placement was eligible for reimbursement despite the private school not developing IEPs for its students. *Id.*

314. Additionally, the Supreme Court quoted with approval from the earlier Court of Appeals opinion in that case, stating, “it hardly seems consistent with the Act’s goals to forbid parents from educating their child at a school that provides an appropriate education simply because that school lacks the stamp of approval of the same public school system that failed to meet the child’s needs in the first place.” *Id.*

315. Given these on-point authorities, the Hearing Officer finds that the lack of a written IEP developed and used by LRA for K is not an impediment to reimbursement in this case.

316. Therefore, the District’s argument fails, and the Hearing Officer finds by a preponderance of evidence that Logan River Academy provides K D special education through specially designed instruction, satisfying the third element of *Elizabeth E.*

317. For further facts establishing that LRA provides K with special education through specially designed instruction, see Findings of Fact paragraphs 432, 489, 494, 560, 563, 564, 574, 587-604, 634, 636-642, and above.

318. The Hearing Officer notes that during the hearing, apparently as a sort of red herring, the District attempted to put on evidence regarding sexual assault allegations made by students at LRA prior to K’s enrollment at LRA; moreover, the District told the Hearing Officer that it would provide evidence that K was a victim of sexual misconduct at LRA. However, no such evidence was presented. Further, according to the legal standards in *Elizabeth E.*, the sexual assault allegations discussed by the District, which occurred prior to K’s enrollment at LRA and did not involve K in any respect, are completely irrelevant to both the legal standards in question in this matter and to K. There is zero evidence that K has been the victim of “sexual misconduct” at LRA. Therefore, the Hearing Officer disregards the District’s “evidence” of sexual assault allegations.

ELEMENT 4 OF *ELIZABETH E.* REIMBURSEMENT TEST: LOGAN RIVER ACADEMY’S SERVICES FOR K BEYOND HIS EDUCATION AND SPECIALLY DESIGNED INSTRUCTION ARE “RELATED SERVICES” AND THUS REIMBURSABLE.

319. The fourth element of the *Elizabeth E.* test states that if the private placement provides additional services beyond specially designed instruction to meet the child’s unique needs, it must be determined whether such additional services can be characterized as “related services” under the Act, i.e., “transportation, and such developmental, corrective, and other supportive services ... as may be required to assist a child with a disability to benefit from special education,” excepting medical services which are not for diagnostic and evaluation purposes. *See* 702 F.3d at 1232; 20 U.S.C. § *Id.* § 1401(26). If the additional services cannot be so characterized, they are not reimbursable. *Id.*

320. “Related services” are defined as “developmental, corrective, and supportive services that are required to assist and exceptional child to benefit from special education.” K.A.R. § 91-40-1(ccc)(1).

321. Included within this definition are “counseling services” and “school psychological services,” which the Hearing Officer finds that all of the LRA witnesses and Complainants discussed at length in their testimony, particularly as to how the counseling/therapy services that K receives are fundamental to K’s ability to make any meaningful academic progress. K.A.R. § 91-40-1(ccc)(1)(D), (R); Transcript 391:13-17, 433:15-20, 434:4-6, 434:17-24, 435:15-25, 436:1-10, 478:14-19.

322. “Parent counseling and training” is also included in this definition, *see* K.A.R. § 91-40-1(ccc)(1)(L), and as Ms. Burke and Complainants testified, Complainants participate in counseling with K at LRA once per week (Transcript 431:16-19).

323. Further, “[r]ecreation, including therapeutic recreation” is also included as a related service. *See* K.A.R. § 91-40-1(ccc)(1)(N). Mr. Farmer spoke to the importance of the recreational aspect of the LRA curriculum and how that aspect is so important for students such as K and their academic progress (Transcript 395:6-25, 396:1-10, 396:18-24).

324. The Hearing Officer therefore finds by a preponderance of the evidence that LRA’s services for K beyond his education and specially designed instruction are “related services” as defined by IDEA and thus reimbursable; those related services include the costs of transportation for K and Complainants between Wichita and Logan, Utah.

