THE STATE OF WYOMING
WYOMING DEPARTMENT OF EDUCATION

No. H 001-25 (Fremont Co. Sch. Dist. 1)

HEARING OFFICER'S
MEMORANDUM DECISION AND ORDER

THIS MATTER arises on the Petitioners' Request for Due Process Hearing, filed with the Wyoming Department of Education on August 6, 2024. ***See*** Request for Due Process Hearing, August 6, 2024 (hereinafter Request for Due Process). The Petitioners' Request for Due Process is granted in part.

PROCEDURAL BACKGROUND

The Respondent School District LEA responded to the Request for Due Process on May 18, 2024. ***See*** Letter Response, May 18, 2024 (hereinafter Answer).

A PreHearing Conference was held on August 16, 2024, which resulted in a PreHearing and Extension Order also being entered on August 16, 2024. ***See*** PreHearing and Extension Order, August 16, 2024 (hereinafter PreHearing Order). Among other things, the PreHearing Order granted the request by the parties to extend the date for the due process order decision until November 16, 2024, subject to subsequent extensions should the matter be revisited. ***See*** PreHearing Order. The due process hearing was set to commence on October 7, 2024, by personal appearances and witnesses at a School District site, and for the Hearing Officer, with concurrence of the parties, to appear and hold the hearing virtually, via Zoom conference. ***Id***.

The Petitioners filed their proposed Statement of Issues on August 30, 2024. ***See*** Petitioners' Statement of Issues, August 30, 2024 (hereinafter Ps' Issues). Respondent

also filed its proposed Statement of Issues on August 30, 2024. ***See*** Respondent (School District) Statement of Issues, August 30, 2024 (hereinafter R's Issues).

On September 26, 2024 Respondent filed its Motion to Continue Hearing and to Extend Deadlines. ***See*** Respondent (School District) Motion to Continue Hearing and to Extend Deadlines, September 26, 2024 (hereinafter Motion to Continue). The Petitioners filed a response opposing the Motion to Continue on September 26, 2024. ***See*** Petitioners' Response to Respondent's Motion to Continue Hearing and to Extend Deadlines, September 26, 2024 (hereinafter Response to Motion to Continue). The Motion to Continue was denied on September 29, 2024. ***See*** Order Denying Continuance, September 29, 2024. Also on September 29, 2024, an administrative *Sua Sponte* Order regarding the record proper and filings was entered. ***See*** Sua Sponte Order, September 29, 2024.

The parties filed their respective Witness and Exhibit Lists. ***See*** Petitioners' Witness and Exhibit List, September 27, 2024; Respondent (School District) Witness and Exhibit List, September 30, 2024. On September 27, 2024 Petitioners' filed a notice of expert designation. ***See*** Notice of Designation of Expert Witness Pursuant to W.R.C.P. 26(a)(2), September 27, 2024.

The Due Process Hearing convened on October 7, 2024, and continued, with nightly recesses, through October 11, 2024. Tr. Vols. 1-5. The Respondent's counsel personally appeared with Respondent's representatives, and the Petitioners personally appeared with counsel in the hearing room, with a virtual broadcast from that location. Tr. Vol 1. The Court Reporter worked virtually from an outside location. Id. The Hearing Officer appeared virtually. Id. Witnesses appeared in person. Online cameras

and video screens allowed the participants to view, hear, and speak with one another simultaneously.

Both parties were well-represented by their respective trial counsel. Findings of Fact, Conclusions of Law, and Argument were ordered to be submitted on or before December 11, 2024. Tr. 1108. Proposed Findings of Fact and Conclusions of Law were not to exceed 50 pages, and Argument was not to exceed 40 pages. Tr. 1105. Based on a joint request from the parties, an extension for this decision was granted to be entered on or before January 14, 2025. Tr. 1108. These post-hearing extension dates were revisited at Petitioners' request due to issues with transcripts being timely delivered. ***See*** Petitioners' Email Request to Extend Findings, Conclusions, Argument, and Decision Due Dates, November 14, 2024. The extension request was granted on November 14, 2024, for a due date for Findings, Conclusions, and Argument to be filed by 11:59 p.m. on December 16, 2024, with the decision due on or before January 17, 2025. ***See*** Email Order Granting Extensions, with Decision Due Date, November 14, 2024.

The Respondent filed its proposed Findings of Fact and Conclusions of Law on December 16, 2024. [School District's] Findings of Fact and Conclusions of Law, December 16, 2024 (R's F&C). On December 16, 2024 the Respondent also filed its Argument. Respondent's Argument in Support of Proposed Findings of Fact and Conclusions of Law, December 16, 2024 (R's Argument). The Petitioners filed their proposed Findings of Fact and Conclusions of Law on December 16, 2024. Petitioners' Proposed Findings of Fact and Conclusions of Law, December 16, 2024 (Ps' F&C). The

Petitioners also filed their Closing Argument on December 16, 2024. Petitioners' Closing Argument, December 16, 2024 (Ps' Argument).

This decision is due on or before January 17, 2025. ***See*** Email Order Granting Extensions, with Decision Due Date, November 14, 2024.

ISSUES PRESENTED BY THE PARTIES

1. Whether the School District provided Student with a FAPE consistent with the IDEA and its implementing regulations under 34 C.F.R. §§ 300.17 and 300.101, substantively, as follows:

a. Whether the School District is precluded from asserting it provided FAPE during the 2023-2024 school year after noting in the May 23,2024 Prior Written Notice that it had been unsuccessful in efforts to ensure Student's receipt of FAPE. (Ps' Issue 1 (a)(i)).

b. Whether the School District developed, and timely modified, an IEP which was reasonably calculated to result in educational benefit for Student in light of Student's unique educational needs, consistent with 34 C.F.R. § 300.320. (Ps' Issue 1 (a)(ii)).

c. Whether the School District provided services and supports in conformity with the Student's IEP, consistent with 34 C.F.R. § 300.17. (Ps' Issue 1 (a)(iii)).

d. Whether the School District ensured Student's proposed placement in a therapeutic residential facility setting was made in conformity with 34 C.F.R. § 300.116, in that: (i) the proposed placement was in the least restrictive environment; (ii) the proposed placement was over two hundred miles away and not as close as possible to Student's home; (iii) the proposed placement would not educate Student, to the maximum extent appropriate, with children who are nondisabled because the residential

facility primarily houses children with Autism spectrum disorder and other neurodevelopmental disorders; (iv) the proposed residential placement away from Student's home and community is more restrictive that a virtual one-on-one educational placement in the Student's home with the potential for expanding virtual locations to include community settings with in-person education staff; (v) potential harmful effects on Student or quality of services needed for Student were not considered; (vi) and the School District failed to identify specific special education services, supports, and related services, and failed to articulate why those specific special education services, supports, and related services could not be provided in its determination of LRE under federal and state guidelines. (Ps' Issue 1 (a)(iv)(1-6).

(f) Whether the School District's failure to identify Student as a student with a disability until September 2023, despite actual knowledge of a disability during the 2022-223 school year, contribute to the overall denial of FAPE. (Ps' Issue 1 (a)(v)).

(g) Whether the School District denied a less restrictive one-on-one virtual placement setting, although it had been demonstrated to be successful, due to School District policy not to offer a virtual setting to any student. (Ps' Issue 1 (a)(vi)).

2. Whether the School District should be ordered to reimburse Petitioners, pursuant to 34 C.F.R. § 300.148(c) , as a substantive violation of FAPE, for the cost of the then at the time of filing prospective October enrollment for the Fall and Winter 2024-2025 terms at the private Fusion Global Academy, including for supplementary aides and services, by considering (a) whether Fusion Global Academy is an appropriate placement for Student, (Ps' Issue 1 (b)(i)); and (b) whether Parents acted reasonably (i) in informing the School District that they rejected the residential placement at Seven

Stars in Utah because Student's counselor opined such a placement would be extremely harmful to Student's mental health; (ii) the IEP Teams' insistence that residential placement out of state was the only recommendation, with the virtual option recommended by the counselor rejected; and (iii) that the School District was notified of Petitioners intent to enroll Student in FGA for the Fall and Winter 2024-2025 term, beginning in October, since FAPE was at issue. (Ps' Issue 1 (b)(ii)(1–3)).

3. Whether the School District procedurally complied with the IDEA, implementing regulations, and Wyoming Department of Education's Special Program Division's child find policy in: (a) whether the School District made reasonable efforts to obtain informed consent from Parents for an initial evaluation to determine if Student was a child with a disability after the first request for an initial evaluation, pursuant to 34 C.F.R. § 300.300(a)(iii); (b) whether the School District had actual knowledge that Student was a student with a disability pursuant to 34 C.F.R. § 300.111(c)(1), and failed to initiate eligibility process when a copy of the independent psychological evaluation was provided to them, in violation of "SPD Child Find (I)(B)"; and whether the School District provided Parents with a copy of procedural safeguards upon Parent's request for an initial evaluation. (Ps' Issue 2 (a)(i-iii)).

4. Whether the School District substantively offered and provided FAPE to the Student, as defined by 34 C.F.R. § 300.17, including evaluation, eligibility, IEP meeting and creation of an IEP for academic and social needs, meetings and modifications of the IEP, therapeutic residential placement in Utah among options considered, consideration of online FGA yet not appropriate to meet Student's needs and least restrictive environment and not complying with federal and state regulations and rules, prior

written notice of change of placement issued, and Parents acted unilaterally in placement at private FGA. (R's Issue 1).

5. Whether, procedurally, the School District is obligated to reimburse Parents for placement at FGA due to placement being inappropriate at FGA because it does not meet Student's needs, it does not comply with least restrictive environment, it does not comply with federal and state regulations, and that Parents did not inform the School District of intent to enroll Student at a private school at public expense before doing so, and did not provide 10 day notice prior to removing Student from public school, with the only knowledge based on a records request from FGA noting Student was enrolled there on July 10, 2024, and that Parents' actions were unreasonable. (R's Issue 2).

6. Whether, procedurally, the School District did not violate child find because when it received information in August 2023 of admission to Wyoming Behavior Institute it initiated the process to evaluate Student; and whether prior to the 2023-2024 school year the Student's grades, academic progress, and social abilities did not demonstrate or show any need for special education services. (R's Issue 3).

RELEVANT LEGAL OVERVIEW

The burden of proof rests with the party challenging the IEP. ***See*** *Schaffer v. Weast*, 546 U.S. 49 (2005); *Johnson v. Indep. Sch. Dist. No. 4*, 921 F.2d 1022 (10th Cir. 1990). In an action for tuition reimbursement for unilateral placement the burden of proof is on the parents challenging appropriateness. ***See*** *D.A.B. v. New York City Dep't of Educ.*, 66 IDELR 211 (2nd Cir. 2015)(unpublished, used persuasively). In this action, the burdens rest, unless otherwise noted, with the Petitioners.

A twofold inquiry is demanded to determine if a child has been provided with a free appropriate public education. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 207 (1982). The initial inquiry is whether the State has complied with the procedures set forth in the Act. The second inquiry is whether the individualized educational program developed through the procedures of the Act is reasonably calculated to enable the child to receive educational benefits. *Id.*, 458 U.S. at 207. "The IDEA contains both extensive procedural requirements designed to ensure that an IEP is properly developed for each child and that parents or guardians have significant involvement in the educational decisions involving their children, as well as substantive requirements designed to ensure that each child receives the 'free appropriate public education' mandated by the Act." *Murray v. Montrose Cnty. Sch. Dist. RE-1J*, 51 F.3d 921, 925 (10th Cir. 1995). "[A] child is entitled to 'meaningful' access to education based on her individual needs." *Fry v. Napoleon Cmty. Sch.*, 580 U.S. ___, 137 S. Ct. 743, 753-754 (2017). "To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 137 S. Ct. 988, 999 (2017). This requires a "prospective judgment by school officials . . . informed not only by the expertise of school officials, but also by the input of the child's parents or guardians." *Id.* at 999-1000.

The educational program offered by the IEP must be "appropriately ambitious in light of [the child's] circumstances." *Endrew F.*, 137 S. Ct. at 1000. The "unique circumstances" of the child for whom the IEP was created determine the adequacy of the offered IEP. *Endrew F.*, 137 S. Ct. at 1001. Deference is given to the expertise and

exercise of judgment by the school authorities, with parents and school representatives to be given the opportunity to fully air their opinions regarding how an IEP should progress. *Endrew F.*, 137 S.Ct. at 1001. The issue for review is to determine if the IEP is reasonable, not whether it is regarded as ideal. *Endrew F.*, 137 S. Ct. at 999. Meaningful educational benefit is to be provided to the child, although that means neither maximizing the potential of the child nor minimizing the benefit provided. *O'Toole v. Olathe Dist. Unified Sch. Dist. No. 233*, 144 F.3d 692, 702 (10th Cir. 1998).

For unilateral placement tuition reimbursement, falling under 20 U.S.C. § 1412(a)(10)(C)(ii), if a school district fails to provide a FAPE, then the parents may enroll their child in a private school and seek tuition reimbursement. ***See*** *Elizabeth B. v. El Paso County Sch. Dist.* (10th Cir. December 16, 2020, No. 19-1299)(unpublished, persuasive only). The tuition reimbursement test requires a determination, first, of whether the school district failed to offer the child a FAPE prior to private enrollment, and, if so, whether the student's placement in a private school is appropriate. 34 C.F.R. § 300.148. ***See*** *Florence Cnty. Sch. Dist. Four v. Carter ex. rel Carter*, 501 U.S. 7 (1993); and *Burlington Sch. Comm. v. Massachusetts Dep't of Educ.*, 471 U.S. 359 (1985).

The Tenth Circuit notes a three part test, first, whether FAPE was made available by the school district, then whether the private school is state-accredited, and then whether the private school provides FAPE. ***See*** *Jefferson Co. Sch. Dist. R-1 v. Elizabeth*, 702 F. 3d 1227, 236-237 (10th Cir. 2012). As to the second element, the Circuit looked to the language of 20 U.S.C. § 1412(a)(10)(C)(ii), with a definition for secondary school under 20 U.S.C. § 1401 (27), for the accreditation requirement under state law. *Id.*

Under Wyoming law, via its educational regulations, the proposed unilateral placement does not have to meet Wyoming public school standards. ***See*** Wyo. Dept. Of Educ., Special Programs Division, Policy and Procedures for Special Education, Responsibility for Children in Private Schools, FAPE at Issue, Unilateral Placement, Sec. 111 (B). ***See*** *Elizabeth B. v. El Paso County Sch. Dist.* (10th Cir. December 16, 2020, No. 19-1299)(unpublished, persuasive only, noted for the reasons that only the first and third elements of the reimbursement are noted in the test). This is consistent, as well, with the federal regulations that the unilateral placement does not have to meet state standards to be appropriate. 34 C.F.R. § 300.148(c) .

In the context of unilateral placement reimbursement, 20 U.S.C. § 1412(a)(10)(C)(iii) provides additional limitations:

> (iii) Limitation on reimbursement
> The cost of reimbursement described in clause (ii) may be reduced or denied—
> (I) if—
> (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);
> (II) if, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in section 1415(b)(3) of this title, of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for such evaluation; or
> (III) upon a judicial finding of unreasonableness with respect to actions taken by the parents.

