

BEFORE THE STATE DEPARTMENT OF EDUCATION
STATE OF NEBRASKA

Case No. 22-08 SE

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| |) | |
| Petitioners, |) | FINDINGS OF FACT, CONCLUSIONS |
| |) | OF LAW AND ORDER |
| vs. |) | |
| |) | |
| LINCOLN PUBLIC SCHOOLS |) | |
| 5905 O Street |) | |
| Lincoln NE 68510 |) | |
| Respondent. |) | |

The following constitutes the Report, Final Decision and Order of the Hearing Officer, Mona (Molly) Burton, Attorney at Law, 140 N 8th St #250, Lincoln, NE 68508 pursuant to Neb. Rev. Stat. § 79-1163; Title 92, Nebraska Administrative Code, Rule 55 of the Nebraska Department of Education, and pursuant to the Hearing Officer’s Notice of Assignment by the Department of Education. This is a special education matter involving (“ ”) .

FINAL DECISION AND ORDER

A. JURISDICTION

Jurisdiction is founded upon Chapter 55 of Title 92 of the Nebraska Administrative Code, the Nebraska Special Education Act, Neb. Rev. Stat. § 79-1110 et seq., and The Individuals with Disabilities in Education Act, 20 U.S.C. § 1400 et seq.

B. BACKGROUND

Petitioners, (“ ”) and (“ ”) (collectively, “ ”), on behalf of their , , filed a Due Process Petition with the Nebraska Department of Education on July 27, 2022. A hearing was held on January 17, 2023; February 24, 2023; and March 20, 2023, at Lincoln Public Schools (“LPS”), 5905 O Street, Lincoln, NE 68510. Petitioners, and , appeared and were represented by Amy K. Bonn, Attorney at Law. Respondent, LPS, appeared and was represented by Gregory H. Perry and Haleigh B. Carlson, Attorneys at Law. The hearing was completed on March 20, 2023. At that time the Hearing Officer closed the record and took the matter under advisement.

The hearing was held pursuant to the Prehearing Conference Orders which are contained in the filings of this case. Witnesses were not sequestered. The hearing was recorded by Great Plains Production, 1299 Farnam Street, Suite 300, Omaha, NE 68102. At the conclusion of the hearing, it was determined that the briefing deadline should be April 17, 2023. This deadline was extended by stipulation of the parties to April 21, 2023. The hearing officer's decision was continued by agreement and the hearing's officer's own motion to June 22, 2023.

At the hearing, _____ claimed LPS denied _____ a FAPE during the 2021-2022 school year at North American Martyrs Catholic School ("NAM"). Specifically, _____ testified they were seeking reimbursement for the cost of a paraeducator in the amount of \$3,599.03 (79:5-8; Exhibit 3 p. 18); reimbursement for the cost of tuition and fees for attendance at NAM for the Spring 2022 semester in the amount of \$1,393.75 (85:10-25, 86:1-6; Exhibit 3, p. 18); reimbursement for payments made to a math tutor in the amount of \$540.0 (79:21-25, 80:1-15; Exhibit 3, p. 18); additional compensatory education services to remedy the educational loss caused by LPS during the 2021-2022 school year (102:10-25, 103:1-5; Exhibit 3 p. 24); an amendment to _____ current Individualized Education Plan ("IEP") so _____ will receive 3 hours of special education services per week (1 hour in writing, 1 hour in math, and 1 hour in social skills), provided at the NAM campus during the 2022-2023 school year (104:14-25, 105:1-2; Exhibit 3 p. 24); and a determination Petitioners are the prevailing party of this case pursuant to 20 U.S.C. § 1415(i)(3)(b) (Exhibit 3 p. 24).

C. WITNESSES

The witnesses who testified and their qualifications are presented in the order in which they testified:

1. _____, _____ of _____.
2. _____, _____ of _____.
3. Sister Janelle Buettner. Sister Buettner was the principal of _____ during the 2021-2022 school year. Sister Buettner holds a master's degree in educational administration. (171:13-17)
4. Melissa Peters. Peters was _____ Math Interventionalist and Math Tutor during the 2021-2022 school year. (236:11-24). She holds a certificate for substitute teaching with the Nebraska Department of Education. She is not endorsed in special education. (254:24-25, 255:1-8).
5. Whitney Husted. Husted was hired by Mr. and Mrs. _____ to serve as Paraeducator during the 2021-2022 school year. (259:1-17, 261:9-11). Husted holds neither a certificate nor any special education endorsements with the Nebraska Department of Education. (270:25, 271:1-5). Husted has not taken any assessments with the State of Nebraska to be certified as a paraeducator. (271:6-8).
6. Kaye Kreikemeier. Kreikemeier was a Reading Interventionalist for _____ during the 2021-2022 school year. (275:3-21). Kreikemeier holds a teaching certificate with the Nebraska Department of Education. (282:25, 283:1-2). She does not have a special education endorsement with the Nebraska Department of Education. (283:3-4). Kreikemeier was a _____

member of MTSS team. (Exhibit 67).

7. Summer Utrup. Utrup was Second Grade Teacher during the 2021-2022 school year, until she left for maternity leave in March of 2022. (284:12-25, 285:1-12, 293:6-8). She does not have any special education endorsements. (300:3-10).

8. Monica Nagel. Nagel was Substitute Second Grade Teacher in the spring of 2022. (311:11-17). Nagel holds a certificate for substitute teaching with the Nebraska Department of Education. (319:14-17). She does not have any special education endorsements. (319:18-20).