325. For further facts establishing that LRA’s services for K beyond his education and specially designed instruction are “related services” as defined by IDEA and thus reimbursable, see Findings of Fact paragraphs 395, 432, 481, 489, 560, 563-565, 573-574, 581-583, 585-586, 594, 599, 605-608, 610, 613-623, and 643-645, above.

EACH ELEMENT OF THE ELIZABETH E. TEST FOR REIMBURSEMENT TO COMPLAINANTS HAS BEEN ESTABLISHED BY COMPLAINANTS BY A PREPONDERANCE OF THE EVIDENCE, THEREFORE COMPLAINANTS ARE ENTITLED TO REIMBURSEMENT FOR THEIR PLACEMENT OF K AT LRA

326. In conclusion, the Hearing Officer finds that all four elements of the *Elizabeth E.* reimbursement standards test are met, and Complainants are entitled to reimbursement of all expenses associated with K’s placement LRA.

327. LRA charges a total of \$11,900.00 per month for services rendered to K, and has done so since June 4, 2021, through its contractual arrangement with Complainants. *See Exhibit 207 at pp. 2-3; See Transcript 382:9-18.*

328. At the hearing, the District presented zero evidence rebutting that amount, nor did the District present any evidence that the cost of LRA for K would be an undue burden for the District.

329. The Hearing Officer orders the District to compensate Complainants \$142,800.00 for the LRA cost from June 4, 2021, through June 3, 2022, and to further compensate Complainants moving forward at the rate of \$11,900.00 per month until such time as K exits LRA, as confirmed in writing by LRA to Complainants and the District at such time, and to compensate Complainants for the costs of transportation of K and Complainants between Wichita and Logan, Utah until such time as K exits LRA.

THE DISTRICT’S PROPOSED PLACEMENT AT SOWERS CANNOT PROVIDE K WITH A FAPE AND AS A RESULT, LRA IS THE LEGALLY REQUIRED PLACEMENT AS IT IS THE LEAST RESTRICTIVE ENVIRONMENT AND THE MOST APPROPRIATE PLACEMENT ON THE CONTINUUM

330. The Hearing Officer finds that even beyond the *Elizabeth E.* test for reimbursement, discussed above, (under which Complainants are entitled by law to reimbursement due to the District’s failure to provide FAPE to K), as a standalone legal matter the District’s proposed

IEP does not satisfy the *Endrew F.* standard set forth by the Supreme Court, as the District’s IEP, including the District’s proposed placement at Sowers Alternative High School, cannot provide K with a FAPE; additionally, the Hearing Officer finds that LRA is the legally required placement for K as it is the least restrictive environment and the most appropriate placement for K.

331. Each local education agency in Kansas is required to provide a free appropriate public education (“FAPE”) to all children residing in the State, including children with disabilities. *See* 34 C.F.R. § 300.101, K.A.R. § 91-40-2.

332. As noted above, FAPE means special education and related services that meet the following criteria:

- (1) Are provided at public expense, under public supervision and direction, and without charge;
- (2) Meet the standards of the state board;
- (3) Include an appropriate preschool, elementary, or secondary school education; and
- (4) Are provided in conformity with an individualized education program.

See K.A.R. § 91-40-1.

333. Under IDEA, children with disabilities must also be placed in the “least restrictive environment” (“LRE”). LRE is defined as:

The educational placement in which, to the maximum extent appropriate, children with disabilities, including children in institutions or other care facilities, are educated with children who are not disabled, with this placement meeting the requirements of K.S.A. 72-976, and amendments thereto, and the following criteria:

- (1) Determined at least annually;
- (2) Based upon the student's individualized education program; and
- (3) Provided as close as possible to the child's home.

See K.A.R. § 91-40-1(II); *see also* *L.B. ex rel. K.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 975 n. 13 (10th Cir. 2004).

334. The Hearing Officer finds by a preponderance of the evidence that the District’s proposed placement of K set forth in its IEP, Sowers, cannot provide FAPE to K.

335. The District rejected placement of K at LRA in its IEP and its Prior Written Notice circa July 2021 (Exhibits 196 and 197). The District instead insisted on placement at Sowers

within the District, a placement Complainants rejected at the IEP meetings and in subsequent correspondence with the District (Joint Exhibit CCC).