Id.

Equitable considerations regarding parent actions in the unilateral placement process may allow discretionary denial of tuition reimbursement. ***See*** *Neske v. A.N. New York City Dep't of Educ.*, 123 LRP 37531 (2nd Cir.2023).

Under Wyoming rules, when FAPE is at issue for children placed in private schools, then the matter is governed by the requirements of 34 C.F.R. § 300.148. Wyo. Dept. Of Educ., Special Programs Division, Policy and Procedures for Special Education, Responsibility for Children in Private Schools, FAPE at Issue, Unilateral Placement, Sec. 111 (citing federal regulations as authority). The requirements of 34 C.F.R. § 300.148 are consistent with 20 U.S.C. § 1412(a)(10)(C)(iii), noted above. Among other things, as well, if parents did not receive procedural notice of the 10-day notice requirement, ***see*** 34 C.F.R. § 300.148(e)(1)(iii), or if complications would cause serious emotional harm to the child, 34 C.F.R. § 300.148(e)(2)(ii), then the notice may be excused. *Id*. ***See also*** Wyo. Dept. Of Educ., Special Programs Division, Policy and Procedures for Special Education, Responsibility for Children in Private Schools, FAPE at Issue, Unilateral Placement, Sec. 111 (D).

When FAPE is at issue, the unilateral placement does not have to meet Wyoming standards. Wyo. Dept. Of Educ., Special Programs Division, Policy and Procedures for Special Education, Responsibility for Children in Private Schools, FAPE at Issue, Unilateral Placement, Sec. 111 (B).

Extended school year services must be "necessary" to comply with FAPE beyond the normal school year. 34 C.F.R. § 300.106(a)(2) & (b). "OSEP recognizes that a child's IEP for ESY services will probably differ from the chid's regular IEP, *since the purpose of the ESY program is to prevent regression and recoupment problems*."

Letter to Myers, Office of Special Education Programs, December 18, 1989, 16 IDELR 290. ***See*** *Johnson v. Ind. Sch. Dist. No. 4 of Bixby, et al*, 921 F.2d 1022 (10th Cir. 1990)(past and future regression and recoupment, among other things).

All children with disabilities who are in need of special education and related services are to be identified, located, and evaluated. ***See*** 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a)(i) ("child find"). The school district "bears the burden generally in identifying eligible students for the IDEA." *Cudjoe v. Ind. Sch. Dist. No. 12*, 297 F.3d 1058, 1066 (10th Cir. 2002). All children residing in the local educational agency's (LEA's) jurisdiction must be identified, located and evaluated. ***See*** 20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a)(1). This "child find" obligation is imposed on the LEA for a child suspected of a disability and in need of special education, even though the child may advance from grade to grade. ***See*** 34 C.F.R. § 300.111(c)(1). The responsibility for the evaluation lies with the LEA. ***See*** *Wiesenberg v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 181 F. Supp. 2d 1307, 1310 (D. Utah 2002). The identification and evaluation must be made within a reasonable time once school officials are placed on notice of behavior likely to indicate a disability. ***See*** *Id.* at 1311. That is, there must be a suspicion of disability, rather than actual knowledge of the underlying qualifying disability. ***See*** *Regional Sch. Dist. No. 9 v. Mr. and Mrs. M.*, 53 IDELR 8, 109 LRP 51058 (D.C. Conn. 2009). An LEA's failure to meet its "child find" obligation is a cognizable claim. ***See*** *Compton Unified Sch. Dist. v. Addison, et al.*, 598 F.3d 1181, 1183-84 (9th Cir. 2010). Eligibility for special education benefits may be considered, as well. ***See*** *Hansen v. Republic R-III Sch. Dist.*, 632 F.3d 1024, 1026 (8th Cir. 2011). A "difficult and sensitive" analysis can be required with these issues. *Mr. I. v. Maine Sch.*

Admin. Dist. No. 55, 480 F.3d 1, 4 (1st Cir. 2007)(quoting *Greenland Sch. Dist. v. Amy*, 358 F.3d. 150, 162 (1st Cir. 2004).

A disability is suspected, under persuasive authority from the Ninth Circuit, when the district is put on notice that symptoms of disability are displayed by the child. ***See*** *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 1120 (9th Cir. 2016). Notice may come in the form of expressed parental concerns about a child's symptoms, expressed opinions by informed professionals, or less formal indicators, like the behaviors in and out of the classroom. *Id.* at 1121.

A "child with a disability" is a child evaluated and determined to be eligible for, among other things, emotional disturbance, which adversely affects the child's educational performance. ***See*** 34 C.F.R. § 300.8(c)(4). As a result, the child must need special education and related services. ***See*** 34 C.F.R. § 300.8(a).

In Wyoming, an emotional disability, consistent with federal regulations, is defined as an inability to learn which cannot be explained by sensory, intellectual, or health factors, as well as an inability to build or maintain satisfactory interpersonal relationships with peers or teachers, or by having inappropriate types of behavior or feelings under normal circumstances, or having a general pervasive mood of unhappiness or depression, or having a tendency to develop physical symptoms or fears associated with personal or school problems. Wyo. Dept. of Educ. Rules, Chapt. 7, Sec. 4 (d)(v).

A hearing officer's determination must generally be based on substantive grounds as to whether a child received a free appropriate public education. ***See*** 34 C.F.R. § 300.513(a). If a procedural violation occurs, then it results in a denial of a free

appropriate public education only if the procedural inadequacies: (1) impeded a child's right to a free appropriate public education, (2) significantly impeded the parent's opportunity to participate in the decision-making process for a provision of a free appropriate public education; or (3) caused deprivation of educational benefit. *Id.* at (a)(2). Procedural defects are insufficient to set aside an IEP unless a rational basis exists to believe the procedural errors seriously hampered the parents' opportunity to participate in the decision process, compromised the student's right to an appropriate education, or caused a deprivation of educational benefits. ***See*** *O'Toole v. Olathe Dist. Unified Sch. Dist. No. 233*, 144 F.3d 692, 707 (10th Cir. 1998). In other words, technical deviations alone are insufficient to establish a denial of free appropriate public education. ***See*** *Urban v. Jefferson Cnty. Sch. Dist. R-1*, 89 F.3d 720, 726 (10th Cir. 1996). Procedural violations must adversely impact the student's education or significantly impede on the parent's opportunity to participate in the process. ***See*** *Sytsema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306 (10th Cir. 2008). Procedural defects must amount to substantive harm for compensatory services. ***See*** *Garcia v. Bd. of Educ. of Albuquerque Pub. Sch.*, 520 F.3d 1116, 1125-26 (10th Cir. 2008). A hearing officer may order a LEA to comply with procedural requirements. ***See*** 34 C.F.R. § 300.513(a)(3). "The only relief that an IDEA officer can give . . . is relief for the denial of a FAPE." *Fry*, 137 S. Ct. at 753.

Failure of the LEA to meet its child find duty to locate, identify, and evaluate a student with a disability amounts to a procedural violation. ***See*** *Timothy O.*, 822 F.3d at 1124. Similarly, improper implementation of an IEP can run afoul of the procedural requirements demanded by the IDEA. ***See*** *J.W. ex rel. J.E.W. v. Fresno Unified Sch.*

Dist., 626 F.3d 431, 432 (9th Cir. 2010)(citations omitted). An IEP meeting must be conducted within 30 days from a determination that the student needs special education and related services. ***See*** 34 C.F.R. § 300.323(c)(1).

Written notice is required regarding issues for the identification, evaluation or placement of a child. ***See*** 34 C.F.R. § 300.503. Parents are afforded an opportunity to participate in the IEP meetings by ensuring the district provides them with a notice of the meeting, which is to include, among other things, the purpose, time, and location of the meeting, as well as who will be present. ***See*** 34 C.F.R. § 300.345(a). In the context of requiring meaningful involvement and input from a student's parents in the IEP, the parents must be provided with prior written notice of any change in the provisions of a student's free appropriate public education. ***See*** *Logue v. Unified Sch. Dist. No. 512*, 153 F.3d 727 (10th Cir. 1998). The IDEA requires notice of a proposed change before the change is made – not notice of the proposed change prior to commencement of the IEP meeting where the change will be discussed. ***See*** *Masar v. Bd. of Educ. of the Fruitport Cmty. Schs.*, 39 IDELR 239, 103 LRP 37950 (W.D. Mich. 2003). ***See also*** *Tenn. Dep't. of Mental Health and Mental Retardation v. Paul B.*, 88 F.3d 1466, 1481 (6th Cir. 1996) (failure to provide notice of "stay-put" not prejudicial for summary judgment proceedings). Nonetheless, a predetermination by the district of the student's placement and services does not allow the student's parents to meaningfully participate in the process and results in substantive harm to the student. ***See*** *Deal v. Hamilton Cnty. Bd. of Ed.*, 42 IDELR 109, 104 LRP 59544 (6th Cir. 2004).

Pursuant to 20 U.S.C. § 1415(b)(3), "a school district must give prior written notice whenever it proposes to change, or it refuses to change, any aspect of a child's

education." *Murray*, 51 F.3d at 925. As a result, a "parent wishing to challenge a school district decision is entitled to an impartial due process hearing conducted by a state, local or intermediate educational agency." *Id.*

A school district must also provide parents a procedural safeguards notice once a year, and for a request for an evaluation, due process or complaint filing, discipline procedures, and parental request. 34 C.F.R. § 300.504(a). Among other things, the safeguards notice must explain the procedural safeguards for unilateral placement. ***Id.*** at (c)(9).

The IEP Team for a child with a disability includes: the parents of the child, not less than one general education teacher of the child (if the child is or may be participating in the general education environment), not less than one special education teacher of the child, or, where appropriate, not less than one special education provider of the child, a district representative who: (i) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; (ii) is knowledgeable about the general education curriculum; and (iii) is knowledgeable about the availability of district resources, an individual who can interpret the instructional implications of evaluation results, and at the discretion of the parent or the district, other individuals who have knowledge or special expertise regarding the child, included related services personnel as appropriate, and, whenever appropriate, the child. ***See*** 34 C.F.R. § 300.321.

An appropriate plan considers the (1) strengths of the child; (2) the concerns of the parents for enhancing the education of their child; (3) the results of the initial or most recent evaluation of the child; and (4) the academic, developmental, and functional

needs of the child. ***See*** 34 C.F.R. § 300.324(a). Communication needs and the use of assistive technology must be considered, as well. *Id.* Related services are such "developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education . . ." 34 C.F.R. § 300.34(a). ***See also*** *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 891 (1984)(services to aid student to benefit from special education).

As articulated in *Tatro*, *Id.*, to be a related service, the child must have a disability to require special education services under the IDEA, the service must be necessary to aid the child with the disability to benefit from the special education, and the service must be performed by a non-physician. *Id.* The IDEA's definition of "related service" is "relatively broad." *Jefferson Co. Sch. Dist. v. Roxanne B.*, 702 F.3d 1227, 1236 (10th Cir. 2012).

The child is to be educated in the least restrictive environment (LRE) – the child is to be educated in a regular classroom to the maximum extent appropriate. 20 U.S.C. § 1412(a)(5)(A). Removal from the regular education classroom can occur only when the nature or severity of the child's disability is such that regular classroom education cannot be achieved satisfactorily with the use of supplementary aids and services. *Nebo* 379 F.3d at 976(citing 20 U.S.C. § 1412(a)(5)(A)). Education in the least restrictive environment is a substantive requirement as a statutory mandate. *Id.* That is, substantive provisions are violated if the LEA either (1) fails to provide FAPE to the child, or (2) if FAPE is provided, then it is not to the maximum extent appropriate in the least restrictive environment. *Id.* at fn. 13.

The LRE test in the Tenth Circuit is, initially, whether education in the regular classroom, with the use of supplemental aids and services, can be satisfactorily achieved. *Id*. at 976. Non-exhaustive factors used to make this determination include: (a) the steps the LEA has taken to accommodate the student, including consideration of a continuum of placement and support services, in the regular classroom; (b) a comparison of the student's academic benefits he or she will receive in the regular classroom with those to be received in the special education classroom; (c) the overall educational experience of the student in the regular education classroom, which includes non-academic benefits; and (d) the effect of the student's presence in the regular classroom. *Id*. Then, if found that the student' education in the regular classroom can be satisfactorily achieved with the use of supplemental aids and services, whether the LEA has mainstreamed the student to the maximum extent appropriate. *Id*.

In Wyoming, LRE is consistent with federal regulations. ***See*** Wyo. Dept. of Educ. Rules, Chapt. 7, Sec. 5 (c) . In relevant part, LRE placements are to be as close as possible to the child's home, Wyo. Dept. of Educ. Rules, Chapt. 7, Sec. 5 (b)(iv)(B)(lll), and must consider the harmful effect on the child. Wyo. Dept. of Educ. Rules, Chapt. 7, Sec. 5(b)(vi).

The IEP is to be implemented as soon as possible after the IEP meeting. 34 C.F.R. § 300.323(c)(2). Various steps must be followed not only to design an IEP, but to implement it as well. ***See*** *Johnson v. Olathe Dist. Unified Sch. Dist. No. 233*, 316 F. Supp. 960 (D. Kan. 2003).

The cornerstone for analysis of whether a free appropriate public education has been or is being provided is within the four corners of the IEP itself. ***See*** *Sytsema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306, 1316-1317 (10th Cir. 2008).

Hearing officers have authority to grant relief as deemed appropriate based on their findings. ***See*** 20 U.S.C. § 1415(e)(2). Equitable factors are considered in fashioning a remedy, with broad discretion allowed. ***See*** *Florence Cnty. Sch. Dist. v. Carter ex rel. Carter*, 510 U.S. 7, 16 (1993). The form of compensatory education as a remedy is intended to cure the deprivation of the student's rights while reviewing the length of the inappropriate placement. ***See*** *Murphy v. Timberlane*, 973 F.2d 13 (1st Cir. 1992). As to the compensatory education component of the remedy, under persuasive authority for a qualitative approach, compensatory education awards should be reasonably calculated to provide the student with the education benefits which the student should have received had the district provided the services in the first place. ***See*** *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516 (D.C. Cir. 2005). Indeed, even with a free appropriate public education denial, subsequent placement may remedy the prior violation. *Wheaten v. Dist. of Columbia*, 55 IDELR 12 (D.D.C. 2010). Wide discretion to fashion equitable relief includes the ability to decline to award any equitable relief at all, due, for instance, to insufficient evidence to adequately catalogue services and expenses, and particularly if the proposed relief would have no effect on the student's education. ***See*** *Chavez v. N.M. Pub. Educ. Dep't.*, 621 F.3d 1275, 1284 (10th Cir. 2010). Procedural defects must amount to substantive harm for compensatory services. *Garcia v. Bd. of Educ. of Albuquerque Pub. Schs.*, 520 F.3d 1116 (10th Cir. 2008).

FINDINGS OF FACT

1. There is jurisdiction over the parties and of the subject-matter only for matters raised contesting a free appropriate public education (FAPE) under the IDEA, unless otherwise found or concluded herein. ***See*** 34 C.F.R. § 513.