9. Dr. Mindy Roberts. Dr. Roberts is the Assistant Director of Special Education at Lincoln Public Schools. (Exhibit 56 p. 1). She has a Doctor of Education from the University of Nebraska-Lincoln. (Exhibit 56 p. 1). She also holds a Certificate in Standard Administration with the Nebraska Department of Education with the following endorsements: Elementary K-6, Principal 7-12, Special education behavior interventionalist PK-12, and special education supervisor B-12. (Exhibit 56 p. 4). Dr. Roberts was a member of MTSS and IEP teams during the 2021-2022 and the 2022-2023 school years. (Exhibits 77, 83, 95, 109, 112, 114, 119, 130, 134, 135).

10. Seth Larson. Larson is a School Psychologist at Lincoln Public Schools with an Ed.S in Educational Psychology degree from the University of Nebraska at Kearney. (Exhibit 57 p. 1). He is approved through the National Association of School Psychologists and Accredited from the International School Psychology Association. (Exhibit 57 p. 1). He holds a teaching certificate with a school psychologist endorsement with the Nebraska Department of Education. (Exhibit 57 p. 4). Mr. Larson was a member of MTSS and IEP teams during the 2021-2022 school year. (Exhibits 67, 83, 95, 109, 112, 113, 114, 119, 130).

11. Polly Hess. Hess is a School Psychologist at Lincoln Public Schools with a master's and Ed.S. in Educational Psychology from the University of Nebraska, Lincoln. (Exhibit 56 p. 1). She holds a teaching certificate with an endorsement in school psychology with the Nebraska Department of Education. (Exhibit 56 p. 4).

12. Brigitte Morgan. Morgan is a Special Education Team Leader at Lincoln Public Schools. (606:3-7). She holds a master's in psychology degree with a specialty in applied behavior analysis from Capella University. (Exhibit 58 p. 1). She is also a board-certified behavior analyst. (Exhibit 58 p. 2; 607:3-9). Morgan holds a teaching certificate with a Special Education endorsement from the Nebraska Department of Education. (Exhibit 58 p. 4). Morgan was a member of MTSS team during the 2021-2022 school year. (Exhibits 83 and 95).

13. Ashley Risueno. Risueno is a Special Education Teacher with Lincoln Public Schools. She holds a Master of Education degree from Doane College. (Exhibit 59 p. 1). She holds a teaching certificate with a Special Education endorsement from the Nebraska Department of Education. (Exhibit 59 p. 3). Risueno was a member of MTSS and IEP teams during the 2021-2022 school year. (Exhibits 67, 83, 95, 109, 112, 113, 114, 119, 130).

14. Tim Oehring. Oehring is a Special Education Teacher with Lincoln Public Schools. He holds a Master of Education Degree from Peru State College. (Exhibit 60 p. 1). He holds a

teaching certificate with endorsements in Elementary K-8 and Special Education with the Nebraska Department of Education. (Exhibit 60 p. 3). Oehring was a member of IEP team during the 2022-2023 school year and currently provides special education services directly to at NAM. (Exhibits 134, 135).

15. Dr. Jennifer Fundus. Dr. Fundus is the Director of Special Education at Lincoln Public Schools. (Exhibit 54 p. 1). She has a Doctor of Education from the University of Nebraska-Omaha. (Exhibit 54 p. 1). She holds an Administrative Certificate with the Nebraska Department of Education with the following endorsements: Elementary K-6, Mild/Moderate Disabilities K-9, Principal PK-8, Superintendent PK-12. (Exhibit 54 p. 4).

D. ISSUES

The issues of law presented at the Hearing are substantive and procedural. The substantive issue is whether was denied a free appropriate public education at NAM during the 2021-2022 school year. Within this issue, the following sub-issues are raised:

a. Whether IEP developed on May 2, 2022, was reasonably calculated to allow to make appropriate progress in light of unique circumstances;

b. Whether IEP developed on November 29, 2022, was reasonably calculated to allow to make appropriate progress in light of unique circumstances;

c. Whether the compensatory education provided to in the summer of 2022 was sufficient to remedy any educational deficit may have had as a result of a delayed evaluation.

The procedural issues raised in the Petition include:

- (1) The alleged Child Find violation;
- (2) The alleged failure to take appropriate steps in light of a referral for a special education evaluation;
- (3) The alleged failure to provide Mr. and Mrs. with a prior written notice for any alleged denial to evaluate
- (4) The alleged failure to provide Mr. and Mrs. with a copy of the procedural safeguards prior to April 18, 2022;
- (5) The alleged predetermination of special education services and goals in the May of 2022 IEP; and
- (6) The alleged delay in obtaining parental consent for an evaluation.

EXHIBITS

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| Exhibit 1 | Nebraska Department of Education Rule 51 Effective Date January 1, 2017 (Revised) |
| Exhibit 2 | Nebraska Department of Education Rule 55 Effective Date September 9, 2012 |