336. The Hearing Officer finds it significant that the District did not present a single witness who works at Sowers to attest to how Sowers would provide K with a FAPE, and nearly all of the District's witnesses who spoke about Sowers had minimal knowledge of the school and its services, and even less as to how those services would be provided to K.

337. The District's proposed placement and IEP mention *nothing* about night and weekend services for K, which are absolutely necessary for K to be able to make appropriate progress in light of his circumstances (Exhibit 344; Transcript 874:9-12, 1579:15-18).

338. The District feinted toward an argument that it was capable of providing evening services for K, but presented no real evidence on that point, and the District's witnesses conceded repeatedly in their testimony that the IEP it proposed for K mentioned nothing about night and weekend services. Instead, the District's witnesses and counsel discussed the Sowers Evening Program, which the Hearing Officer notes is not mentioned once in the IEP prepared by the District. *See* Exhibits 196-197; *see* Transcript 1485:15-1486:4, 1486:15-17.

339. Indeed, at the hearing, the District's own witnesses could not even identify the hours during which the "Sowers Evening Program" operates, and additionally, the Hearing Officer notes that evidence was discussed that the Sowers Evening Program only operates from 3:30pm to 5:30pm on weekdays, which the District's own witnesses could neither confirm nor deny. *See* Transcript 1616:5-10.

340. The District's placement decision is also contradictory of its stated reason for finally agreeing to evaluate K for special education and ultimately find him eligible for special education—the District has claimed repeatedly in this matter that it was Dr. Chiles' evaluation that was the impetus for the District to evaluate K for special education (ignoring that the problems experienced by K noted in that evaluation were not readily apparent to the District for years), and the District relied on that evaluation in determining K to have exceptionalities and in need of special education, yet paradoxically, the District completely ignored and did not adhere to Dr. Chiles' recommended placement for K at a residential therapeutic boarding school.

341. Dr. Chiles' recommendation, found at Exhibit 206, makes the following clear recommendation for K (recall that the District voluntarily and unilaterally reimbursed parents for this evaluation, then proceeded to ignore its central recommendation for K):

Following [K's] stay at Blue Fire Wilderness, it is recommended that he is placed in a residential therapeutic setting that works with students diagnosed with high functioning autism, neurodevelopmental challenges, problems and concerns involving attachment, demonstrating emotional difficulties, behaviors that impact his health and well-being, academic challenges, and lack of self-confidence and sense of self. Such a setting will provide [K] a combination of nurturance, therapeutic support, social development opportunities, opportunities to develop hobbies and interests, etc. Such a setting will provide him with ongoing support, structure, and nurturance to develop healthy coping skills, learn to express feelings and emotions effectively, develop mindfulness, find a direction to pursue in the future, and improve his overall interpersonal/relationship functioning. [K] should have access to individual, group, and family therapy. He should have access to a supportive peer culture and solid academic curriculum. This recommendation is given over [K] returning home due to the need for him to remain in a setting where there will be a level of structure to ensure he avoids harming himself and learns healthier means of coping besides avoiding and relying on electronics, learns to develop meaningful and lasting relationships, and continues to receive academic support, needed to help him become successful across all aspects of his life.

342. LRA is such a “residential therapeutic setting” that provides the services discussed at length in Dr. Chiles’ report; Sowers, the District’s proposed placement, is not. Further, the District failed to provide evidence as to how Sowers would be able to provide the services discussed in Dr. Chile’s report.

343. Instead of heeding the clear recommendation of Dr. Chiles, whose report (Exhibit 206) the District claims caused it to move forward with evaluating K for special education and finding him eligible (*see* Exhibit 1), with that recommended placement of K being at a residential treatment facility and boarding school such as LRA, the District claimed the “proposed IEP is calculated to provide FAPE/educational benefit to K[en] in light of his circumstances.” Exhibit 196.

344. The Hearing Officer finds this is nothing more than a rote recitation of the *Andrew* standard, with no explanation of why and how the proposed IEP can accomplish these goals.