2. With concurrence of the parties, the Due Process Hearing Officer appeared virtually over a Zoom platform, with the parties, counsel, and witnesses at the hearing location setting.

3. Other procedural hearing factual matters are noted in the Procedural Background, above, and incorporated by reference herein.

4. The Due Process Hearing allowed the parties to be represented by their respective counsel and communicate with their counsel, and they could present evidence (both written and testimonial) and confront, cross-examine, and compel the attendance of witnesses. The interactive video broadcast allowed the parties and the Hearing Officer to see and communicate with one another in full room presentation. Credibility could be assessed.

5. In an attempt to avoid duplicity in these numbered findings and in the Analysis section, the numbered findings are also supplemented by findings in the Analysis section.

6. The relevant statutory period for substantive consideration commenced two years prior to August 6, 2024. ***See*** Wyo. Dept. of Educ. , Special Programs Division, Policy and Procedure for Special Education Dispute Resolution Procedures, Due Process Hearing Procedures, IV (C).

7. The Student was born on October 7. 2008. ***See*** Ex. 21.

8. Historically, in relevant part, Student was enrolled with the School District beginning with Kindergarten in the 2014-15 school year, and continued with the School District through the 2018-2019 school year. Ps' Exs. 81, 93.

9. For the 2019-2020 school year the Petitioners enrolled Student in an asynchronous online virtual public school named Wyoming Connections Academy, where the parents were responsible for Student doing work. Ps. Exs. 62, 81, 93.

10. Prior to enrollment at Wyoming Connections Academy, Student had been the subject of being choked, tr. 44-45, being tackled, tr. 55-56, and behavioral issues arose. Tr. 65-66.

11. While at Wyoming Connections Academy, Student was neither evaluated for IDEA eligibility nor Section 504 eligibility. Tr. 253-54.

12. Petitioners then re-enrolled Student with the School District after about two months in the virtual program. Ps. Exs. 81, 94. Tr. 252-53.

13. Beginning in 2019, Student began mental health therapy. Tr. 81-82.

14. Petitioners obtained a private neurological evaluation on February 25, 2020. Ps' Ex. 2.

15. The evaluation was shared with the School District at some unspecified point in time, maybe not in the grade school year, because the evaluation was undertaken primarily because of Covid. Tr. 68-69.

16. Student's diagnosis was oppositional defiant disorder and other specified anxiety disorder. Ps' Ex. 2.

17. Among other things, it was suggested Student be considered for eligibility under a 504 Plan, but did not include language for an evaluation under the IDEA. Ps' Ex. 2.

18. Counseling, social group therapy, and outpatient occupational therapy were suggested. Ps' Ex. 2.

19. For the grade, the 2020-2021 school year, Student was home-schooled. Ps' Ex. 81. Tr. 69.

20. The Petitioners were working from home at that time and could assist Student with education, including emotional supports, and emotional deregulation. Tr. 71-72.

21. Another asynchronous online virtual school situation was not an option for them. Tr. 69.

22. Student was again re-enrolled with the School District for the 2021-2022 school year, for the grade. Tr. 71.

23. A 504 Plan was created at the beginning of the grade. Tr. 73-74.

24. Student began discussion with peers about being nonbinary, started using a chosen name at home, and they/them pronouns. Tr. 92-93.

25. A 504 Plan was developed. Ps' Exs. 4, 5. Tr. 73-74.

26. The 504 Plan noted Student's anxiety, cognitive failure, and sensory sensitivity confronting daily challenges. Ps' Ex. 5.

27. Student began to have inconsistent attendance, yet academic performance was satisfactory. Exs. 8, 106, 107, 108, 110.

28. Student met with the school counselor, and other adults. Ps' Exs. 104, 105, 113, 114, 115. Tr. 76, 249.

29. Student was having difficulties with assignments, and difficulty with getting to school, particularly after winter break, when Student began to share concerns with Mother about bullying. Tr. 75.

30. Specifically, it happened with multiple different kids over time. Tr. 76.

31. Mother reported the bullying incidents to the school counselor, who had not reported it administration. Tr. 76-78.

32. Importantly, Mother reported to the school counselor that the bullies in the grade were the same bullies who had bullied him in his earlier years in school. Tr. 76.

33. For instance, in January 2022 Student was called a "trans" by a school girl in a negative way, Ps. Ex. 116, and the school's response was that it was taking action as to the other students who engaged in these types of misbehavior, as to nonbinary identification. Ps. Exs. 91, 115, 116, 118, 119. Tr. 243-49.

34. In March 2022 Student was called a "bisexual bitch" by another student while showing a new student around the school .R's Ex. 23.

35. During the grade, in 2022, three incidents arose: the Student being tripped by another, taking things from the Student, and calling Student derogatory names perceived by the Student as bullying. Tr. 96.

36. School staff investigated bullying concerns. Ps' Exs. 91, 115, 116, 118, 119. Tr. 243-49.

37. When outside of school, when Student was approached by students in his age group, the Student felt threatened and misunderstood, and did not feel safe independently. Tr. 83.

38. On March 18, 2022 Petitioners withdrew Student from the School District's L School due to ongoing bullying issues. Ex. P 9.

39. Student began home schooling once again, with Student primarily left alone to work under the home school program, because post-Covid Mother had returned to work outside of the home. Ps' Exs. 2, 12. Tr. 73, 80, 84.

40. While home schooled, Student otherwise remained in L School's computer science class, and in choir. Ps'. Exs. 9, 81.

41. Student was home schooled for the majority of the school year. Ps' Ex. 81.

42. The statute of limitation period begins to arise during this time frame.

43. Student continued in this environment during the grade year.

44. Student struggled with the home school program. Ps. Exs. 2, 12. Tr. 84.

45. By the end of the school year Student was not no longer completing much of the school work. Tr. 80, 472.

46. Student's mental health regressed and private mental health treatment was begun. Tr. 80, 472-74.

47. Student began having suicidal ideation and thoughts of self-harm. Tr. 82-83.

48. Since about March 27, 2023 Student began treatment with psychotherapist Dr. Z. Tr. 261.

49. On April 24, 2023, Petitioners had a second private neuropsychological evaluation conducted, resulting in a diagnosis of major depressive disorder (moderate,

recurrent), generalized anxiety disorder, and attention deficit hyperactivity disorder (ADHD), predominantly inattentive presentation, moderate. Ps' Ex. 12.

50. It was reported that Student had a difficulty understanding how other people are feeling by misinterpreting body language. Ps' Ex. 12.

51. It was recommended that Student is twice exceptional, as gifted, and with neurodevelopmental difficulties. Ps' Ex. 12.

52. From an educational perspective, Student "will need support" for anxiety, depression, ADHD, and giftedness, with a recommendation that Student be considered for a 504 Plan or an Individualized Education Program. Ps' Ex. 12.

53. The final written report resulting from the evaluation by psychologist Dr. S. was completed on May 25, 2023, Ps' Ex. 121, although Mother was provided a draft copy before then. Tr. 87.

54. On May 9, 2023, via email, Mother requested an eligibility evaluation from the School District for special education services, noting the private evaluation identifying 2 of 13 areas of eligibility. Ps' Ex. 120.

55. Mother noted the final written report would be completed in a couple of weeks. Ps' Ex. 120.

56. Mother objected to another 504 Plan. Ps' Ex. 120.

57. Mother talked with Coordinator RS over the telephone and shared the information contained in the draft of the evaluation report. Tr. 87.

58. The School District's response to this request for an evaluation was that Student's assessments in the past showed proficiency or advanced, with two behavior write-ups, and that "[p]arents can always request an evaluation and the school team can

look into the child's records," yet "with the data I have, I don't see anything that would suggest a disability." Ps' Ex. 120.

59. In a telephone call to Student's Mother it was again represented the request for an evaluation was denied. Tr. 87.

60. Petitioners were unaware of action they could take under the IDEA based on this denial. Tr. 88.

61. The record does not reflect that a procedural safeguards notice had been provided to the Petitioners – there was no procedural safeguards notice.

62. The School District did not make reasonable efforts to receive parental consent for an evaluation.

63. There was no prior written notice issued to Petitioners regarding this action, and although a document called a prior written notice was dated on May 12, 2023, see Ps' Ex. 13, little weight is given to this document being drafted on that date because, given the history of communications between the parties, it was not until August 22, 2023 that the School District proposed a first meeting to discuss any IDEA evaluation. Ps' Ex. 127. Tr. 109-10.

64. Additionally, RS admitted she forgot to send a procedural safeguards notice. Tr. 111, 934.

65. Moreover, email chains in the period of May 9, 2023 through June 15, 2023 do not show any service of a notice of prior written action denying the evaluation request, or for that matters, procedural safeguards. Ps' Exs. 120, 121, 122.

66. Petitioners did not receive such a notice. Tr. 100-101.

67. Rather, the School District continued to work on a 504 Plan, through 504 Plan Coordinator RS. Ps. Ex. 13.

68. No action was taken regarding a special education evaluation under the IDEA.

69. At Student's request, toward the end of May 2023, Student sought therapeutic treatment, and subsequently entered in-patient treatment for 11 days at the Wyoming Behavior Institute. Tr. 90 -91.

70. Student did not feel the ability to keep themselves safe. Tr. 90.

71. The Student's diagnosis resulting from the Wyoming Behavior Institute treatment, in a medical letter dated October 10, 2023, was Major Depressive Disorder, recurrent episode, in partial remission (active), Generalized Anxiety Disorder (active), ADHD , predominantly inattentive presentation (active), Sensory Processing Disorder (active), and provisional diagnosis of Autism Spectrum Disorder, Level 1 (active). Ps' Ex. 20.

72. Gifted students are also a type of neurodivergent students. Tr. 278.

73. Student is neurodivergent, twice exceptional, gifted, Ps. Ex. 12, coupled with with Wyoming Behavior Institute's October 10, 2023 letter diagnosis, and subsequent IEP exceptionality category determination of ED. Ex. 21.

74. A twice exceptional student who fits into the neurodivergence group is both gifted and has a second learning difference. Tr. 298.

75. "Neurological brains have physiological and quantifiable differences", tr. 276, which may account for differences in human behavior. Tr. 276.

76. These behavioral differences are not based on intentional acts, but rather related to a part of the brain that does not work as it would with atypical children. Tr. 277.

77. Autism is a neurodevelopmental disorder which tends to impact interpersonal skills, communication skills, and independent skills, and arises in many different capacities under different skills, strengths, weaknesses, and limitations. Tr. 343.

78. Both Autism and ADHD are neurological development disorders which are not mutually exclusive, since a child may have both. Tr. 340-341.

79. This affects how a student manifests in the world with strengths and weaknesses, and impacts interactions with others. Tr. 340.

80. "The most common areas to assess" for "a student with autism" are in "social skills, communication, nonverbal communication, intellectual capacity, academic capacity, sensory needs, emotional regulation and independent skills." Tr. 340-343.

81. Student's autistic profile includes strong independent, intellectual, and communication skills, tremendous vocational skills, good at problem solving, and a good retention for information, while Student's giftedness adds strong abstraction connections. Tr. 343-344.

82. Student has a deep sense of empathy, a strong sense of emotions, and anxiety around interpersonal interactions. Student has weaknesses in functioning deficit skills, mainly test completion, as well as time management. Tr. 344-347.

83. Student's sense for justice is strong, yet Student has a hair trigger for emotional triggers so that emotions move quickly. Tr. 344-347.

84. The Student's autistic profile also includes "pathological demand avoidance," or PDA. Tr. 344-347.

85. PDA is physiological subset of autism spectrum disorder where the sympathetic nervous system, the fight or flight system, becomes hypersensitive. Tr. 340-341.

86. Demands are seen as threats to the student and the body releases compounds and sends electrical signals all throughout the body. These signals affect the part of the student's brain that controls their behavior. The signals along the sympathetic nervous system also affect the entire body. This takes a lot of energy and puts a lot of stress on the body. Stress hormones are released when the fight or flight response is triggered, so that repeated exposure to these hormones can be damaging to the student's brain and body. When bodies activate those memories are stored in the body. The more a student is triggered the more easily it becomes to be triggered in the future. These experiences run the risk of being misunderstood, since they occur internally but are often expressed externally. People who have had traumatic experiences tend to be retraumatized. Thus, connecting this trauma response to a person with PDA, Student sees things that others of us would not see as demands as also threats. Tr. 341.

87. Trauma is anything that occurs where the body perceives that it is in danger. Personal autonomy is threatened. Tr. 292-294.

88. Given the autism profile, Student has anxiety around interpersonal interactions, based on the bullying Student received within the Student's perception, which created trauma. Tr. 345-346.

89. A neurodivergent individual, like Student, is not only more likely to experience trauma, but also more likely to re-experience trauma because of the uniqueness in the way the brain and body aligns. Tr. 350.

90. Student would find it much easier if Student did not want to attend school, if Student was a type of person who hated school, but that is not the case, because Student loves to learn, to flex the brain, but then Student becomes fixated about the place where the education is provided, and all that could go wrong while there, and all the things that could hurt Student while there. Tr. 352.

91. Student's autism profile includes pathological demand avoidance, with hypersensitivity, fight or flight, where if a demand feels like a threat then it is fight or flight. Tr. 341

92. Neuroscience is in context for providing an educational, academic, and behavioral health plan, with interventions in neuroscience to avoid a default to personal, logical explanations for a neurodivergent student's actions, with an intense experience of emotions in frequency, intensity, and duration, with a therapeutic goal to feel less anxiety, less often, and for a shorter period of time, and learn not to resist change, to become unstuck. Tr. 306-307.

93. Neurodivergent learners can help become unstuck through synchronous options, allowing the learner to approach it later on, when the learner is feeling able to learn. Tr. 307-308.

94. Use of behavioral interventions, such as boundaries, are consistent with consequences, rather than positive behavior reinforcement to shape behavior, which is effective with neurodivergent learners. Tr. 312.

95. Student's treatment goals are three-fold: engage in the assignment when asked and complete it with fidelity, continue with develop executive function skills, and continue to explore emotional intensity and determine root cause of emotional challenges, including suicidal ideation. Tr. 320-322.

96. Time management is difficult for Student. Tr. 345.

97. These are some of the unique characteristics of this Student when viewed through the Student's lens of perception.

98. A copy of Dr. S's written report was given to the School District on about May 25, 2023. Tr. 90

99. On about August 6, 2023 Petitioners again contacted the School District seeking a determination for eligibility referring to the May 9, 2023 request, noting as well a provisional diagnosis of Autism. Ps. Ex. 124.

100. On August 7, 2023, a 504 Plan was created. Ex. 10.

101. Among other things, the 504 Plan noted that Student struggles with regulation of emotions, depression, and anxiety, with the 504 disability identified as a diagnosis with Attention Deficit/Hyperactivity Disorder, Major Depressive Disorder, Generalized Anxiety Disorder, Sensory Processing Disorder, and Provisional Autism. Ex. 10.

102. The 504 Plan acknowledged that although Student may look as if all is fine, this often masks "an extreme and intense struggle with anxiety, depression, focus, and emotional regulation." Ex. 10.