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| Exhibit 3 | Petition <i>*This Exhibit was admitted on the basis the contents would not be considered for the truth of the matter asserted, but only to explain the parties' subsequent actions.</i> |
| Exhibit 4 | Answer of Respondent <i>*This Exhibit was admitted on the basis the contents would not be considered for the truth of the matter asserted, but only to explain the parties' subsequent actions.</i> |
| Exhibit 5 | Notice of Prehearing Conference |
| Exhibit 6 | Order; Duly Served on October 3, 2022 |
| Exhibit 7 | Order; Duly Served on November 15, 2022 |
| Exhibit 8 | Petitioners Notice of Address Change of Petitioners |
| Exhibit 9 | Respondent's Answers to Interrogatories |
| Exhibit 10 | ADHD Diagnosis <i>*This Exhibit was admitted on the limited grounds of demonstrating the effect on the listener and was not admitted for the truth of the matter asserted.</i> |
| Exhibit 11 | ASD Diagnosis <i>*This Exhibit was admitted on the limited grounds of demonstrating the effect on the listener and was not admitted for the truth of the matter asserted.</i> |
| Exhibit 12 | Math Tutor Fees |
| Exhibit 13 | Tuition and Para Fees |
| Exhibit 14 | Lincoln Public Schools Meeting Request |
| Exhibit 15 | Notice of District Decision Regarding Request |
| Exhibit 16 | Individualized Education Program; Dated September 9, 2022 |
| Exhibit 17 | Multidisciplinary Team (MDT) Report; Dated May 16, 2022 |
| Exhibit 18 | IEP Progress Report – Annual Goal; Dated October 14, 2022 |
| Exhibit 19 | Second Grade North American Martyrs' Data |
| Exhibit 20 | Munroe-Meyer Institute Occupational Therapy Independent Educational Evaluation Report; Dated August 26, 2022 |
| Exhibit 21 | Speech-Language Pathology Consultation; Dated August 26, 2022 |
| Exhibit 22 | North American Martyrs 2021-22 Rule 14 Nonpublic Schools Annual Report |
| Exhibit 23 | North American Martyrs Curriculum |

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| Exhibit 24 | Complaint Investigation Report and Letter of Findings for Complaint #21.22.24 <i>*This Exhibit was admitted on the limited grounds of explaining the parties' subsequent actions and was not admitted for the truth of the matter asserted.</i> |
| Exhibit 25 | United States Department of Education Office of Special Education and Rehabilitation Services Memorandum; Dated January 21, 2011 |
| Exhibit 26 | Individualized Education Program Dated May 23, 2022 |
| Exhibit 27 | Email from _____ to Sr. Janelle Buettner Dated October 18, 2021 <i>*This Exhibit was admitted on the limited grounds of explaining the parties' subsequent actions and was not admitted for the truth of the matter asserted.</i> |
| Exhibit 28 | Email Thread between Molly Cassiday and _____; Re: Contact Information: Molly Cassiday Dated October 28, 2021, and October 19, 2021 |
| Exhibit 29 | Email from Sr. Janelle Buettner; Our Documentation on _____. Submitted to LPS Dated April 18, 2022 |
| Exhibit 30 | Email Thread between Mindy Roberts, Seth Larson, Angie Green, Sr. Janelle Buettner, and Ashley Riusueno; Re: Question Dated November 10, 2021 |
| Exhibit 31 | Email from _____ to Sr. Janelle Buettner and Suzie Schlautman Dated December 2, 2021 <i>*This Exhibit was admitted on the limited grounds of explaining the parties' subsequent actions and was not admitted for the truth of the matter asserted.</i> |
| Exhibit 32 | Email Thread between _____, Sr. Janelle Buettner, and Kaye Kreikmeier; Re: _____ Update Dated January 23, 2022 |
| Exhibit 33 | Email from Mindy Roberts to Sr. Janelle Buettner; Re: _____ Update Dated January 23, 2022 |

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| Exhibit 34 | Email Thread between Kaye Kreikemeier, , and Sr. Janelle Buettner; Re: Update Dated January 19, 2022, and January 20, 2022 <i>*This Exhibit was admitted on the limited grounds of explaining the parties' subsequent actions and was not admitted for the truth of the matter asserted.</i> |
| Exhibit 35 | Email Thread between Sr. Janelle Buettner, Kaye Kreikemeier, Summer Utrup, and ; Re: Update Dated January 7, 2022, January 10, 2022, and January 13, 2022 |
| Exhibit 36 | Email from to Summer Utrup Dated February 9, 2022 |
| Exhibit 37 | Email from to Mindy Roberts ad S. Janelle Buettner; Re: IEP Evaluation Request for Dated April 1, 2022 |
| Exhibit 38 | Email Thread between Mindy Roberts and ; Re: IEP Request for Educational Services for Dated April 14, 2022, and April 18, 2022 |
| Exhibit 39 | IDEA Part B Parents' Rights IN Special Education (Age 3-21) |
| Exhibit 40 | Notice of Intent to Evaluate Dated August 23, 2013 |
| Exhibit 41 | Parent/Guardian Consent for Individual Evaluation Dated August 23, 2023 |
| Exhibit 42 | Email Thread between Mindy Roberts and ; Re: IEP Request for Educational Services for Dated April 19, 2022, and April 21, 2022, and Re: – IEP Assessments Dated April 27, 2022 and April 29, 2022 |
| Exhibit 43 | Correspondence from to LPS Autism Team; Re: Evaluation. <i>*This Exhibit was admitted on the limited grounds of demonstrating the effect on the listener and was not admitted for the truth of the matter asserted</i> |
| Exhibit 44 | Report Cards |
| Exhibit 45 | Email from Mindy Roberts with Revised IEP |