345. In addition to ignoring Dr. Chiles’ clear placement recommendation, the District’s proposed placement set forth in its IEP ignored the statements at the IEP development meetings from Complainants, Mr. Farmer of LRA, and Ms. Salehani, all of which set forth why LRA was the appropriate placement for K and why the District’s proposed placement was inadequate.

346. The District’s placement decision in its IEP also ignored its own history of failing K and his parents due to its years-long violation of IDEA.

347. Further, as discussed at length during the hearing in this matter, the Hearing Officer notes that eight (8) out of the fourteen (14) listed accommodations in the IEP are recycled in one form or another from the failed 504 Plans, yet the District has argued that it now expects them to somehow be successful this time around. (Exhibit 344; Transcript 870:1-25, 871:1-25, 872:1-25, 873:1-25, 874:1-8, 1291:14-25, 1292:1-19, 1293:1-6, 1367:3-11, 1367:13-25, 1368:1-11.)

348. Additionally, the Hearing Officer notes that the District is asking Complainants to trust the District with their child, after the District failed this child for years, violating federal law in multivarious ways in the process, causing long-lasting harm to K and his parents. Moreover, the District is arguing it can provide FAPE to K now via the proposed IEP, yet nobody with the District's special education team has bothered to reach out to LRA since the IEP meeting in July to inquire about K and K's progress, K's needs, or anything else related to K (Transcript 1147:3-12).

349. The Hearing Officer notes that the District is asking for this trust after discovery in this case revealed numerous internal emails exchanged by District personnel *at two different schools* mocking and/or showing hostility to K and Complainants (Exhibits 37, 55, 71, 102, 103, 110, 137, 164 as just some examples). The Hearing Officer finds this hostility and mocking to be quite troubling, considering that these exchanges were about a disabled child desperately in need of help, and moreover, because Complainants did everything in their power to make public school in the District work for K.

350. The Hearing Officer also notes that it is worth remembering the District's machinations to exit/withdraw K from the District, behind the scenes, during the Spring of 2021, when K was receiving treatment at blueFire. This was clearly in violation of IDEA, as enunciated in the *Elizabeth E* case, discussed previously.

351. The Hearing Officer agrees with Complainants that the District has poisoned the well; even ignoring that Complainants' placement of K at LRA qualifies for reimbursement under the law, the Hearing Officer finds that the District has disqualified itself from further educating K due to its conduct as to this child and his family, and it simply cannot be trusted with K, his education, and his future.

352. The Tenth Circuit has adopted the *Daniel R.R.* test, stating, "[i]n determining whether the least restrictive environment mandate in the IDEA has been violated by a school district,the court: (1) determines whether education in a regular classroom, with the use of supplemental

aids and services, can be achieved satisfactorily; and (2) if not, determines if the school district has mainstreamed the child to the maximum extent appropriate.” *Nebo Sch. Dist.*, 379 F.3d at 976.

353. The District contends that Sowers is the LRE for K since it is closer in location to Complainants’ home in Wichita, Kansas than is LRA. While Sowers is closer in physical location to K’s home than LRA, the District ignores that the definition states that LRE should be “provided as close as possible to the child’s home.” *See* K.A.R. § 91-40-1(*ll*) (emphasis supplied). The Hearing Officer finds that Sowers’ mere physical location in closer proximity to K’s home does not make Sowers the LRE for K.

354. The Hearing Officer notes that the District’s IEP and placement decision at Sowers proposes to remove K from the general education population one hundred (100) percent of the time, while K has been and will continue to be a part of the general education population at LRA (Transcript 851:10-13), in accordance with LRE’s requirement that children with disabilities must be educated with students who are not disabled to the maximum extent appropriate.

355. On that basis, the Hearing Officer finds by a preponderance of the evidence that LRA, and *not* Sowers, provides K with the LRE and with FAPE. At LRA, K is receiving special education and needed one-on-one services in the context of a “regular classroom,” while a placement at Sowers would result in no mainstreaming at all of K; the *Daniel R.R.* test tips in favor of LRA in this matter.

356. The Hearing Officer further finds as a matter of law that the District did not present sufficient evidence to establish that Sowers was the appropriate placement for K. As such, the Hearing Officer finds that The District’s proposed placement at Sowers cannot provide K with a FAPE and as a result, LRA is the legally required placement as it is the LRE and the most appropriate placement on the continuum for K.