103. School staff within the chain of IEP evaluation authority and ability to obtain consent were not available until the beginning to mid-August. Ps' Ex. 123.

104. Student sought to attend grade orientation on around August 21, 2023, yet Student could not do so due to stress anxiety. Ps' Ex. 79, 126, 128. Tr. 102.

105. On August 21, 2023, Petitioners requested help to have Student attend school in person, yet the School District responded that it does not have supports outside of school to assist. Ps' Exs. 123, 126, 128.

106. Once again, on August 22, 2023, Petitioners requested an evaluation, noting that they had been trying to have an evaluation since the end of the Student's eighth grade year. Ps' Ex. 127.

107. Petitioners also stated that history of trauma prevented Student from attending school. Tr. 108-109, 127.

108. On August 22, 2023, after about 3 ½ months from Petitioners' first request for an evaluation for special education eligibility, Special Education Director MC contacted Petitioners to discuss an eligibility evaluation. Ps' Ex. 127. Tr. 109-10.

109. A meeting took place on August 29, 2023. Tr. 112.

110. On August 30, 2023 a Prior Written Notice and Consent for Evaluation was created, where the team recommended an evaluation for special education eligibility, with boxes checked for academic performance, communication skills, motor skills, and "Other Social Pragmatics, Review of outside evaluations provided by parents". Ps' Ex. 14.

111. In greater detail, symptoms of social anxiety stemming from severe anxiety, depression, ADHD, and other mental health impairments were noted. Ps' Ex. 14.

112. On August 31, 2023, Mother consented to the evaluation. Ps' Ex. 14.

113. In September 2023, an evaluation was completed by School Psychologist LL, where it was recommended the team consider qualifying Student as eligible under the categories of either Emotional Disability or Other Heath Impaired. Ps' Ex. 15.

114. On September 14, 2023, an Occupational Therapy Evaluation Report was issued through the School District's evaluator KB, which noted anxiety and social difficulties are the more primary cause of sensory processing, with writing struggles, and visual and auditory sensitivity considerations to be addressed for a more regulated state of learning. Ps' Ex. 16.

115. An Eligibility Report and Eligibility Determination was completed on September 28, 2023, where Student was determined to be eligible for special education by having a disability and in need of special education with a disability determination of Emotional Disability. Ps. Ex. 18.

116. In August and September 2023 Student's Mother asked for a virtual option for classes from home, yet the School District told her that School District does not have options for a virtual educational program. Tr. 116.

117. A subsequent notice of meeting was issued for a team meeting to review results of the Wyoming Behavioral Institute's October 10, 2023 letter adding a provisional diagnosis of Autism Spectrum Disorder, based on the then current available information. Ps' Exs. 19, 20. Note, however, that the School District's 504 Plan had already referred to provisional autism prior to the written letter from the Wyoming Behavioral Institute.

118. An IEP Team meeting occurred on October 11, 2023 for a draft IEP review, without a resulting finalized IEP document. Ps' Exs. 19, 21, 131. Tr. 124-125.

119. On October 18, 2023 the Respondent convened the Student's IEP team to finalize the Student's initial IEP. Ps' Ex. 21, 135. Tr. 128.

120. The Petitioners and Psychiatrist, Dr. Z, attended this meeting and provided input into the development of the Student's IEP, and several recommendations from the Petitioners and Dr. Z were incorporated into the final IEP. Ps' Exs. 21, 136, 137. Tr. 129-30, 132-33, 137-38, 142-47, 149-50, 353-60.

121. Principal CW attended this meeting and provided information about PHS and its programming. Ps' Exs. 134, 135.

122. On October 18, 2023, a Prior Written Notice and Consent for Initial Provision of Services was completed. Ps' Ex. 22.

123. In this Prior Written Notice, it was noted that the option of having Student continue at L School was discussed, but rejected by parents, with an option to have Student take a class on Edgenuity at the School District's central office, yet this was rejected by the School District, with an option for homebound school discussed, yet rejected by the School District because the Student was not confined at home, and a suggestion to re-renter the Student at the Wyoming Virtual Academy, yet this was unsuccessful in the past and rejected by the parents, home schooling was suggested, yet rejected by the parents, a private on-line school was suggested by the parents, yet rejected by the School District because the Student would not be enrolled in a public school. Ps' Ex. 22.

124. The Petitioners request for credits for use of Kahn Academy was rejected by the School District, and that Student would not be able to test out based on competency. Ps' Ex. 22, 133. Tr. 120, 125-126.

125. In this Prior Written Notice, it was noted that Petitioners again expressed their concern over bullying throughout the Student's educational career. Ps' Ex. 22.

126. Subsequently, it was concluded, as noted in the Prior Written Notice, with Mother consenting to initial services proposed, to have Student enroll at PHS alterative school, under a modified one-on-one setting, beginning at 10:00 a.m., and ending at 3:30 p.m., with Student taking more than one class, to eventually move Student to a full-time in person schedule in the general education environment. Ps' Ex. 22.

127. A resulting IEP, dated October 18, 2023, placed Student at PHS, an alternative high school environment with reduced class sizes, higher staff-to-student ratios, and increased opportunities for Student to access alternative environments and adult support. Ps' Ex. 21, 138. Tr. 447, 866-67.

128. The IEP included beginning in a self-contained classroom, with a paraprofessional or special ed teacher, with eventual integration into the general education setting, with classes beginning at 10:00 a.m. Ps' Ex. 21.

129. The IEP identified the following accommodations and supports: preferential seating at the Student's discretion; visual aids for understanding and organization; frequent breaks and movement opportunities to address sensory needs; additional time for completing tasks and assignments; use of positive behavioral supports; a system for organizing and tracking materials; clear and concise instruction, including breaking down complex tasks into smaller, manageable steps; availability of a quiet and calming space for regulation during times of heightened anxiety or emotional distress; open communication between home and school; opportunities to verbally process information; development of trusting relationships with at least one to two staff

members; opportunities to talk through issues with a trusted adult during times of dysregulation; and the use of fidgets/sensory processing tools during class, including during exams. Ps' Ex. 21.

130. The IEP provided the following special education and related services: specially designed instruction in the areas of self-advocacy and social skills; specially designed instruction in the area of executive functioning; school counselling services; and therapeutic counselling services. Ps' Ex. 21.

131. The IEP provided the following supplementary aids and services: access to a quiet, low stimulus environment for testing and assignments; frequent breaks offered to manage ADHD symptoms and maintain focus; a visual daily schedule to support executive functioning skills; complex tasks broken down into smaller, manageable steps with clear instructions; access to the school calming room for self-regulation and relaxation with a trusted adult; additional time on assignments and assessments; use of fidgets or sensory aids during class, assignments, and exams; modified transition times between classes; text-to-speech and speech-to-text assistive technology; "CLOZE" notes and notes provided by teachers; use of ear-loop ear plugs and attached lanyard; preferential seating at the Student's discretion; opportunities for verbal processing; multiple moments of positive praise; avoidance of punitive language; and incentives for school attendance and work completion. Ps' Ex. 21.

132. The IEP noted three annual goals, which are to reduce anxiety and provide for coping skills, improve executive functioning through the use of an organization system to track educational goals and progress, and to improve self-advocacy with advocating to a trusted adult. Ps' Ex. 21.

133. Upon request of the Petitioners, Respondent contracted with the Student's outside therapist, Dr. Z, to provide therapeutic counselling services to the Student and consultative services to the Student's team. Ps' Ex. 21. Tr. 136.

134. Student began at PHS alternative school on October 24, 2023. Ps' Ex. 22, 139, 140. Tr. 159.

135. Student's placement was in self-contained classroom, with access to educational software Edgenuity. Ps' Ex. 22.

136. Student was absent on the second day of school, October 25, 2023. Ps's Ex. 31, 141. Tr. 160.

137. The Edgenuity coordinator, Paraprofessional C, worked with Student in an administrative room, across from the cafeteria, one-on-one for a few months, where Student live streamed classes and worked on credit recovery through Edgenuity. Tr. 719, 727, 1066-1067.

138. Student began to express disinterest in Edgenuity. Tr. 163.

139. On November 28, 2023, the School District convened the Student's IEP team to review and discuss the Student's progress and performance and to consider the process for integrating the Student into the classroom. Ps' Ex. 25, 143.

140. Prior to the meeting, the School District staff consulted with Dr. Z regarding the Student's progress and his input into the team's discussions. Ps' Ex. 25. Tr. 623.

141. The team discussed and considered this input. Ps' Ex. 25.

142. The team did not change the Student's placement and tabled all further discussion topics to gather more data. Ps' Ex. 25.

143. Following the meeting on November 28, 2023, the Student's attendance and

progress declined. Ps' Ex. 31, 147. Tr. 170.

144. On December 11, 2023, the School District convened the Student's IEP team to discuss and address the Student's lack of attendance and progress since the November 28, 2023 meeting. Ps' Ex. 27, 147, 148, 150. Tr. 361.

145. Dr. Z participated in the meeting, and the team discussed and considered his input. Ps' Ex. 27. Tr. 361-62.

146. Dr. Z stated that Student's trauma was very real, and that Student required support to deal with the stress to the Student. Ps' Ex. 27.

147. The team agreed to amend the Student's IEP to state that the Student's team would focus on keeping the Student engaged in current academic content areas in lieu of requiring the Student to complete missing work. Ps' Ex. 27, 151.

148. The School District would not consider a functional behavior assessment until the Student's attendance would allow data to be collected and to allow the Petitioners and the Student to participate in the planning process. P's Ex. 21, 27.

149. On January 17, 2024, the School District convened a team meeting to discuss the Student's semester schedule and progress. Ps' Ex. 35, 155.

150. The data reviewed demonstrated the Student's difficulty in engaging in online coursework because it caused a lot of stress, and no one to help. Tr. 180-81.

151. The team discussed the Student's interest in increasing involvement in classes with peers and how to address incomplete course work from the prior semester. Ps' Ex. 35.

152. The team scheduled the Student additional regular classes for the new semester. Ps' Ex. 35, 156.

153. At the beginning of the semester, Student was to be attending class commencing at 8:00 a.m. Ps' Ex. 40.

154. The Student's IEP was not modified or amended to reflect that the Student's change in placement was to the general education setting. Ps' Ex. 21.

155. Petitioners reported that school was draining and made attendance on consecutive days difficult. Ps' Ex. 36, 37.

156. On February 8, 2024 Special Education Coordinator NS communicated with Mother that she would begin inquiry into the availability and process related to a functional behavioral analysis. Ps' Ex. 38, 158, 159, 160; R's Ex. 55. Tr. 634-37.

157. On February 19, 2024, Respondent requested and received Petitioner's consent to undertake a functional behavior assessment. Ps' Ex. 39, 160.

158. On March 15, 2024 Petitioners requested an IEP team meeting to discuss how to best support the Student going into the next semester. Ps' Ex. 40, 164.

159. On March 20, 2024, the School District convened a team meeting. Ps' Ex. 40.

160. The team met to discuss how to support the Student in returning to regular attendance and completing course work in a timely manner in the next semester. Ps' Ex. 40, 164. Tr. 197-98, 638-39.

161. Dr. Z was present at the meeting and indicated prior recommended accommodations should be revisited, like positive reinforcement, or praising preferred behavior, could be interpreted by the Student as a demand, and that asking the Student to quantify their anxiety could be a trigger. The team discussed whether the Student's needs could be met in a placement at PHS alternative school or whether an alternative

placement, such as a residential placement, should be considered. Ps' Ex. 40; Tr. 885-86, 889-90.

162. Dr. Z noted that the function of the Student's behavior was escape. Tr. 366.

163. Dr. Z indicated that changing the Student's environment may be the most effective intervention. Ps' Ex. 40. Tr. 363-365.

164. A change of placement would not arise until the scheduled FBA could be completed and the School District could research other placement options. Ps' Ex. 40.

165. Dr. Z agreed to assist the School District in researching placement options. Ps' Ex. 40. Tr. 363-365.

166. Dr. Z considers changing a student's environment as one of the most effective interventions that professionals can offer to intervene upon extreme or severe behaviors. Tr. 270.

167. The BCBA evaluator hoped to see Student in a classroom during an unannounced visit, as part of the functional behaviour evaluation process, yet because of Student's absences this did not arise. Tr. 193-194.

168. On April 2, 2024 the Student struggled to get to school and arrived late to school but did not to report to his new English class. Instead, the Student reported to a room where a different class of students was being supervised by Paraprofessional C, whom Student trusted. The Student felt safe and was able to de-regulate in this room with comfy chairs, ability to see outside, and friendly conversation with others in the room. Ps' Ex. 167.

169. Student was unaware he was not supposed to go there since it was an official class, as Student had been in the same class three or four times before without incident.

Ps' Ex. 167.

170. Special Education Teacher JT then told Student that Student was not allowed to be in that class, and that Student had to go to English class. Ps' Ex. 167.

171. Special Education Teacher JT let Student know that Paraprofessional C's class had work to do and needed quiet to do it. Ps' Ex. 167.

172. Principal CW arrived and noted Student would not go to class, and sat in a chair outside the counsellor's office. Student felt misunderstood, and overstimulated, and Principal W told Student to take ten minutes and regroup and then head to class. Student stated that Student was not going to the class, and put on headphones. Student felt at fault for doing something wrong, and then texted Petitioners because of an on-going mental health crisis. Neither a calming room for self-regulation nor a calming space to retreat were offered Student. Ps' Ex. 21, 166, 167; Tr. 739-48, 795-97, 875-880.

173. The only safe room, in Student's perception, was the paraprofessional's room. Tr. 467.

174. Mother wrote to Principal CW that the Student was struggling based on negative interactions, and had significant anxiety about going to school, with the thought of school causing stress and anxiety. Ps' Ex. 167.

175. Student has a hair trigger emotional system wired to seek threat, and had lost some or all of communicative abilities, with a perception that Student was being pushed back into class which amounted to stress, resistance, and erosion of trust, thus amounting to concerns of safety. Tr. 374-378.

176. The Student never returned to regular attendance. Ps' Ex. 31. Tr. 205-208.

177. On April 10, 2024 the School District convened the Student's IEP team to review the Student's most recent progress and performance data and discuss appropriate placement, and discussed the incident on April 2, 2024. The team discussed the lack of Student's success in returning the Student to participation in the educational environment. Ps' Ex. 42, 43. Tr. 206.

178. Rather than trying to fix a system that was not working, the focus shifted to finding a system which would work and to prepare Student to be successful in it. Tr. 330.

179. Alternative placement was considered appropriate in light of the lack of progress in returning the Student to regular attendance and participation. Ps' Ex. 42, 43. Tr. 206, 643-44.

180. The School District suggested residential therapeutic placement if the Student was unable to get to school. Tr. 206.

181. Therapeutic residential placements are more of a mental health intervention than an educational intervention. Tr. 395.

182. Residential treatment could lead to regression. Tr. 414.

183. Student wanted to continue to attend school at PHS alternative school Tr. 207.

184. The team agreed that it would continue to support the Student in attending their placement at PHS alternative school, and that if the Student began regularly attending and participating in that program, the team would support maintaining that placement. Ps' Ex. 42, 43. Tr. 207.