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| Exhibit 46 | Email from Mindy Roberts with Proposed Schedules for Extended School Year Services and Compensatory Services at North American Martyrs |
| Exhibit 47 | Lincoln Public Schools: MTSS Training Nonpublic Bates Stamped LPS 040-092 |
| Exhibit 48 | MAP Growth Spring 2022 |
| Exhibit 49 | State Complaint |
| Exhibit 50 | Email Thread: IEP Evaluation Request for . Dated March 31, 2022 and April 1, 2022 |
| Exhibit 51 | Email Thread: N. CICO Goalsheet Data Spreadsheet Dated February 11, 2021 |
| Exhibit 52 | Email from Brigette Morgan; ND, NAM Programming Updates dated April 20,2022 |
| Exhibit 53 | Example CICO Sheet |
| Exhibit 54 | Jennifer Fundus, Ed. D., Certificate and Resume |
| Exhibit 55 | Mindy Roberts, Ed. D. Certificate and Resume |
| Exhibit 56 | Polly Hess, M.A., Ed.D., Certificate and Resume |
| Exhibit 57 | Seth Larson, Ed.D., Certificate and Resume |
| Exhibit 58 | Brigette Morgan, M.S., Certificate and Resume |
| Exhibit 59 | Ashley Risueno, M.A., Certificate and Resume |
| Exhibit 60 | Tim Oehring, M.A., Certificate and Resume |
| Exhibit 61 | Alyssa Rousseau, OTD, Certificate and Resume |
| Exhibit 62 | Angela Green, MS, CCC-SLP, Certificate and Resume |
| Exhibit 63 | Laura Sousek, MS, CCC-SLP, Certificate and Resume |
| Exhibit 64 | Special Education Records (2018-2021) |
| Exhibit 65 | Email, Re: Connection You; Molly Cassiday to Seth Larson (October 18, 2021) |
| Exhibit 66 | Email-Consent Form: N.D.; Bates Stamped LPS 0130 |
| Exhibit 67 | Monthly MTSS Agendas between LPS and NAM (September 14, 2021; October 26, 2021; November 9, 2021; December 21, 2021; January 11, 2022; February 8, 2022; March 8, 2022; April 12, 2022; May 10, 2022) |
| Exhibit 68 | Seth Larson Observation Date (October 28, 2021) |

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| Exhibit 69 | Email Chain-Re: Question; Bates LPS 0396-0403 |
| Exhibit 70 | Draft FBA/BIP |
| Exhibit 71 | Final FBA/BIP (November 2021) |
| Exhibit 72 | Non-Public Student Assistance Process Form |
| Exhibit 73 | Email Chain-Re: Autism Team Observation; Bates Stamped LPS 0234-0235 |
| Exhibit 74 | LPS Academic Calendar 2021-2022 School Year |
| Exhibit 75 | NAM Academic Calendar 2021-2022 School Year |
| Exhibit 76 | Email Chain-Re: N. Update; Bates LPS 0180-0188 |
| Exhibit 77 | Email-NAM Student Service Update; Bates Stamped LPS 0216-0218 |
| Exhibit 78 | Email Chain-Re: NAM Student Service Update; Bates Stamped LPS 0345-0346 |
| Exhibit 79 | Email Chain-N.D. Academic Info; Bates Stamped LPS 0327-0328 |
| Exhibit 80 | Email Chain-N.D. Academic Info; Bates Stamped LPS 0334-0335 |
| Exhibit 81 | Brigitte Morgan Observations (January 27, 2022; February 3, 2022; April 6, 2022) |
| Exhibit 82 | Brigitte Morgan Recommended Strategies |
| Exhibit 83 | Meeting Agenda (February 9, 2022) |
| Exhibit 84 | . Incentives |
| Exhibits 85 | Email Chain-Re: N. CICO Goalsheet Data; Ashley Risueno to Summer Utrup (February 11, 2022); Brigitte Morgan to Ashley Risueno (February 11, 2022) |
| Exhibit 86 | Sample CICO Documents (Shared February 11, 2022) |
| Exhibit 87 | Email – 4 – Square Social Story: Ashley Risueno to Summer Kennett (March 2, 2022) |
| Exhibit 88 | 4 Square Social Story (Shared March 2, 2022) |
| Exhibit 89 | N. CICO Data |
| Exhibit 90 | Email Chain- Re: Students; Bates Stamped LPS 0412-0414 |
| Exhibit 91 | Nebraska Department of Education Complaint Filed by (March 3, 2022) |
| Exhibit 92 | Email Chain-Re: IEP Evaluation Request for N. Bates Stamped LPS 0246-0249 |
| Exhibit 93 | Email Chain-Re: Private Eval Report; Bates Stamped LPS 0383-386 |
| Exhibit 94 | Meeting Notice Dated April 5, 2022 |

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| Exhibit 95 | MDT 1 Meeting Agenda (April 12, 2022) |
| Exhibit 96 | Seth Larson MDT 1 Meeting Notes (April 12,2022) |
| Exhibit 97 | Email Chain-Re: IEP Request for Education Services for N. Bates Stamped LPS 0305-0308 |
| Exhibit 98 | Prior Written Notice Dated April 21,2022 |
| Exhibit 99 | Email Chain-Re: N.'s Autism Evaluation; to Seth Larson (April 21, 2022); Sr. Janelle Buettner to Seth Larson (April 21, 2022); Mindy Roberts to Sr. Janelle Buettner (April 22, 2022) |
| Exhibit 100 | Email- MTSS Student Recommendations; Bates Stamped LPS 0205-0210 |
| Exhibit 101 | Notice of Intent to Evaluate (April 18, 2022) |
| Exhibit 102 | Parent/Guardian Consent for Individual Evaluation (Signed April 19, 2022) |
| Exhibit 103 | Email – ND, NAM Programming Updates; Brigitte Morgan to Ashley Risueno (April 20, 2022) |
| Exhibit 104 | Email Chain-Fwd: N. – IEP Assessments; Bates Stamped LPS 0166-0167 |
| Exhibit 105 | Email Chain – Fwd: N. Parent/Teacher Rankings; Bates Stamped LPS 0168-0170 |
| Exhibit 106 | Meeting Notice Dated May 3, 2022 |
| Exhibit 107 | Observation Data (May 12, 2022) |
| Exhibit 108 | Email Chain-Fwd: N. BASC 3; Bates Stamped LPS 0165 |
| Exhibit 109 | MDT 2 Meeting Agenda (May 16, 2022) |
| Exhibit 110 | Email Chain-Fwd: MDT Draft; Bates Stamped LPS 0155-0157 |
| Exhibit 111 | Meeting Request (May 17, 2022) |
| Exhibit 112 | MDT Report Final Dated May 16, 2022 |
| Exhibit 113 | MDT Signature Page (Signed by Parents May 24, 2022) |
| Exhibit 114 | IEP Draft (May 23, 2022) |
| Exhibit 115 | Prior Written Notice (May 23, 2022) |
| Exhibit 116 | Writing Goal Baseline Data (May 24, 2022) |
| Exhibit 117 | Email: DRAFT IEP; Bates Stamped LPS 0135 |
| Exhibit 118 | Email – N.'s Reports/Paperwork; Mindy Roberts to (June 3, 2022) |
| Exhibit 119 | IEP Dated May 23, 2022 (Finalized June 3, 2022) |
| Exhibit 120 | Consent for Special Education Services (Signed May 24, 2022) |