357. Additionally, as discussed above, the District appeared to argue that LRA was somehow unsafe for K due to alleged instances of sexual misconduct that were entirely irrelevant to K.

358. Moreover, the District spent a great deal of time exploring the nature of restraints and holds utilized at LRA, arguing that some of the holds utilized at LRA are not in compliance with Kansas statute or regulation, with the apparent subtext being that the District is “concerned” for K’s safety at LRA—this argument fails for numerous reasons, including that the District’s history in this case of violating federal special education law as to K in numerous ways, and mocking

K and Complainants, make such recent expressions of “concern” seem insincere; most basically, this line of argument from the District ignores the clear federal law that parental placements such as that in this case “may be found appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA and LEAs.” 34 C.F.R. § 300.148; *see also Florence County*, 510 U.S. at 12-13 (1993).

359. The District presented no evidence that the holds LRA uses are in violation of Utah state law, or in violation of federal law, nor that any of the holds used on K resulted in harm to K.

360. Again, the relevant federal regulation states that “If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child.” 34 C.F.R. § 300.104; *see also* K.A.R. § 91-40-21.

361. At the hearing, the District presented zero evidence that the cost of LRA for K would be an undue burden for the District.

362. For further facts establishing that the District’s proposed placement of K at Sowers cannot provide K with a FAPE, and that LRA is the legally required placement for K as it is the least restrictive environment and the most appropriate placement in the continuum, see Findings of Fact paragraphs 395, 432-433, 446, 469, 476-492, 494-499, 503, 513, 515, 516-520, 526, 559-560, 563-565, 568, 574, 581-583, 585-586, and 604, above.

363. The Hearing Officer concludes as a matter of law that placement of K at LRA is necessary to provide him with the special education he needs to receive FAPE in light of his unique circumstances, and this placement must be at no cost to Complainants.

364. As such, the District must compensate Complainants \$142,800.00 for the cost of LRA from June 4, 2021, through June 3, 2022, and to further compensate Complainants moving forward at the rate of \$11,900.00 per month until such time as K exits LRA or reaches the age of 21. Reasonable costs of transportation for K and Complainants for three (3) family visits annually between Wichita and Logan, Utah, will be compensated by the District within 30 days of the date of the billing.

COMPLAINANTS PROVIDED THE DISTRICT WITH PROPER NOTICE OF K’S ENROLLMENT AT LRA, AS WELL AS AMPLE OPPORTUNITY TO EVALUATE K FOR SPECIAL EDUCATION SERVICES, AND COMPLAINANTS DID NOT ACT IN BAD FAITH IN ENROLLING K AT LRA, AND AS A RESULT THE REIMBURSEMENT AWARD WILL NOT BE REDUCED.

365. When a hearing officer determines that a local education agency failed to offer a student a FAPE and that the private placement parents chose is appropriate, equitable considerations must be evaluated to determine whether reimbursement is warranted. *Forest Grove*, 557 U.S. at 247.

366. Some factors that the hearing officer must consider in determining whether reimbursement is appropriate are (1) notice provided by the parents, and (2) the school district’s opportunities to evaluate the student. *Id.* Moreover, Courts “retain discretion to reduce the amount of a reimbursement award if the equities so warrant.” *Id.* at 232; *see also Burlington*, 471 U.S. at 370.

367. Further, per IDEA, the amount of reimbursement may be reduced or denied if the following occur:

(aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa);

See 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(aa)-(bb).

368. Here, the District made some effort to portray Complainants as acting in bad faith and delaying providing notice to the District that Complainants had enrolled K at LRA and that Complainants intended to seek reimbursement from the District all along.

369. However, the Hearing Officer notes that Complainants first notified District personnel that they had taken K to blueFire on March 11, 2021, two weeks after they had requested K be evaluated for special education. The District was on notice in March 2021 that Complainants had intended to place K privately.

370. Further, on May 20, 2021, Complainants provided notice to District personnel that they intended to enroll K at LRA on June 4, 2021, and that they intended to seek reimbursement from the District of the costs of LRA, due to the District’s failures as to K (Exhibit

177). This notice came ten or more business days before K matriculated at LRA, which occurred on June 4, 2021.