185. Later in April 2024 the Student reported to Dr. Z that Student could not

return to the educational environment at PHS alternative school. Tr. 329-330.

186. On May 2, 2024, Behavior Analyst KM completed her functional behavior assessment report. Ps' Ex. 48.

187. On May 2, 2024, Respondent convened the Student's IEP team to review information resulting from the FBA, to review progress and attendance data, and to consider the Student's least restrictive environment. Ps' Exs. 49, 179.

188. At the meeting, the School District represented that Wyoming law would compel the student's disenrollment upon ten consecutive days of absence, yet that it was an administrative function and would not be a barrier to the Student's continued public education. Ps' Ex. 49.

189. Dr. Z was present yet had to leave early, so Mother requested that the meeting be suspended until Dr. Z could continue the meeting, and the meeting was suspended. Ps' Ex. 49.

190. The team further agreed to continue exploring therapeutic placements that may be more appropriate to address the Student's needs. Ps' Ex. 49.

191. The School District prepared a draft plan identifying interventions to support the Student. Ps' Ex. 53. Tr. 648-49.

192. On May 8, 2024 the IEP meeting was reconvened. Ps' Ex. 54.

193. Mother stated the FBA report was "triggering" and requested that the team not discuss it further, and stated significant school trauma is what prevented the Student from returning to the PHS alternate school. Ps' Ex. 54. Tr. 649-50, 692-93, 893-894.

194. The team discussed potential future placement options, including

residential therapeutic placement options proposed by School District staff, including a in-house treatment facility named Seven Stars in Utah, as well as home-based virtual programming options from FGA proposed by Dr. Z, and another in Buffalo, New York. Ps' Ex. 54, 55. Tr. 391-98, 653-54.

195. Dr. Z had to leave early, so the matter was continued for researching and defining the potential placement options. Ps' Ex. 54, 55.

196. Dr. Z represented that Student wanted to graduate from PHS. Ps. Ex. 54.

197. On May 9, 2024 the School District issued Prior Written Notice regarding the Student's mandatory disenrollment pursuant to state law, although it was represented that this would not impact Student's special education provisions. Ps' Exs. 57, 58, 59. Tr. 221-23, 650-52, 1027-28.

198. On May 14, 2024, Respondent issued a Prior Written Notice indicating that the Student was re-enrolled and that access to all services under the previous IEP would resume while the Respondent continued to work to develop an updated IEP and placement. Ps' Ex. 62. Tr. 221-23, 650-52.

199. Prior to the May 17, 2024, IEP team meeting, School District staff conducted further inquiries regarding residential therapeutic facilities approved by the Wyoming Department of Education or the Wyoming Department of Family Services for placement by school districts, and were provided a list of facilities by the Wyoming Department of Education. Tr. 908-09, 1024-25.

200. On May 17, 2024 the IEP meeting was reconvened. Ps' Ex. 63.

201. At the meeting, School District staff stated that they did not believe that FGA was a viable placement option because the FGA did not implement IEPs and could

not ensure that services would be implemented by teachers and providers appropriately certificated and endorsed to provide the relevant special education and related services. Petitioner and Dr. Z disagreed with this conclusion and requested that the School District inquire further. The team agreed that School District staff would inquire further with FGA regarding the concerns raised. Ps' Ex. 63. Tr. 210-14.

202. On May 20, 2024, Special Education Director MC and Special Education Coordinator S met with the FGA's Head of School AW, and the School District concluded that in their estimation FGA would be an inappropriate placement. Ps' Ex. 67. Tr. 210-11, 653, 959-63.

203. On May 22, 2024, the IEP meeting was reconvened. Ps' Exs. 67, 69.

204. Over Mother's objections and those of Dr. Z, FGA was not considered appropriate, yet that it would be appropriate to recommend a therapeutic residential placement for the Student. The Petitioners indicated their intent to seek a third-party resolution. Ps' Ex. 67. Tr. 209, 215-18.

205. On May 23, 2024, the School District issued a prior written notice of the proposal to change the Student's placement to a therapeutic residential placement due to the intensity of services needed for the Student to return to accessing general and special education services, making progress in the general curriculum, and attaining their IEP goals. Ps' Ex. 69.

206. In the Prior Written Notice dated May 23, 2024, it was stated that " [i]n sum, the district has been unsuccessful in its efforts to ensure [the Student's] receipt of FAPE. At this time, [the School District] believes it is obligated to propose a change in placement that will hopefully allow [the Student] to make progress in the general

curriculum and achieve meaningful progress toward the attainment of [the Student's] IEP goals." Ps' Ex. 69.

207. In recognizing that the educational plan at PHS was lacking, the PWN noted that the Student had been at PHS since October 23, 2023, yet that the Student only earned 1.5 credits. The Student had limited attendance, lack of participation and progress in the general curriculum, and lack of access to special education services because of poor attendance. The Student had missed 52 days of school. It was noted that Student was unable to come to school regularly because of anxiety faced by the Student due to the demands the school system places on the Student. Moreover, when at school, Student declines frequently to go to class, and struggles to complete work and to make up missed assignments because of stress. Shortened workdays, alternate classroom settings, extended time, one-on-one support, and multiple breaks, had been tried without success. Ps' Ex. 69.

208. A specific residential placement facility had not been offered by the School District, with the notices and discussion as possibilities. Ps' Ex. 40, 43, 69. Tr. 707, 1084.

209. Student was absent for 67 classes out of 184 in the second quarter of the 2023-24 school year. Ps. Ex. 31.

210. Student received .750 credits out of 2.5 credits during the second quarter of the 2023-2024 school year. Ps. Ex. 32.

211. Student was absent for 64 classes out of 210 classes in the third quarter of the 2023-2024 school year. Ps' Ex. 31.

212. Student received .750 credits out of 1.5 credits during the third quarter of the 2023-2024 school year. Ps' Ex. 32.

213. Student was absent for 134 classes out of 264 classes during the fourth quarter of the 2023-2024 school year. Ps' Ex. 31.

214. Student received no credit out a total of two credits during the fourth quarter of the 2023-2024 school year. Ps' Ex. 32.

215. In early July 2024, without disenrolling Student from the School District, Ps' Ex. 186, Petitioners entered Student into a private summer program at FGA to see if FGA would be good for a try out, tr. 1096, first for an individual class session as a trial engineering class, and then with positive results, into the full summer session which started on July 15, 2024. Ps' Ex. 186. Tr. 1095-1098.

216. Fall term at FGA begins around the first part of August 2024, and ends in December. Tr. 534.

217. The record does not reflect that the School District had provided Petitioners a procedural safeguards notice which included a 10-day notice requirement to the School District for parental unilateral placement.

218. School District Coordinator RS stated she forgot to send a procedural safeguards notice. Tr. 111, 934.

219. On July 16, 2024 the School District issued a PWN to Petitioners proposing to end special education because it had received a request for records from FGA. Ps' Ex. 77.

220. On July 19, 2024 the School District issued another PWN noting the Student would remain enrolled with the School District for the summer because the Petitioners planned on the enrollment as a summer session. Ps' Ex. 78.

221. At a mediation meeting on July 25, 2024 Petitioners provided verbal notice of their intent to enroll Student fully at FGA and to seek reimbursement. Ps' 79.

222. On July 30, 2024 a written notice was provided to the School District by Petitioners of their intent to unilaterally enroll Student at FGA at public expense. Ps' 79.

223. Petitioners unilaterally enrolled the Student in FGA and filed for due process before the School District could identify an appropriate therapeutic residential placement for the Student and develop an IEP with the support of that placement's providers. Ps' Ex. 79, 189. Tr. 706-07, 965, 1042-46, 1057-59, 1064, 1083-87.

224. FGA has 80 campuses in 18 states around the United States, with physical locations for in-person instruction. Tr. 517.

225. FGA also has a virtual arm, supporting students in all 50 states and in countries around the world. Tr. 517.

226. FGA's virtual program grew after the rise of Covid, because of lockdowns, with serving about 1,000 students. Tr. 520.

227. FGA is regionally accredited through Cognia, SACs, NCA, and program approvals from NCAA and UC A-G California, with pending approvals for Middle States, Virginia Council for Private Education, and the Western Association of Schools and Colleges. Tr. 521.

228. Cognia is an independent organization accrediting schools, private schools around the world, and is deemed the gold standard in accreditation requiring high quality standards upholding an academic rigor. Ps' 73. Tr. 522.

229. With accreditation from Cognia, FGA can issue a diploma as a fully-authorized degree provider, although it cannot issue a Wyoming diploma. Tr. 582.

230. FGA has an in-person and global graduation ceremony. Tr. 555.

231. Two hundred fifty teachers support FGA's virtual campus, as well as teachers in physical locations at the physical school buildings. Tr. 571.

232. As a virtual academy, FGA provides the global café to make student connections as virtual open space to do homework and eat with others, breakout rooms, a gaming club, and virtual events throughout the year, like cooking events by taking computers into the kitchen, pet parties, playing trivia, with student life mentors available to help students make connections, and constant monitoring of activity. Tr. 539-544.

233. At FGA, Student will be able to interact with nondisabled peers. Tr. 421.

234. Other off-line activities arise, including in person trips for whale watching, Disneyland grad night, and travel to different locations. Tr. 548-555.

235. FGA does not operate in Wyoming and does not have any Wyoming teachers teaching Student, or special education providers providing services to Student, as certified by the state of Wyoming, although it does employ special education teachers holding other certification or licensure. Tr. 579, 588.

236. All teachers at FGA have a least a bachelor's degree, with some coming straight from the field, like a software engineer or a lawyer teaching classes. Tr. 557.

237. FGA and school districts have the opportunity to have a dually enrolled student, as a hybrid student, with about 100 students supported as dually enrolled in the past with the virtual academy. Tr. 531

238. Related services such as therapy and counseling are not directly provided by FGA, tr. 587, although it works with third-party practitioners to work within the schedule and provide space for the services, provided by public or private connections, tr. 592, as well as providing within the curriculum social and emotional learning. Tr. 589-590.

239. FGA is not approved for payment for special education placement in Wyoming. Tr. 587.

240. Specific planning guides are used at FGA to satisfy mandatory attendance requirements under Wyoming requirements. Tr. 586.

241. FGA is a mastery-based learning organization, which incorporates one student to one teacher, customized around the student's needs, based on a customized learning plan, with content mastered before moving on. Tr. 523-524.

242. The flexibility FGA offers in its learning model for Student is in classroom assignments and activities with choices in assignments and building off of and diving into the Student's interests and curiosities. Ps' Ex. 73.

243. Student's virtual plan at FGA is synchronous, that is, one-to-one classes, with direct one-to-one interaction with teachers on a schedule basis, a live and interactive program. Tr. 570 571.

244. Although other students may meet for a class at the same time, each student is in a separate Zoom room for one-on-one learning. Tr. 572.

245. Where a student struggles with timing and prescheduled sessions and arriving for virtual classes without adult supervision, like Student, then the goal is to bring the student to full autonomy, directing their learning to build the schedule with the family and class selections, with Student involved in the process. Tr. 573-574.

246. Schedules for students meet with the student's individual needs where the student is, and happens with schedules, with schedules for classes later in the day to meet the needs of the student, to meet the student with the schedule and helping the student being able to advocate and self-manage. Tr. 574.

247. Project-based learning incentives Student. Tr. 609.

248. Student has a defined schedule which is agreed on, with attendance monitored and adherence to a schedule, with a space created in a physical location at the home, so that in that place the Student is in school, with a student portal and access for parents to that portal, all in real time, so that parents can find out what is going on as it happens, so to decrease student struggles with getting to the learning sessions. Tr. 575-576.

249. Parents receive nightly wrap-ups not only about the work, but about the student's attendance. Tr. 576.

250. Since the student is not physically in the same space as the instructor, the teacher and the student individually find a place to work within the boundaries for the student's best learning environment. Tr. 581-582.

251. While at FGA, Student has had good attendance and has received all "As" for grades. Tr. 604.

252. Student's progress has been excellent. Tr. 499.

253. Student had not missed a day of school except for Student's birthday. Tr. 500.

254. Student receives self-advocacy and executive functions at least twice a week for 50-minute sessions, provided by a certified special education instructor if required by the School District. Ps' Ex. 73.

255. Student is taking five courses in the relevant session time period. Tr. 603.

256. The record includes Algebra 1 A, Ps' Ex. 197, Biology A, Ps' Ex. 199, Engineering and Technology, Ps' Ex. 201, and World History A, Ps' Ex. 204.

257. While FGA is not obligated to follow federal law as to accommodations and supports related to special education, it customizes the learning environment to each student under a unique 1:1 learning model, which allows it to modify instructional approaches, expected mastery outcomes, and classroom experiences in order to align with IEP plans. Ps' Ex. 73

258. A learning specialist joins the student's team of teachers when a student arrives with an IEP, and IEP meetings are attended with the local school creating the IEP, and there is interaction between school personnel, and FGA can work with a school district liaison, tr. 526-527, develop an assessment plan, tr. 532, seek IEP meetings in collaboration with the school district, and reconsider special education needs and services as they arise. Tr. 533.

259. As a matter of the School District's practice, when a student is placed out-of-district, then the School District maintains the Student's enrollment with the School District, and maintains active ownership of student's records in the special education

databases, with the School District issuing all notices, including prior written notices, and progress reports, to ensure it is providing FAPE. Tr. 1039-1040.

260. With reference to Student, the learning specialist's plan for Student's accommodations based on the learning challenges of anxiety, major depressive disorder, ADHD, executive functioning challenges, sensory processing, and Autism, include positive reinforcement and feedback, breaks to reinforce on task behavior, use of graphic organizers, use of class notes or guided notes to be used throughout the lesson, clear assignments with a check to see if what must be done is understood, provide choices to show mastery (such as written essay, oral report, online quiz, or hands on project), assuring that assignments are not long or repetitive, break down large assignments into smaller, accomplishable tasks or chunks, use of fidgets, and allowance for extra time. Ps' Ex. 200.

261. Moreover, if Student shuts down or drops out of the call due to being upset or frustrated, then follow-up is made with Student's team leader. Ps' Ex. 200.

262. FGA's plan to meet the Student's educational and social-emotional learning goals note depression, anxiety, emotional deregulation and sensory issues hinder the Student's focus, engagement, and social interactions, as well as excessive talking, with Autism and ADHD causing fluxuating skills and needs, which impact regular school attendance. The Student has trouble adapting to changes, and prefers antonymous learning, with response to positive praise rather than punitive measures. P's Ex. 73.

263. Trust becomes a primary focus rather than natural consequences. Ps' Ex. 73.

264. According to Mother, the Student, while at FGA, is engaged in an education which she has not seen in many, many years. Tr. 1099.

265. In Dr. Z's opinion, to which weight is given, given Student's need for flexibility, choice, deep learning and exploration, connection with peers in a place to feel safe and supportive safe place, and what he has seen at FGA, shows the progress he would like to see for Student psychologically, interpersonally and academically. Tr. 419.

266. In Dr. Z's opinion, to which weight is given, Student is rising to the occasion and doing great work while with FGA, going from a person with pretty significant suicidal ideation, from a perception of being unable to be taught, unable to get and hold a job, to a person hope for a realistic pathway for the future. Tr. 327-328.