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| Exhibit 121 | Compensatory Services Hours |
| Exhibit 122 | Compensatory Service Summary |
| Exhibit 123 | Email – . ; to Mindy Roberts (August 1, 2022) |
| Exhibit 124 | Letter from Jennifer Fundus to (August 2, 2022) |
| Exhibit 125 | Meeting Notice Dated August 29, 2022 |
| Exhibit 126 | IEP Draft (September 9, 2022) |
| Exhibit 127 | Meeting Notice Dated October 25, 2022 |
| Exhibit 128 | Prior Written Notice (November 7, 2022) |
| Exhibit 129 | IEP Draft (November 22, 2022) |
| Exhibit 130 | MDT Final Report with IEE (November 29, 2022) |
| Exhibit 131 | MDT Signature Page (November 29, 2022) |
| Exhibit 132 | Prior Written Notice (November 29, 2022) |
| Exhibit 133 | Meeting Notice Dated November 29, 2022 |
| Exhibit 134 | IEP Final (Most Recent) |
| Exhibit 135 | IEP Signature Page (November 30, 2022) |
| Exhibit 136 | Email-Services at Fredstrom; Mindy Roberts to (Dec. 1, 2022) |
| Exhibit 137 | .’s Progress Reports |
| Exhibit 138 | . Attendance Data (2021-2022 School Year) |
| Exhibit 139 | . Behavior Data from Martyrs |
| Exhibit 140 | Nebraska Department of Education Rule 51 Effective Date May 17, 2022 (Revised) |
| Exhibit 141 | Evaluation and Identification Procedures |

E. FINDINGS OF FACT

In accordance with Nebraska Department of Education Rule 55.007.02G, the hearing officer takes official notice of cognizable facts, of general, technical, or scientific facts within her specialized knowledge and the rules and regulations adopted and promulgated by the Department of Education.

Mr. and Mrs. moved to Lincoln, Nebraska with their , , on October 15, 2021, into an apartment within the boundaries of LPS. (34:25, 35:1-11). While attending preschool and kindergarten in Iowa, received special education services through an IEP. (Exhibit 65 p. 85). On May 11, 2020, at the end of kindergarten school year (2019-2020 school year), was exited from special education services because, “social skills and communication skills are no longer significantly discrepant and unique from same-age peers and has shown growth on all IEP goals. Therefore, no longer qualifies for special education services.” (Exhibit 64 p. 73).

On May 18, 2021, at the end of first grade school year (2020-2021 school year), was again evaluated for special education services. (Exhibit 64 p. 11). The Iowa MDT

determined [redacted] did not qualify for special education services. (Exhibit 64 p. 9). The Iowa MDT team noted, “[redacted] is currently exceeding grade-level behavior standards and [redacted] behavior is not significantly discrepant and unique from [redacted] same-age peers.” (Exhibit 64 p. 9). The MDT team made this finding despite the fact that during evaluations, Mr. and Mrs. [redacted] claimed [redacted] social skills were well below average, (Exhibit 64 p. 15), and [redacted] problem behaviors were well above average (Exhibit 64 p. 16).

When the [redacted] moved to Nebraska, they enrolled their son [redacted] at NAM. (42:2-25, 43:1-7). [redacted] first day of school was October 18, 2021. On October 18, 2021, Molly Cassiday, a school counselor at NAM, emailed Seth Larson at LPS indicating she observed exhibiting behaviors when frustrated such as whimpering, groaning, leaning back with hands on [redacted] face, tears, and laying [redacted] head on [redacted] desk. (116:16-25; Exhibit 65 p. 2). Ms. Cassiday also wrote, “in a matter of less than a minute, and without signaling [redacted] frustration in a different way, the student stabbed [redacted] in the hand enough to make it bleed . . . [and stated] ‘I deserved it. I deserved it.’” (Exhibit 65 p. 2). Ms. Cassiday explained [redacted] should sign a form to begin the “SAP.” (Exhibit 65 p. 3; Exhibit 66). Ms. Cassiday asked Mr. Larson **“for tools and practical Tier 2 steps that we can take right away to set this student up for success.”** (Exhibit 65 p. 3) (emphasis provided).