371. Moreover, after the May 20, 2021, notice above, eight (8) days later, through counsel, Complainants notified the District that Complainants were seeking a private placement for K (Exhibit 179).

372. The Hearing Officer finds that Complainants' May 20, 2021 email to District personnel, which was circulated the very next morning among high-ranking District administrators (Exhibit 177), satisfied the 10-day notice requirement under IDEA and therefore, reduction of the reimbursement owed to Complainants is not warranted, nor legally permissible. *See* 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(bb).

373. The Hearing Officer finds that, in any event, the May 20, 2021 notice was not even technically required because as of that date, the District had already unilaterally exited K from being a student in the District, meaning it was the District itself which removed K from being a student with the District, negating Complainants' need to provide the ten-day notice in the first place.

374. Additionally, the Hearing Officer notes that it has been held that a "parent's expression of concerns regarding a child's placement arguably put the education board 'on effective notice of the IEP's inadequacy and the Board's potential liability to [child's] parents.'" *See Bernardsville Bd. of Educ. v. J.H.*, 42 F.3d 149, 157 (3d Cir. 1994). The evidence adduced in this matter is replete with Complainants concern that K was not receiving a FAPE even as the District continuously insisted on relying on K's ineffective 504 Plans.

375. Further, Complainants attended both IEP meetings in July 2021, and at both meetings, specifically requested that K be placed at LRA in the IEP (Transcript 835:5-12) and that they did not approve of placement at Sowers. This also provided notice to the District that Complainants would reject the District's proposed placement per 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(aa).

376. Finally, Complainants were allowed by the District until July 12, 2021 to accept or reject all or part of the IEP and proposed placement at Sowers, and on that date, through counsel, Complainants rejected placement at Sowers and informed the District that they would be seeking reimbursement of their placement of K at LRA, satisfying 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(aa). *See* Exhibit 198.

377. Finally, the Hearing Officer notes that Complainants were and are perfectly entitled under federal and state law to (a) insist that private placement at LRA was the only appropriate placement for their child and should be the placement reflected in the IEP (34 C.F.R. § 300.104), and (b) seek reimbursement for their placement of K at LRA (34 C.F.R. § 300.148); Complainants doing so was simply not, in any respect, in bad faith.

378. The Hearing Officer also finds that there was zero evidence presented at the hearing in this matter that Complainants acted in bad faith in any respect, or that the District was in any way prejudiced by Complainants' course of action in doing what was necessary for their child.

379. Therefore, the Hearing Officer rejects the District's argument on this point.

380. Similarly, the District also argues that it did not have an opportunity to provide services to K under the IEP since Complainants had already placed K at LRA at the time the IEP was created, and further, that the District did not have an adequate opportunity to evaluate K for special education.

381. This brazen argument by the District fails because the evidence establishes that Complainants tried for years to convince the District to evaluate K and provide him with special education. The District refused to evaluate K for special education on three occasions, during three separate school years, and as evidenced above, failed to provide K with a FAPE.

382. The Hearing Officer finds that the District had ample opportunity to evaluate K and provide him with special education and related services for multiple years but failed and refused to do so, in violation of federal and state special education law. The District's argument and position on this point fails and Complainants had every right to pursue placement and reimbursement from the District under IDEA.

383. Additionally, the Hearing Officer notes that the District presented zero evidence at the hearing that the cost of LRA would be an undue burden on this large school district, further indicating that a reimbursement award without reduction is warranted in this case.

384. The Hearing Officer finds that the award for reimbursement should not be reduced due to any alleged lack of notice, bad faith, any purported failure to provide the District with the opportunity to evaluate K for special education services, or any other reason.

385. The Findings of Fact established that Complainants provided the District with proper notice of K's enrollment at LRA and that Complainants would seek this placement to be at public expense, further that Complainants gave the District ample opportunity to evaluate K for

special education services with the District refusing for years to do so, and further that Complainants did not act in bad faith in enrolling K at LRA and seeking reimbursement from the District.