267. Petitioners acted reasonably and did not engage in obstructionist tactics.

268. Petitioners paid about $ 20,000 for FGA services for the Fall semester. Tr. 229.

269. Petitioners had paid $12,000, plus a $1,500 application fee, for summer school. Tr. 228.

270. Student hopes, at some future point in time, to return to, and graduate from, PHS. Tr. 396.

272. Generally, all testifying witnesses are considered to be truthful in testimony at the hearing. Credibility, and weight, is not only limited to truthfulness, however. Bias, self-serving interests, reasonableness of testimony, witness memory, and other matters will be considered.

273. Mother's testimony is given great weight. Her testimony is viewed very favorably. She had been reasonable in seeking educational services for Student, seeking help with the complexities of her child, at times hitting walls, built trying again and

again. She was open in her presentations, and tied facts to her recollection. In sum, she is found to be believable. Weight is given to her testimony.

274. Dr. Z is found to be very credible. His background is significant, including education and work history. This in and of itself allows weight to be given to his opinions. As much as his qualifications support the weight given to his opinions, an example of his truthfulness came forward unexpectedly when, during examination, he asked whether his license was being subject to the proceedings, and whether he was being examined for perjury. In other words, he was very concerned with providing truthful answers, and took his oath very seriously.

275. Superintendent H's testimony is factual to some extent, yet was administrative and regulatory in many ways. While his knowledge is respected, and his testimony is truthful, the ultimate questions decided in this opinion balance weight with this testimony.

276. Paraprofessional JC's testimony is given weight. He showed no apparent bias in favor of the school district. His goal as an aide was to help Student within his authority. It was paraprofessional C's classroom that Student sought for a safe place.

277. Paraprofessional KAW was truthful, a bit nervous, yet truthful. No apparent bias against Student, or Petitioners.

278. JT was truthful, forthright and open in her testimony. She was the individual who reviews IEPs and prepares teachers for the School District. She is found to be credible, with weight given to her testimony relevant to the factual issues. She had some connection to RS, yet this does not impact her credibility.

279. CW, the Principal, is knowledgeable about being a principal, and deemed truthful as to her factual situations with the Student. She had about 70 other students whom she oversaw.

280. CML, the school counselor, came across as truthful, credible. She is not a licensed professional counselor, but holds a master's degree in school counseling. Her impressions about options considered, and not considered, is found to be without bias.

281. DH, the science teacher, is found to be truthful, credible, yet her testimonial perception of Student appeared to be through an objective observation, rather than through the neurodivergent lens of the Student. Weight is given as relevant.

282. MC had some connection with RS, who did not testify, regarding the initial denial for an evaluation, and then, at some point in time, PWN is issued dated 5/12/23, yet email chains show it never was provided to Petitioners, yet that apparently arose before she took over her position. Her testimony was truthful. Her credibility was weighed accordingly.

283. NS, the SPED Coordinator, is deemed truthful in the proceedings, yet did show bias for the School District and against Petitioners, and with self-serving interests, with the appearance of frustration with the number of meetings which arose. Her credibility was weighed accordingly to the extent relevant.

284. FGA's Dr. AW, JZ, and NB are all found to be truthful, credible. Dr. AW has some self-serving interests with showing pride in her school's abilities, yet this is to be expected. They were all believable. Substantial weight is given to Dr. AW's testimony – she presented well, and was well-prepared.

285. Should there be a conflict in testimony by credible witnesses, then weight is given to the testimony which fits the Finding of Fact in the issue.

286. Should a Finding be more applicable as a Conclusion, or *vise versa*, then it is to be interpreted under the proper classification.

ANALYSIS AND LEGAL CONCLUSIONS

Jurisdiction

Unless otherwise found, jurisdiction properly lies over the parties and over the subject-matter, except as noted below. 34 C.F.R. § 300.507(a).

Hearing Held Virtually

The parties agreed to allow the Hearing Officer to appear at the hearing virtually. States may permit hearings on due process complaints to be conducted through video if concluded that the hearings are consistent with the State's practices. 34 C.F.R. § 300.511(c)(1)(iii). Such a hearing must ensure the parent's right to an impartial due process hearing consistent with the requirements in 34 C.F.R. §§ 300.511 through 300.515. ***See*** United States Department of Education, Office of Special Education and Rehabilitative Services, Office of Special Education Programs, IDEA Part B Dispute Resolution Procedures (June 22, 2020). There is nothing prohibiting virtual due process hearings under the Wyoming Rules.

Therefore, it is concluded that the Due Process Hearing held virtually was in accord with the State and Federal directives, that the hearing afforded all parties the

rights contained under 34 C.F.R. §§ 300.511 through 300.515, that credibility could be assessed, and that holding the hearing virtually was not inconsistent with State rules.

Burden

The burden is on the Petitioners to prove their claim. ***See*** *Schaffer v. Weast*, 546 U.S. 49. The burden will be by a preponderance of the evidence. Affirmative defenses, however, shift to the party asserting the defense. ***See*** *Surles v. Andison*, 678 F.3d 452, 458 (6th Cir. 2012). There being no affirmative defenses, the burden in this case is on the Petitioners.

Ripeness

The Petitioners seek resolution of whether an out-of-state therapeutic residential center in Utah is the least restrictive environment for the Student. The School District gave notice that it was considering therapeutic residential treatment, including at the Utah facility, and asked for Petitioners' input. An IEP never resulted stating that the Utah residential treatment facility was to take place, although the facility was discussed in detail in meetings. Petitioners sought mediation, and due process was eventually filed. Student was never placed at the Utah facility.

Sytsema, 538 F.3d at 1316-1317, teaches that the focus is on the IEP as written. *Id.* The relevant IEP in this case, described as a type of "living IEP," is the document to be addressed. Ps' Ex. 21. It provides the blueprint for the Student's special education. To delve into whether or not the Utah facility is more restrictive, or less restrictive, than the unilateral placement of Student at FGA, or in any other context, contemplates something not yet mature, something in the future, something that is at best advisory should it happen, or not happen, in the future, contingent on something that may or may not occur

as anticipated, or may not occur at all. In sum, the issues relating to the possible Utah therapeutic residential center are not yet "ripe" for determination. ***See*** *Texas v. United States*, 523 U.S. 296, 300 (1998)(matters must be ripe).

As a result, the claims reflected in Issue 1(d), to wit: whether the School District ensured Student's proposed placement in a therapeutic residential facility setting was made in conformity with 34 C.F.R. § 300.116, in that: (i) the proposed placement was in the least restrictive environment; (ii) the proposed placement was over two hundred miles away and not as close as possible to Student's home; (iii) the proposed placement would not educate Student, to the maximum extent appropriate, with children who are nondisabled because the residential facility primarily houses children with Autism spectrum disorder and other neurodevelopmental disorders; (iv) the proposed residential placement away from Student's home and community is more restrictive that a virtual one-on-one educational placement in the Student's home with the potential for expanding virtual locations to include community settings with in-person education staff; (v) potential harmful effects on Student or quality of services needed for Student were not considered; (vi) and the School District failed to identify specific special education services, supports, and related services, and failed to articulate why those specific special education services, supports, and related services could not be provided in its determination of LRE under federal and state guidelines, will be, and now are, dismissed. It is jurisdictional. Petitioners did not prove a denial of FAPE. 34 C.F.R. § 300.513(a)(1).

This addresses Issue 1(d).

Alleged FAPE Denial Admission, and Door-to-Door Related Service

Petitioners have not met their burden proving that the School District denied Student a FAPE from a statement in the May 23, 2024 Prior Written Notice that it had been unsuccessful in efforts to ensure Student's receipt of FAPE. In context, the May 23, 2024 IEP reflects a possible obligation by the School District to purpose a change in placement to a therapeutic setting because "[i]n sum, the district has been unsuccessful in its efforts to ensure [the Student's] receipt of FAPE." Ex. 69. This does not mean the School District admitted that it had denied FAPE to the Student, particularly as reflected by testimony at the hearing, which is given weight on this point, but that lack of Student's attendance resulted in the lack of FAPE success. Thus, while this in and of itself did not amount to an admission by the School District it had denied FAPE to the Student, it will be considered that during the time frame of May 23, 2024, the Student was not receiving a FAPE so that a change was considered appropriate. As reflected by an administrative hearing decision in Connecticut, a school district is placed in a difficult position if, under appropriate circumstances, therapeutic placement is not offered, which may result in a FAPE denial. ***See*** *Plainville Bd. Of Educ. v. R.N.*, 58 IDELR 257 (D. Conn 2012). Petitioners did not prove this statement amounted to a substantive denial of FAPE. 34 C.F.R. § 300.513(a)(1).

In a similar context, Petitioners' contention that the School District substantially or procedurally denied the Student a FAPE because it would not assist with removing Student from home to go to school, under these circumstances, is without merit. It does not go unnoticed that a school district's duty does not begin or end at the front door. ***See*** *Pierre-Noel v. Bridges, Pub. Sch.*, 113 F. 4th 970 (D.C. Cir. 2024). Testimony at the

hearing from school agents shows, however, that the School District held the position that it was up to the parents to get the Student to school. Nonetheless, under the facts as a whole, not providing assistance or a plan to physically remove the Student from his home into a physical school setting amounts to a distinction without a difference. Student was mobile, with anxiety, emotional disturbance, past trauma, depression, ADHD, bullying, characteristics of Autism, and a fear of being in the school setting provided by the School District, among other things. At this stage, even when the Student had been in the school setting, he sought refuge. Although, as determined below, FAPE was being denied under the IEP (and the school setting) before and the time Petitioners opted for unilateral placement, the Petitioners still did not prove a denial of FAPE by not providing a related service to help remove Student from the house. This particular service was not required for the Student to receive a FAPE, it was not needed for the Student to benefit from special education. 34 C.F.R. § 300.34. There was no denial of FAPE. 34 C.F.R. § 300.513(a)(1)&(2).

This addresses Issues 1(a) and (c) .

Procedural Safeguards and Evaluation

On about the period beginning May 9, 2023 Mother contacted the School District, said she wanted an eligibility evaluation, in writing and with follow-up phone calls, noted that a 504 plan was not an option, explained that Student had received a second private neuropsychological evaluation which Mother interpreted as having two eligibility requirements, and said a full report would be forthcoming when completed. The School District's position was that parents could request an evaluation for the school team to review but that did not consider this input from Mother, be it email, and follow-up calls,

as sufficient. School District staff noted that its data, consisting of past proficiency or advanced assessment and two write-ups, did not show the need for an initial evaluation. This was in an email from School District staff to Mother, as well as in conversations.

No procedural safeguards were issued to the Petitioners regarding this decision. No prior written notice was provided to Petitioners regarding this decision. Indeed, the record reflects a document called Prior Written Notice was drafted at some point in time, to which little weight is given, since the emails show no transmission of a notice, and Petitioners did not receive a notice, coupled with one School District staff member testifying that RS had forgotten to send procedural safeguards during the time frames of August into September. Rather, the School District worked on a 504 plan.

A prior 504 Plan had been completed, of which the School District was aware, stating Student's struggle with anxiety in the classroom, sensory sensitivity, and cognitive fatigue. Student's Mother complained about Student's perception of being bullied. Student was absent from school. This Petitioners removed Student from school and put Student into a home-setting because the Student was unable to receive educational benefit at the school. This additional "data" was not considered by the School District, in connection with Mother's communications that a new neuropsychological evaluation had been performed with two noted exceptionalities. School staff summarily denied an evaluation without it being referred to a group of professionals using assessment tools. It was a School District staff summary denial.

There is nothing to indicate a procedural safeguards notice was sent to Petitioners. Petitioners were unaware of action they could have taken at that point.

Then in late May, 2023, Student entered in-patient therapeutic treatment with extreme anxiety and depression.

After a parental request for an evaluation is made, a duty is placed on the school district to conduct an evaluation within 60 days, by a group of qualified professionals, using a variety of assessment tools, including information provided by the parent and notice of the procedures to the parent, to determine if the child is a child with a disability and the educational needs of the child. 34 C.F.R. §§§ 300.301, 304, and 306. As a caveat, the 60 day limit begins after receipt of parental consent, 34 C.F.R. § 300.301 (c) , yet, as explained below, the School District did not reach out to the Petitioners for consent until almost four months after the request for an evaluation. The school district must make reasonable efforts to obtain informed consent. 34 C.F.R. § 300.300(a)(iii). An initial evaluation is to consider input and evaluations from the parents, assessments, and observations by teachers and related service providers and then to identify and consider additional data. 34 C.F.R. § 300.305 (a). Then a determination for eligibility is made after drawing on a variety of sources, including input from the child's parents, and aptitude and achievement testing, and, among other things, information about the child's physical condition, adaptive behavior, and cultural or social background. 34 C.F.R. § 300.306 (c) . No single measure or sole criteria is to be used. 34 C.F.R. § 300.304 (b)(2). The assessment tools must be tailored to address specific educational needs, and not only a general intelligence quotient. 34 C.F.R. § 300.304 (c)(2). A determination is made, and an evaluation report is sent to the parents. 34 C.F.R. § 300.306 (a)(1). The School District conducted none of these procedures with its summary denial of an evaluation.

A prior written notice of proposed action must then be provided to the parents if it refuses to initiate an evaluation. 34 C.F.R. § 300.503(a)(2). A number of explanations have to be provided for the action taken by the school district, including procedural safeguards protections via notice. 34 C.F.R. § 300.503(b)(4). A procedural safeguards notice must be given to the parents on a parental request for an evaluation, detailing, among other things, the right to prior written notice, consent, access to records, time periods of due process, independent evaluations, due process hearings, and unilateral placement requirements. 34 C.F.R. §§ 300.504(b)(1), and (c) .

There was neither a prior written notice of action, nor a procedural safeguards notice, issued to parents with the School District's summary denial. ***See*** *Hawkins County (TN) Sch. Dist.*, 120 LRP 11384 (OCR, SD, 04-19-1516, Oct. 22, 2019)(although in 504 context, persuasive that verbal dismissal and no procedural safeguards result in violation). While the record contains a document referred to as a prior written notice, it is given little weight, since there is no record that it was ever given to the parents, and an inference based on a school district staff member's testimony that in August RS had forgotten to send out a procedural safeguards notice.

It is therefore concluded that the School District's summary denial resulted in procedural violations in violating its duties under the evaluation procedures, lack of prior written notice, and lack of procedural safeguards. 34 C.F.R. § 300.513(a).

The Student was placed in an eleven day therapeutic treatment at the end of May 2023 because of, among other things, depression and anxiety. Mother shared the neuropsychological report on May 25, 2023 noting a number of factors, and expressing exceptionality opinions. Again, on about August 6, 2023, Mother asked the School

District for the evaluation she had requested. This is close to the 60 day period from the initial May 9, 2024 evaluation request to the School District. School staff with authority to obtain consent were not due back until mid-August. The School District had another 504 Plan issued on August 7, 2023, which found that Student struggled with anxiety in the classroom, sensory sensitivity, and cognitive fatigue, with provisional autism noted, and stating that Student will mask it as if all is fine.