LPS held monthly Multi-tiered Systems of Support (“MTSS”) meetings with staff at NAM to discuss students whom NAM suspected had a disability and to recommend interventions and recommendations about next steps. (393:16-19, 410:6-25; 411:1-7). MTSS is considered the same as the Student Assistance Process, “SAT” that is required under Rule 51. (218:22-25, 219:1, 569:22-25; 92 NAC § 51-006.01B). MTSS is promoted by the Nebraska Department of Education as a problem-solving process pursuant to Rule 51. (475:6-18). It is also a nationally recognized problem solving process. (566:19-25). The MTSS process allows LPS to assist students whom others suspect to have a disability in accordance with Rule 51. Students are referred for a variety of reasons and their process is individualized:

One way would be a universal screening, where a teacher would give all students a reading evaluation or all students a math evaluation or a writing evaluation, and determining students that might fall below the average range. That might be one way. If it’s behavioral concern, it might be a number of office referrals, the number of times a student needs an out-of-class movement, the number of outbursts. Social-emotional could look different as well. So it could be different factors depending on the area of need. We would start that intervention process looking at tier two interventions . . . Again, those look different depending on what kind of needs a student has. If a students are making growth, then we would stick with that and then slowly reduce those interventions. Some students need tier three interventions, which would just be adding another layer of support on top of those first layer of tier two interventions . . . S those are general education processes and means that we would use first. We would progress monitor, and we would talk about kids’ progress to see if they were growing and

learning. If we found that kids were not growing and learning after implementing those interventions with Fidelity, then we would consider the special education evaluation process.

(392:9-25, 393:1-15)

The NAM MTSS team consisted of general education teachers, interventionists, special education staff, and the principal of NAM. (518:10-15). Specifically, the members were Seth Larson, School Psychologist, Ashley Risueno, Special Education Teacher, Angie Green, Speech Language-Pathologist, Sister Buettner, Principal of NAM, Kaye Kreikemeier, reading interventionist at NAM, Molly Cassiday, School Counselor at NAM, Kailey Reidy, and Jenny Thomas. (Exhibit 67). On October 26, 2021, the MTSS team met to discuss for the first time. (Exhibit 67 p. 42-44). At the conclusion of this MTSS meeting, the team agreed Seth Larson, an LPS School Psychologist, would observe in order to draft a Functional Behavior Assessment (“FBA”) and a Behavior Intervention Plan (“BIP”). (Exhibit 67 p. 43-44; 497:20-25). Additionally, the MTSS team recommended interventions to be utilized in general education classroom:

A timer is often very useful for students to kind of give them some time to, I guess, cope with whatever’s going on that is very difficult for them. And it also gives them a stopping point and allows them to transition a little bit easier to the next activity. Just having that visual piece is kind of a – just a better way to regulate emotions. The visual schedule would be very useful for just planning out day and also preparing for any changes to day. Sometimes that can be difficult for students. And then earning time by himself, this is an incentive that we talked a lot about. And it’s really – in my opinion, the most important part of any behavior plan is to find out something that is motivating that students can be a lot more willing to, I guess, engage in those different strategies, it is going to be more successful.

(503:7-25, 504:1-7).

Seth Larson observed on October 28, 2021. (Exhibit 68). After observing , Larson created an FBA and a BIP and shared it with the MTSS team on November 10, 2021. (Exhibit 69, 71; 509:5-17). Larson believed the function of behavior, “adult attention/seeking help from adults,” could be helped through MTSS, in the form of a BIP, because:

That would be . . . a great opportunity for us as a team to come together to find anger prevention strategies that teach him more appropriate skills of – of getting help and not depending on really that immediate help, because really that’s not – that’s not supporting him and that’s not allowing him to learn. It’s simply solving the issue. And we really like to work on reinforcing more appropriate skills and building on – on those social/emotional regulation skills.

(509:18-25, 510:1-9).

Based on his expertise as a school psychologist, Larson made several recommendations for NAM to implement in the general education classroom:

[T]he practicing replacement behavior. And when I say [re]placement behavior, I'm talking about not like your picturesque perfect students, but one step down from – from those behaviors that we're seeing. A lot of students that I work with who struggle with adult attention will have a cue card or just flip it and that lets the – the teacher know that they need some help. That's something that students are very capable of doing. So that was one thing that we really wanted to work on – start working on immediately. Also structured daily schedule on task activities, that was that—

...

That was that visual schedule that we talked about earlier, designing assignments to meet student instructional skill level. At the time that we had received we really didn't know what skill level was, so we wanted to make sure that we were adapting as much as we could to help support him in the classroom until we were able to – to find out more about him. We also modified our type of activity, again, to reduce some of those more – some more of those – or more of those incidents where he became overwhelmed providing needed materials, teaching and reteaching procedures. Once again, going back to that, just asking for help, making sure that we're touching on that frequently throughout the day. And then let's see, teaching strategies, social skills instruction, I felt like this was a huge one for , because just didn't have the skills necessary to be successful with those social skills that – that came to us with. Earning incentives for approximations of desired behavior, so this would be like earning that time alone or time with preferred activity for the exhibiting behaviors that are more appropriate than the ones that we're seeing in class. Let's see. Giving frequent attention and feedback for appropriate behavior. Just knowing that likes that adult detention really lets us know that if we can provide positive attention for , specific positive praise to him, that's going to be a huge motivator for . So that's why we wanted to include that strategy.

(510:10-25, 511:1-25, 512:1-4). Larson's recommendations were sent to the staff at NAM. (512:10-25, 513:1-4).

The next MTSS meeting was on November 9, 2021. During this meeting, Larson discussed his observations of in the classroom. (Exhibit 67, p. 33, 42). During the meeting, NAM staff mentioned the hired a paraeducator to work full time with one on one in the classroom. (Exhibit 67 p. 42). The made this decision because Sister Buettner told the she felt a one-on-one paraeducator was necessary for to remain enrolled at NAM. (189:18-25, 190:1). Larson, and the other LPS MTSS members explained to NAM staff their concerns with having a one-on-one paraeducator in the classroom, including the

potential for learned helplessness. Specifically, Larson explained to NAM staff he did not recommend use of a paraeducator:

That is considered to be the most restrictive support that we can provide, not only in general education, but special education that is for students who have much higher needs than what had . . . it really prevents a student from developing skills necessary to independently cope and engage in social skills that being taught in the classroom. Oftentimes it's called learned helplessness, because the – the adult in the room is taking care of all the student's needs and really, does – does not have any, I guess, social or emotional responsibility for that.