DONATIONS FROM CONTRIBUTORS TO COMPLAINANTS' GOFUNDME, AS WELL AS FINANCIAL HELP FROM FAMILY MEMBERS, ARE NOT A BAR TO REIMBURSEMENT AS THE TEST FOR REIMBURSEMENT IS NOT MEANS TESTED, NOR IS THERE A RIGHT FOR OFFSET.

386. The District argues that the donations received by Complainants to help pay for LRA indicate that Complainants would be receiving a windfall if they were to be reimbursed for the costs of LRA.

387. However, the Hearing Officer is unaware of any statute or regulation stating there is a right of offset for a school district when it violates IDEA and parents are entitled to reimbursement, or that the test for reimbursement is means tested, nor has the District provided such authority.

388. Further, as Complainant J D testified at the hearing, the money Complainants would receive as reimbursement would serve to reimburse those who have contributed financial help to ensure that K is at the appropriate placement. (Transcript 790:4-25, 791:1-25, 792:1-25, 793:1-16). Any money leftover would be placed in a fund for K's future needs. (Transcript 790:24-25, 791:1).

389. As a result, the Hearing Officer finds that the reimbursement by the District in this case should not be reduced for any donations or financial help that Complainants have received to pay for K's education that should have been provided to K by the District for many years.

IV. DECISION & AWARD:

A. The Hearing Officer finds in favor of Complainants J D and S Z and against Respondent USD 259 with respect to Complainants' due process hearing complaint, with the Hearing Officer ordering reimbursement payment from the District USD 259 to Complainants in the amount of \$142,800.00 for the costs of LRA from June 4, 2021 through June 3, 2022, and for the District USD 259 to further compensate Complainants moving forward at the rate of \$11,900.00 per month until such time as K exits LRA or reaches the age of 21, as confirmed in writing by LRA to Complainants and the District at such time, and for the District to reimburse Complainants the costs of transportation for K and Complainants for three (3) family visits annually between Wichita and

Logan, Utah, as will be set forth in proper documentation of such transportation costs to be provided by Complainants to counsel for the District within a reasonable time period after such travel.

Transportation costs will be compensated by the District within 30 days of the date of the billing.

B. The Hearing Officer further orders that the IEP for K be amended by the District USD 259 to reflect that placement at LRA is the least restrictive environment and the legally required placement for K, until such time as K exits LRA, with the District obligated to ensure such placement is at no cost to Complainants.

C. Additionally, the Hearing Officer finds that because Complainants are prevailing parties who are the parents of a child with a disability, they may apply to a District Court for an award of their attorney's fees incurred in this matter, within the timeframe set forth by statute. 20 U.S.C. § 1415(i)(3)(B)(i)(I); K.S.A. § 72-3430(b)(12).

D. Any party may appeal this decision to the State Board of Education, pursuant to K.S.A. 72-3418(b), by filing a written notice of appeal to:

Notice of Appeal
ATTN: Special Education and Title Services
Landon State Office Building
900 SW Jackson Street, Suite 620
Topeka, Kansas 66612-1212

The Notice of Appeal must be filed with Special Education and Title Services, designee of the Commissioner of Education, not later than 30 calendar days after the date of the postmark on the envelope containing this decision. Filing is complete upon receipt of the Notice of Appeal in the office of Special Education and Title Services. Emailed submissions will not be accepted for filing.

Be advised that upon receipt of a Notice of Appeal by either party, Special Education and Title Services will inform both parties of a Designated State Review Officer. Upon notification, the local education agency shall ensure the official record is transmitted in a timely manner by the Hearing Officer to the Designated State Review Officer.

IT IS SO ORDERED.

July 15, 2022

Date


Larry Kute, Hearing Officer

Associates in Dispute Resolution LLC
212 S.W. 8th Ave., Suite 207
Topeka, KS 66603
(785)357-1800
(785)357-0002 (fax)

CERTIFICATE OF SERVICE

I, Larry R. Rute, do hereby certify that I have provided a true and correct copy of the above and foregoing Notice of Hearing Officer's Decision upon the following parties:

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by e-mailing the to all parties, this 15th day of July, 2022. A hard copy will not be mailed.


Larry R. Rute, Hearing Officer