Student then tried to go into the grade in person, yet was unable to go because of the anxiety. Student wanted to go to school, but could not due to Student's anxiety and fear, as viewed through the lens of this neurodivergent Student's unique needs. Mother sought help to get Student to go to school, which was refused. Student could not go to school and Student had received in-patient care. Mother persisted seeking an evaluation, and the School District then reached out to her on August 22, 2023 to set a meeting for evaluation. This was about 3 ½ months since the initial request by Mother for an evaluation. Student had essentially received no education. On August 30, 2023 a written consent was provided by the School District, which Mother signed the next day. On September 28, 2023 the Student was found eligible for special education, which was going on five months from the date Mother initially sought an evaluation. It was not until October 18, 2023 that an IEP was completed.

It is therefore concluded that the School District's untimely evaluation techniques resulted in procedural violations in violating its duties under the evaluation procedures, the lack of reasonable efforts to obtain timely consent, and lack of procedural safeguards. 34 C.F.R. § 300.513(a).

Having concluded procedural violations for both the summary denial of an evaluation, as well as for the untimely evaluation techniques employed by the School District, it is also concluded that, as shown above, these procedural violations impeded the Student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the Student's FAPE, and as a result caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2). This results in a substantive violation of FAPE. *Id*. FAPE was denied from May 9, 2023 through October 18, 2023.

This addresses Issues 1 (f), 3 and 4.

Child Find

The limitations period begins on August 6, 2002. Petitioners seek to add background material preceding the date the limitations period began to help their burden of proof showing knowledge of possible child find factual material outside the limitations period to support their claim within the limitations period. Their materials preceding the limitations period will be viewed for historical purposes, as well as for possible foundational materials leading to what may have been known when the limitations period began. Claims, if any, arising before August 6, 2022, will not be considered.

A Child Find duty will be treated as a procedural matter. ***See*** *Timothy O.*, 822 F.3d at 1124. This is raised in Issues 3 and 6 as procedural violations. It is also raised in Issue 1(f) as a substantive claim based on a failure to identify the Student for services, adding to an overall violation of FAPE. *See* Issue 1(f). Despite Petitioners' classification of identification as a substantive violation, it will be viewed under the procedural into substantive violation test. ***See*** *Timothy O.*, 822 F.3d at 1124 (duty to locate, identify, and

evaluate as procedural matters). ***See also*** *T.B. v. Prince George's Co. Bd. of Educ.*, 897 F.3d 566 (4th Cir. 2018)(procedural denial not resulting in substantive denial). Although labeled as a Child Find issue, much of it is interrelated with the evaluation issue, discussed above.

Historically, in relevant part, Student had a history of being bullied. As a result, Petitioners placed Student in asynchronous online virtual public school, and then re-enrolled Student with the School District. A private neurological evaluation on February 25, 2020, shared with the School District at some unspecified point in time, maybe not in the grade school year, because the evaluation was undertaken primarily because of Covid, diagnosed oppositional defiant disorder and other specified anxiety disorder. That private evaluation suggested Student be considered for eligibility under a 504 Plan, including recommendations for counseling, social group therapy, and outpatient occupational therapy. It had no recommendation for special education.

Student was then home-schooled, and then re-enrolled with the School District for the 2021-2022 school year, for the grade, and a 504 Plan was created. During this time Student began discussions with peers about being nonbinary, started using a chosen name at home, and they/them pronouns. Student's attendance was inconsistent, yet academic performance was satisfactory, although Student had difficulties with assignments, and difficulty with getting to school, particularly after winter break, when Student began to share concerns with Mother about bullying, by multiple different kids over time, such as being called a "trans," which Mother reported to the School District, noting that the bullies in the grade were the same bullies who had bullied

Student in his earlier years in school. Student was tripped, called derogatory names, and had things taken away.

In March 2022 Petitioners withdrew Student from the School District's L School due to ongoing bullying issues, and began home-schooling again, with only a computer science class and choir at the school. Student's mental health regressed, and treatment with psychotherapist Dr. Z was begun. Then, in April 2023, a second private neuropsychological evaluation was conducted, noting a diagnosis of major depressive disorder (moderate, recurrent), generalized anxiety disorder, and attention deficit hyperactivity disorder (ADHD), predominantly inattentive presentation, moderate. It was recommended that Student is twice exceptional, as gifted, and with neurodevelopmental difficulties, and that from an educational perspective, Student would need support for anxiety, depression, ADHD, and giftedness. The report recommended that Student be considered for a 504 Plan or an Individualized Education Program. Mother emailed and spoke with School District staff in May 2024 and made the School District aware of the report's recommendations.

Student's history with the School District, up to the second neuropsychological evaluation conducted while Student was home-schooled, shows that Student was not attending school because of bullying. Although the School District had the burden to identify an eligible student, *Cudjoe v. Ind. Sch. Dist. No. 12*, 297 F.3d at 1066, only at that point where a request for an evaluation was made in May 2024 did a suspicion of disability arise for the duty to evaluate. ***See*** *Regional Sch. Dist. No. 9 v. Mr. and Mrs. M.*, 53 IDELR 8, 109 LRP 51058 (D.C. Conn. 2009)(suspicion rather than actual knowledge). That is, it is concluded that from August 6, 2022 (the limitations period)

through May 9, 2023, the Petitioners did not meet their burden to prove a procedural violation of FAPE. However, as explained in the evaluation issue above, Petitioners did meet their burden to prove a procedural violation of FAPE after May 9, 2023, because the Student was not identified and located, ***see*** 20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a)(1), until the evaluation process began in earnest, which was August 30, 2023 , when Mother was forwarded a consent for evaluation, with an IEP not written until October 18, 2023. This amounts to a procedural violation. 34 C.F.R. § 300.513(a).

Just as with the evaluation issue, above, given the 3 ½ month lapse of time, and Student's ongoing struggles during that time, and lack of educational benefits, this procedural violation impeded the Student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the Student's FAPE, and as a result caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2). This results in a substantive violation of FAPE. *Id*. FAPE was denied from May 9, 2023 through October 18, 2023.

This addresses Issues 1(f), 3, and 6.

Suggested One-on-One Virtual Consideration

Petitioners raise a substantive issue by contending the School District had a practice of not offering virtual settings to students with disabilities, including this Student, for a less restrictive setting, thus substantively denying FAPE. ***See*** Issue 1 (g). This argument is unpersuasive.

Initially, this is a FAPE matter in due process regarding this individual Student, not a systemic matter about all students with disabilities in the School District. ***See*** 34 C.F.R § 300.1 (purpose of Act to meet a student's unique needs). Moreover, as framed in

a less restrictive setting context, the virtual setting is read to arise because of the discussion by the School District about the possibility of Seven Stars in Utah, and its relationship to LRE. As found above, this Utah school discussion was not ripe for adjudication. Finally, Petitioners have not met their burden to prove anything about how their proposed virtual placement of some sort, which they contend was not considered, would have been appropriate to meet the Student's unique needs. ***See*** *Schaffer v. Weast*, 546 U.S. 49 (burden on Petitioners in this situation). That is, the Petitioners have not met their burden to prove that some other type of a virtual setting, separate and apart from that of their subsequent unilateral placement at FGA (which will be discussed later), would have been appropriate to meet the Student's unique needs. It is concluded that Petitioners did not prove a violation of FAPE on this issue. 34 C.F.R § 300.17 (an appropriate education).

This addresses Issues 1(g) and 4.

Implementation and FBA FAPE

The Petitioners contend that implementation of the Student's IEP did not arise in two general areas: the April 2024 displacement from Paraprofessional C's classroom and no IEP removal to the general education environment, and an untimely Functional Behavior Assessment (FBA), which is also considered in their substantive denial of FAPE analysis.

The FBA issue will be addressed first. It is the IEP which is the foundation for the determination of a FAPE and services – the four corners of the document itself. ***See*** *Sytsema,* 538 F.3d at 1316-1317. The "living IEP" of October 18, 2023 does not provide for an FBA. Thus, there is nothing to implement for an FBA in the IEP. 34 C.F.R. §

300.323(c)(2). Moreover, as Dr Z testified, the function of the Student's behavior was known to be escape.

Otherwise, an FBA is only required where the child is removed from the current placement in disciplinary actions. 34 C.F.R. § 300.530(d)(ii). ***See*** Wyo. Dept. of Educ. Rules, Chapt. 7, Sec. 6(d)(discipline consistent with state procedures). There record does not reflect that the Student was removed from school placement for disciplinary reasons.

As a result, it is concluded that there is neither a procedural nor a substantive violation of FAPE for failure to timely initiate or create an FBA. 34 C.F.R. § 300.513(a).

Petitioners' claim is unpersuasive that the IEP was not being implemented because Student left the self-contained classroom without an IEP change in language. The "living IEP" provided that the Student would start the process in the School District's educational setting in a self-contained one-on-one setting, with an eventual phasing of the Student into the general education environment full-time. ***See*** Ex. 21. On January 17, 2024 the IEP Team met and placed Student in the general education setting. This was discussed and known to the Petitioners – it was not put into the IEP, however. Student began the general education setting environment.

For a failure to implement claim to be successful it must be a material failure. ***See*** *L.J. v. School Bd. of Broward Co.*, 927 F.3d 1203 (11th Cir. 2019)(persuasive, material failure for implementation). Having the Student go into the general education setting, with the Team having discussed the matter, although the IEP failed to reflect it, was not a material failure to implement the language in the IEP. This did not result in a denial of FAPE, be it procedurally or substantively. 34 C.F.R. § 300.513(a).

More disconcerting, however, is the April 2, 2024 displacement from Paraprofessional C's classroom. The IEP called for anxiety reduction and coping skills to use so that when Student was faced with an educational problem, then support from a preferred staff member is to be accessed and then work with the adult to identify the problem, choose a coping strategy, and move forward. Ps' Ex. 21. Supplementary aids and services included offering Student a calming room for self-regulation and relaxation with a trusted adult. *Id*.

That day Student was late and was having a difficult day, and did not report to the new English class, but went to a class of students which was being supervised by Paraprofessional C, whom Student trusted. The Student felt safe there and was able to deregulate in this room with comfy chairs, and ability to see outside, and friendly conversation with others in the room. Student worked well with Paraprofessional C, and had been to this class three or four times before when Student struggled, and was unaware that this was an error.

The only safe room, viewed in Student's perception, as neurodivergent rather than neurotypical, was this room. The situation is to be viewed through the lens of this unique Student. Student was told by a special education instructor that Student could not be in that class, and that Student should be in an English class, and was told that the paraprofessional's class had work to do and that it had to be quiet. The principal was called. The principal had Student take ten minutes to sit outside the counselor's office. Student's hair trigger emotional system is wired to seek threat, and Student then had lost some or all of communicative abilities, with a perception that Student was being pushed back into class which amounted to stress, resistance, and erosion of trust, thus

amounting to concerns of safety. Student felt misunderstood, and overstimulated, put on headphones, would not go to the new class, and shut-down. Student felt at fault for doing something wrong. Neither a calming room for self-regulation nor a calming space to retreat were offered Student. Thereafter the Student never returned to regular attendance at the school.

This is concluded to be a material failure to implement the IEP. *L.J. v. School Bd. of Broward Co.*, 927 F.3d 1203. Implementation is part of the procedural process of the IDEA. ***See*** 34 C.F.R. § 300.323(c)(2). Although a material failure shows a substantive violation by being material, nonetheless it is concluded that this procedural violation amounts to a substantive violation of FAPE by impeding the Student's right to a FAPE, and as a result causing a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2).

This addresses Issues 1 (b), 1 (c) , and 4.

Unilateral Placement

Petitioners gave verbal notice to the School District of their unilateral placement of the Student at FGA at a mediation session on July 25, 2024, and, although not at an IEP meeting, the School District then placed on actual notice of the unilateral placement. On July 30, 2024 the notice was reduced to writing. Moreover, consideration is given that the Petitioners had not received a procedural safeguards notice regarding their obligations and rights, which included matters for unilateral placement. It is concluded that Petitioners gave notice on July 25, 2024 that Student was to be unilaterally placed commencing in the Fall semester at FGA; alternatively, it is concluded that notice was excused. 34 C.F.R. §§ 300.148 (d) & (e)(1)(ii); 34 C.F.R. §§ 300.504. Limitations on reimbursement are also discretionary if notice did not arise, not mandatory. ***See*** *C.D. v.*

Natick Pub. Sch. Dist., 78 IDELR 10 (D. Mass. 2020). It is therefore also concluded alternatively that should a notice failure arise then it will not impact, as a matter of discretion, unilateral placement reimbursement.

The reimbursement test to employ is generally described as the Burlington-Carter test, that is: (1) whether the school district provided a FAPE, and, if not, (2) whether private placement is appropriate, with (3) a consideration of the equities. ***See*** *Sch. Comm. of Burlington v. Mass. Dept. of Educ.*, 471 U.S. 359 (1985); *Florence Cnty. Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993). ***See also*** 34 C.F.R. § 300.148(c) . The Tenth Circuit Court of Appeals has noted this test as first, whether FAPE was made available by the school district, then whether the private school is state-accredited, and then whether the private school provides FAPE. ***See*** *Jefferson Co. Sch. Dist. R-1 v. Elizabeth*, 702 F. 3d 1227, 236-237 (10th Cir. 2012). It is noted that this provision relates to reimbursement to the parents by the public school district for the cost of the school – this is interpreted to mean that the parents pay for the private school and are then reimbursed, if the test is met, rather than the school district undertaking direct payment to the private school in a vendee/vendor relationship subject to state purchasing law. Indeed, "[a] parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet State standards that apply to education provided by the SEA and LEAs." 34 C.F.R. § 300.148(c) . Wyoming law, through regulations consistent with the federal regulations, states that the proposed unilateral placement does not have to meet Wyoming public school standards. ***See*** Wyo. Dept. Of Educ., Special Programs Division, Policy and Procedures for Special Education, Responsibility for Children in Private Schools, FAPE at Issue, Unilateral Placement, Sec. 111 (B). Thus, the matter for

determination is whether the School District provided FAPE, and if not, whether the Petitioners' unilateral placement is appropriate, considering that under Wyoming law the unilateral placement does not have to meet Wyoming public school standards coupled with private school accreditation, and, if so, whether reimbursement to the Petitioners should be awarded, not a direct vendee/vendor relationship between the School District and FGA, and to the extent reimbursement is determined to be equitable.