(507:10-23).

Larson also explained his impressions of a 1-1 adult working with : I observed the para-educator try to calm when ripped the paper out. I didn't really see any changes in behavior as a result of that. actually got significantly worse. kind of – started at – with sitting on chair, kind of hugging legs. Para-educator attempted to kind of comfort and – and walk through it. And that escalated to lying on the ground and just refusing to do anything.

(506:21-25, 507:1-4). NAM staff were present for Larson's recommendations regarding the paraeducator and learned helplessness. (514:24-25, 515:1-25, 516:1-6).

At the conclusion of the December 21, 2021, MTSS meeting, the team made a referral to the LPS Autism team to see if additional support could benefit . (Exhibit 67 p. 27, 31, Exhibit 73). LPS made a referral to the Autism team on December 22, 2021. (Exhibit 73, Exhibit 76 p. 2). The MTSS team did not make a recommendation to involve the Autism team earlier because “we wanted to problem solve on intervention strategies. We don't typically jump straight to additional supports unless they're absolutely needed.” (520:6-11). However, the Autism Team could not observe until January 27, 2022. (Exhibit 76 p. 2). Originally, the observation was scheduled for January 5, 2022, because LPS and NAM were on Winter break from December 23, 2021 until January 4, 2022. (Exhibit 76 p. 2; Exhibit 74; Exhibit 75). The January 5, 2022, observation was cancelled by NAM because of its Christmas program. (Exhibit 76 p. 2). The observation was rescheduled to January 11, 2022, but was cancelled by NAM due to being sick from January 10-14, 2022. (Exhibit 76 p. 2, Exhibit 138). Then, LPS offered January 18, 19, or 20 for an observation, but the first date that worked for both schools was January 27, 2022. (Exhibit 76 p. 2).

The Autism Team observation was completed by Brigette Morgan, the head of the LPS Autism Team. During her observation, Ms. Morgan noticed:

was a super sweet , very talkative when went back to math. But was in the classroom participating, engaged, had very similar – you know, when you sit in the back of a classroom, especially in like first or second grade, you get to see a nice variety of kids' behaviors. And was very age appropriate where, you know, sometimes we fiddle on our desk a little

bit or we're kind of looking around or talking to a peer when the instruction is going on. But _____ just fit in very nicely with the group. I would never have pinpointed _____ as a student that was having a concern. The only reason I knew that _____ was the student there was specifically because the adult was right there with _____. And so, I was able to kind of work through that. _____ participated in class, raised _____ hand, answered questions, did great with _____ peer that they did partner like during talk exchanges within that whole group instruction.

(613:7-24).

Morgan also believed the paraeducator was distracting for _____ and she disagreed with NAM's decision to pull _____ from group math instruction in the general education classroom:

[T]he para sat right next to _____, and guided and prompted _____ for a variety of different behaviors, so to speak. One of which was like the picking of nails, which kind of was – would distract _____ from the whole group instruction. So, it would take away _____ attention from focusing on the teaching back to what the adult had said, and then _____ missed bits of whole group instruction. You know, _____ was pulled for math, so those certain things that I just – when _____ got – when _____ pulled – was pulled from math I went with _____. And that's our biggest thing is we want kids in the classroom. So that was one of my big recommendations is keep _____ in the math classroom and let's see what is going on within the whole group instruction that is causing kind of that – that spike in behavior during that time of day. Just because when you pull a student, the instruction is not exactly the same as it would be from that certified staff. And so, we want to keep them in that environment, that's always our goal is to get students access to that tier one instruction at all times.

(614:2-22).

Moreover, Morgan felt the paraeducator was hindering _____ learning: When you have an adult, again that's the most restrictive strategy or support you can provide within the general environment. They tend to focus or hyper focus on the student's that they're with, which then turns to a lot of redirections that typical children do. Lots of kids dig in their desks or pick at their nails or kind of stare off, counting ceiling tiles, like whatever it is. Then that adult continued to redirect _____ constantly, which to me caused a withdrawal from the tier one intervention, that full group instruction. So, then _____ focusing on like the nail picking and missing out on what is occurring. I also didn't see as much academic support as I was assuming going into the picture. When I go in and there's a student that has close supervision, they are needing a ton of additional support. And so, I see paras usually sitting for long periods of time or not prompting. My personal notes are also in evidence, and so you can see time periods where I saw large

chunks of time where the para didn't do anything, was just sitting there supporting by sitting. But was participating, actively engaged, completing the work in a timely manner. So yes, I do – I do believe it was hindering ability to – to process and learn and to be able to problem solve through observation and age-appropriate behavior.

(616:12-15, 617:1-11).

Morgan chose to do another observation of because family had informed would be observed on January 27, 2022, and Morgan wanted to observe on a day with a flexible schedule, where would not know would be observed. (617:17-25, 618:1-12). The second observation took place on February 3, 2022. (Exhibit 81 p. 5). During this second observation, Morgan noted minimal issues with :

I think the only difference was that they were practicing for communion. So, Father had come in, which had like interrupted a lesson, which was great to see that he had come in, had to stop what was doing and then they were practicing for a communion that was going to occur that weekend. I think once had asked why had to hold hands in a certain position when going up and getting offers. And so that was the only kind of – as the para had classified it defiance, I would not call it defiance, I would call it questioning as to why. just wanted to know why. And so that was the only quote, 'behavior' that I saw during the observation.

(618:16-25, 619:1-4).