The first part of the analysis begins with whether the School District provided FAPE to Student. It is concluded that as of the date of notice of unilateral placement notice or actual knowledge of notice (July 25-30, 2024), the School District had not provided FAPE to the Student. That is, did it offer Student an IEP that was"reasonably calculated to enable [Student] to make progress in light of [Student's] circumstances." ***See*** *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1,* 580 U.S. 386, 399 (2017). Although not to be read in a vacuum when finding a violation of FAPE, emphasis is given to the language in the Prior Written Notice of May 23, 2024 stating that the Student had been at PHS since October 23, 2023, yet that the Student only earned 1.5 credits, with limited attendance, lack of participation and progress in the general curriculum, and lack of access to special education services because of poor attendance, 52 days missed, and the Student's inability to go to school regularly because of anxiety, and when in school Student declines frequently to go to class, and struggles to complete work and to make up missed assignments because of stress. Although shortened workdays, alternate classroom settings, extended time, one-on-one support, and multiple breaks, had been tried, they were unsuccessful. The School District acknowledged that under these circumstances FAPE could not be provided, and suggested removal to an

out-of-state therapeutic center, yet that offer was never finalized. Petitioners then noticed their unilateral placement. Historically, as well, with Student experiencing trauma, imbedded fear of going to the school because of Student's neurodivergent uniqueness with retraumatization, a function for behavior as escape, with the lack of a timely evaluation, child find issues, and various tried but eventually unsuccessful FAPE offers, and the inability to receive needed education because of these factors, the School District was not providing FAPE. ***See*** *Osseo v. A.J.T*, 96 F. 4th 1062 (8th Cir. 2024 (inappropriate if student cannot go to school before noon to demand use of a bell schedule). Suffice to conclude, for the unilateral placement, that on about July 25, 2024, when the School District had notice of unilateral placement, or July 30, 2024, when formal written unilateral notice was given, FAPE was not being provided to the Student. That is, considering this Student's unique circumstances and needs, the IEP in place was not providing the Student with the ability to make progress under the Student's circumstances, and thus denied the Student a FAPE. *Endrew F. ,* 580 U.S. 386.

Although this focus has been on denial of FAPE at the time of the unilateral placement, it is additionally concluded that FAPE was denied the Student beginning November 28, 2023, through July 25, 2024. November 28, 2023 was when the process was begun to place Student out of the one-on-one environment with the paraprofessional in an administrative room, and into the general education setting with general education times, with Student's corresponding declines in progress and attendance thereafter. This is a substantive issue, differing from the implementation issue. July 25, 2024 was when actual notice of unilateral placement to FGA was provided.

The second part of the analysis is to determine if private placement is appropriate. It is concluded that private placement at FGA is appropriate. 34 C.F.R. § 300.148(c) . FGA is regionally accredited through Cognia, SACs, and NCA, among others, with pending approvals for Middle States, Virginia Council for Private Education, and the Western Association of Schools and Colleges. Cognia is deemed the gold standard in accreditation requiring high quality standards upholding an academic rigor. FGA uses IEP like tools such as the learning specialist's plan for Student's accommodations based on the learning challenges of anxiety, major depressive disorder, ADHD, executive functioning challenges, sensory processing, and Autism, with positive reinforcement and feedback. FGA is open to consultation with Student's School District IEP team, although FGA is not required to follow the federal or state FAPE standards.

FGA is global in reach, with 80 campuses in 18 states, with about 250 teachers, and a virtual arm, supporting students in all 50 states and in countries around the world, in which Student is enrolled. It can issue can issue a diploma as a fully-authorized degree provider. Through its global café the Student can make connections virtually in an open space to do homework and eat with others, breakout rooms, a gaming club, and virtual events throughout the year, like cooking events by taking computers into the kitchen, pet parties, playing trivia, with student life mentors available to help students make connections, and constant monitoring of activity, and Student can interact with nondisabled peers.

The Student has a Virtual Plan developed with Student's interests and curiosities, which is synchronous, one-to-one classes, with direct one-to-one interaction with teachers on a scheduled basis, in a live and interactive program, mastery-based learning,

which incorporates one student to one teacher, customized around the student's needs, based on a customized learning plan, with content mastered before moving on. Although related services such as therapy and counseling are not directly provided by FGA, it works with third-party practitioners to work within the schedule and provide space for the services, provided by public or private connections, as well as providing within the curriculum social and emotional learning.

Specific planning guides are used at FGA to satisfy mandatory attendance requirements under Wyoming requirements and if a student struggles with timing and prescheduled sessions and arriving for virtual classes without adult supervision, like Student, then the goal is to bring the student to full autonomy, directing their learning to build the schedule with the family and class selections, with Student involved in the process. Class schedules are set to meet the student's individual needs where the Student is, and with schedules for classes later in the day to meet the needs of the Student, and to help the student being able to advocate and self-manage. Student has a defined schedule which is agreed on, with attendance monitored and adherence to a schedule, with a space created in a physical location at the home, so that in that place the Student is in school, with a student portal and access for parents to that portal, all in real time, so that parents can find out what is going on as it happens, so to decrease student struggles with getting to the learning sessions. Since the student is not physically in the same space as the instructor, the teacher and the student individually find a place to work within the boundaries for the student's best learning environment.

Student receives self-advocacy and executive functions at least twice a week for 50-minute sessions, and is taking Algebra 1 A, Biology A, Engineering and Technology,

and World History A. Student's grades are all "As", and as of the hearing date Student had not missed a day of school except for Student's birthday.

Taking this into account, including what is noted in the Findings, the Student's special needs can and are being met at FGA. The private placement is working, compared to the School District's attempts to provide a FAPE. Student is being provided, or has access to, support services. Student appears virtually, within a safe virtual place, which allows for the unique need because of Student's trauma, viewed through the Student's lens. Instruction is specially designed to meet the Student's unique needs. Attendance as primarily a behavioral issue is addressed. Student has access to both academic and social development. Dr. Z will continue to provide services to Student, virtually, just as he had done while the Student was attending school in the School District. As well, Dr. Z , after exploring options, opined that FGA was well-suited to meet Student's unique needs. In sum, FGA's education for Student is "reasonably calculated to enable [Student] to receive educational benefit[,]" and is "specially designed to meet [the Student's] unique needs." ***See*** *T.B. ex rel. W.B. v. St. Joseph Sch. Dist.,* 77 F.3d 844, 847-848 (8th Cir. 2012)(persuasive 8th Circuit).

The School District's position that FGA is inappropriate because FGA has no teachers certified in Wyoming, and Wyoming requires teachers to be certified in Wyoming, is unpersuasive. As noted at the outset, a unilateral placement can be found to be appropriate even without meeting state standards. 34 C.F.R. § 300.148(c) . Additionally, the School District's position that the unilateral placement must be approved by the Wyoming Education Department, and that it must meet specific state imposed standards for private schools, and other similar arguments, are equally

unpersuasive. While it may be true that when a public agency, in this case, the School District, places a child in a private school then the education standards that apply to the child's education must comport with state and local education agency requirements, ***see*** 34 C.F.R. § 300.146(b), those same standards do not apply when the child is unilaterally placed in a private school when FAPE is at issue, as in this case. ***See*** 34 C.F.R. § 300.148 (c). Similarly, as noted earlier, the key is "reimbursement" to parents, not a contractual relationship under Wyoming law which a public school might employ to allow payment in a public vendor/private vendee situation. The IDEA is a federal law, under cooperative federalism, as Justice O'Connor once opined. ***See*** *Schaffer v. Weast*, 546 U.S. 49. The federal law, as implemented through the federal regulations, consistent with Wyoming regulations, ***see*** Wyo. Dept. Of Educ., Special Programs Division, Policy and Procedures for Special Education, Responsibility for Children in Private Schools, FAPE at Issue, Unilateral Placement, Sec. 111 (FAPE at issue for children placed in private schools, matter governed by 34 C.F.R. § 300.148), speaks in terms of reimbursement.

Thus, the Student's education, if found to be reimbursable, is under the control of FGA, not the School District. 34 C.F.R. § 300.148 (c) .

Continuing with the second part of the unilateral placement reimbursement test, the School District's position is unpersuasive that because Student was unsuccessful before in a Wyoming virtual setting then this virtual setting at FGA is not appropriate. The Wyoming Connections Academy was an asynchronous online virtual public school, where the parents were responsible for Student doing work. In this case, the unilateral placement test by requiring that the placement be appropriate post-placement not only

reviews FGA's placement program and services, noted above, but also the success of the ongoing unilateral placement at FGA. Student is going to school in this private FGA virtual setting – Student attends all classes. Student is receiving As. Student is responsible for doing the work and attending classes through FGS's positive behavior support models. This placement is working for Student, whereas the Wyoming Connections Academy did not meet Student's needs. The School District's argument is analogous to saying that because education in one brick-and-mortar schoolhouse did not work years before for a student then education in another brick-and-mortar schoolhouse several years later will also not work because it is in a brick-and-mortar schoolhouse. This is not persuasive.

Finally, the School District's argument that FGA as the unilateral placement must be in the least restrictive environment among a continuum of placement options is unpersuasive. Guidance is found in three federal circuits which have held that the private placement does not have be in the least restrictive environment. ***See*** *Warren G. v. Cumberland Co. Sch. Dist., 190 F.3d 80 (3rd Cir. 1999); Cleveland Heights-University Heights Sch. Dist. v. Boss, 144 F.3d 391 (6th Cir, 1998); and C.B. v. Special Sch. Dist. No. 1, 636 F.3d 981 (8th Cir. 2011).* It is concluded that the least restrictive of placements do not have to be met with Student's unilateral option of FGA, focusing on appropriateness, as has been done.

Entering the equitable considerations, Petitioners have conducted themselves reasonably, and have not engaged in obstructionist tactics. Reimbursement "may" be granted , reduced, or denied. 34 C.F.R. § 30.148 (c) and (d). Notice has been found to be sufficient for reimbursement for the Fall semester at FGA. It is concluded there is no

reason to reduce or deny reimbursement, and that reimbursement should be, and is, granted.

Petitioners initially had Student enrolled in a first trial engineering class, and then enrolled Student in summer school on July 15, 2024. This was at a cost of $12,000, with a $1,500 fee. Reimbursement is denied for this sum. The notice was based on a future intent to enroll at FGA, rather than a notice for reimbursement because the Student had already been enrolled in summer school. Thus, the issue regards the Fall session of school only, not summer school. Only the Fall reimbursement cost is ripe, and has been raised, as a factor in this case. The cost paid for Fall 2024 is $20,000. Reimbursement of $20,000 should be, and now is, granted.

This addresses Issues 1(b), 2, 4, and 5.

Other Matters

Petitioners seek an order requiring the School District to pay their expert witness fees for Dr. Z. This is denied. Expert fees are not recoverable. ***See*** *Arlington Central Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006).

Petitioners seek an order determining them to be deemed the prevailing party for attorney fees. This is denied. Only courts can award attorney fees. 20 U.S.C. § 1415(e)(4)(B). Hearing officers are not required, under 34 C.F.R § 300.508 (a)(5), to find prevailing party status, although a state may choose a policy to do so. ***See*** *Letter to Anonymous*, OSEP, 19 IDELR 277 (July 6, 1992). Wyoming policies or rules do not provide for such an avenue. The request is, therefore, denied.

Petitioners seek the School District to be ordered to reimburse them for a private psychological evaluation from 2023, presumably the evaluation by Dr. S resulting in a

report dated May 25, 2023. This is denied. The evaluation was undertaken by Petitioners at their private expense prior reaching out to the School District to conduct its own evaluation. Although the evaluation may have placed the School District on notice of its evaluation and child find duties, nonetheless it still preceded any evaluation conducted by the School District. Petitioners never requested an independent evaluation at public expense based on a disagreement with a School District evaluation, which is when costs can be awarded. ***See*** 34 C.F.R. § 300.502(b)(1). The request, therefore, is denied.

REMEDIES

The School District is ordered to reimburse Petitioners the sum of $20,000 for unilateral placement reimbursement at FGA. The School District is to make payment to Petitioners on or before February 28, 2025. Ongoing and future tuition at FGA while Student is attending FGA with receipt of appropriate education will be reimbursed to Petitioners from the School District within a reasonable time from submission of Petitioners' invoice to the School District.

Staff training has been considered, yet because Student is now receiving educational services at FGA, the staff once involved in Student's education, evaluations, child find, and placement are no longer the ultimate providers. Training for staff would be prospective relief for continuing services, yet the Student is now at FGA. As a result, School District staff training is not awarded as an equitable compensatory remedy.

Other hourly compensatory education services for the FAPE violations are ordered to place the Student in the place Student should have been absent the FAPE denials, focusing on losses between May 9, 2023 through October 18, 2023, due to the evaluation

and Child Find violations, and from November 28, 2023 through July 25, 2024 for the FAPE violation, which will include the April 2024 time frame for implementation violation. ***See*** *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516 (D.C. Cir. 2005)(qualitative rather than quantitative). An hour-for-hour award for hours absent from school during these time frames is not appropriate, although it is noted that Student lost about 265 class hours in the second, third, and fourth quarters of the 2023-2024 school year, for those hours claimed ripe for compensatory services within the Petitioners' arguments. The Student, however, is doing well in FGA, but suffers from stress, anxiety, and depression as it is. Adding a quantity of hour-for-hour service hours is not appropriate, especially given that the ongoing educational plan FGA now provides for Student is working. The FGA plan is tailored to Student individually according to the Student's needs, and what Student is capable of, and when.

Thus, to not overreach and step into shoes of the educational plan at FGA, and in consideration of Student's abilities, an award of 128 hours of compensatory one-on-one direct services are to be provided to Student for two hours each week while at FGA, focusing in academic subjects lost while in the School District, for instance, yet not exclusively, in language arts, math, science, and social studies, or subjects that incorporate those studies. These services are compensatory, that is, in addition to, rather than a part of, the Student's current curriculum.

Compensatory education is an equitable remedy, and considering the equities, the two hours per week under FGA's semester system comes to about two additional hours per week while Student is in school for about two years. These services are to commence on or before February 28, 2025. These compensatory services may be declined at will of

the Petitioners if Student is unable to meet these additional hours or subjects. If the School District is unable as public entity to contract with FGA because FGA might not meet the School District's standards for education, then the School District will create a trust account and put funds for the 128 hours of services at the current FGA hourly cost into that account, based on this order, to be retrieved by Petitioners to pay the costs of the compensatory services to FGA.

The School District is not responsible for payment of other outside non-educational activities provided by FGA, should Student use them, such as trips to Disneyland, or whale watching. ***See*** *J.T. v. Dept. Of Educ. State of Hawaii*, 72 IDELR 95 (D. Hawaii 2018).

Any claims or defenses not otherwise addressed in this order are denied.

ORDER

Therefore, for the foregoing reasons and under the foregoing terms, the Petitioners' Request for Due Process Hearing, filed with the Wyoming Department of Education on August 6, 2024, with requested relief, is granted in part and denied in part.

REVIEW

Any party aggrieved by this decision has the right to bring a civil action in a court of competent jurisdiction pursuant to 20 U.S.C § 1415(i) and 34 C.F.R. § 300.516. Any such action must be filed within 90 days from the date of this decision.

/s/ electronic

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MORGAN LYMAN
IMPARTIAL DUE PROCESS
HEARING OFFICER

Entered: January 17, 2025

CERTIFICATE OF SERVICE

The parties agreed to electronic service and waived service through the U.S. Mail. I certify a true copy hereof was sent by email attachment transmission in PDF format to Attorneys S. Raja and D. Sheen (for the Petitioners), and to Attorneys J. Johnson and S. Kolpitcke for the School District, as well as to R. Mercer for the Wyoming Department of Education, on the 17th day of January 2025.

/s/ electronic

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MORGAN LYMAN