On February 9, 2022, the MTSS team met with Mr. and Mrs. to discuss Ms. Morgan's observations and recommendations. (Exhibit 83). In addition to the regular MTSS team members, this meeting included general education teacher, Summer Utrup, Melissa Peters, a math interventionist at NAM, and Whitney Husted, paraeducator. (Exhibit 83). At the meeting, Morgan recommended:

So again, just pretty basic tier two interventional supports. So, providing that visual schedule, letting know ahead of time when a change is going to happen or occur, you know. And then the biggest pieces that check in and check out are getting data. So, the data that we had received from the BIP that Seth had written and then implemented was all he had done with the data. So, there was no concrete evidence to tell us what the duration, frequency, or intensity of behaviors were. It was a good day or a bad day, or at this or that. So, it gave me absolutely nothing to go off of for like, how often is this occurring? How intense is it? At what time of day is it occurring to where we need to pinpoint additional strategies? So, the check in and check out was one big recommendation that Seth recommended. And then when I went out, it was not implemented. And so that was my big piece was like, 'we have to get this going to get solid data to tell us what time of day this is occurring, how often it is, which will guide us on where our interventions go.' And so, through that, this meeting, we talked about that

check in and check out and we talked with the family on how most of the time we have reinforcers, students we want 80 percent better. And then based upon our reinforcements, like what would _____ like to earn? Do we want to do it at school? Do we want to do it at home? Kind of what that process is. Just because as kids get older, there's you know, not a ton of really motivating things in school when Fortnite and Xboxes are at home, they'd rather earn some time on that than a pop in from their teacher. So, kind of partnering with the family on how we could embed a check in and check out system with that triaging for _____ to process through. Because ultimately, we need _____ to stop, reflect upon _____ behaviors, and then what we can do better next time. Tying that to a score for _____ that is concrete so can help process through that, and then earning a prize for that behavior and then how can we process it next day and refix it. So that was a big piece of my recommendation was that check in and check out, and then how we can tie that into a reinforcement system, whether it's at home or in school. They were already within the classroom doing second steps, which is a social emotional curriculum less than daily. And so, my – one of my recommendations was to make sure that _____ in that – that class period, like time of day to ensure _____ getting those lessons. But then he was also getting a meeting with a counselor once a week to also target specific social skills instructions. And so, through that, I had written a few pieces of like, winning and losing I know was a hard skill that _____ was struggling with. Not finishing during a set period of time, so some kids, you know, we have to pause, and we'll come back later. That was also a concern of theirs that they had mentioned – that North American Martyrs had mentioned. So really focusing in on those targeted social skills during that time with the counselor, but then also still keeping _____ – making sure _____ is in that class for that social/emotional curriculum.

...

[T]he biggest piece is getting that para pulled off of him. I don't want _____ to have learned helplessness, which is where _____ is just reliant on that adult to ask rather than truly, critically thinking and problem solving, and then working through that process and then asking for help when needed. Learned helplessness is just kids not wanting to put that effort forward in problem solving, and so they just seek adults to help them get by. And then great adults in this world, but a lot of times they overly prompt them to get kids that answer. And so that is something I really didn't want _____ to learn long term, because _____ does have the skills to listen, participate in full group. _____ able to problem solve and scan and imitate what other kids are doing, which is a great skill to be able – _____ has those foundational skills to be able to problem solve within that classroom environment.

...

[W]e want _____ in that general ed, tier one group instruction again. One, so we could get some data to support like, which is truly occurring during that 60 minutes that is causing _____ to escalate or get upset. Like, what's occurring within that time frame, and then also to ensure that certified staff are providing _____ with that instruction.

(620:3-25, 621:1-25, 622:1-25, 623:1-15).

During the February 2022 MTSS meeting, Morgan also emphasized to NAM staff the importance of Larson's earlier recommendations, such as check in and check out. (623:22-25, 624:1-2). Morgan noted that according to the data presented by NAM, those interventions were not being implemented by the classroom teachers with fidelity. (623:22-25, 624:1-12). To assist, Morgan, Green and Risueno:

[W]e sent them three different templates of check-in and check-out and sheets that they could customize to _____. We created social stories for them, we created a grid outline of the scores to help break them down and become concrete . . . and then worked with Summer on like, which one was going to be the best for _____, formatting wise. We created a Google spreadsheet to embed all of the data so we could create graphs and trendlines and all of that from the data. And then Social Story . . . I sent them a template of how to create a social story, just a guidance for them, and then let them know like, if you guys have specific skills that you're wanting, let us know because we have banks of social stories that we can help provide.

(625:5-7, 626:3-19).

Throughout the 2021-2022 school year, the MTSS team saw _____ make growth in areas of concern:

_____ was making growth with _____ math intervention. And so, we have data that North American Martyrs provided for those MTSS meetings to show _____ was making growth. We also have _____ check-in and check-out data that also showed _____ was making progress in the area of behavior and social emotional needs.

...

One of the things that I noted was that elopement was one of the problem behaviors, and then I think even before maternity leave, elopement was no longer an issue, so the fact that – it doesn't mean that there weren't still skills that _____ was needing to build on, but that they had targeted that problem behavior and that was no longer one day they were struggling with or that was happening with great intensity or frequency would show that those were quickly addressing that.

...

When I had gone out in January, the concern was math, but looking back at December scores to January, had made significant growth.

...

was showing progress and growth when in those tier two systems in both computation and concepts and applications. made growth on those metrics. And also was above 80 percent for that average on check-in and checkout as well. So, was performing well in those matters.

(422:15-23, 583:5-15, 638:10-12, 724:8-13; Exhibit 8).

On March 2, 2022, Sister Janelle Buettner sent a list of students to Mindy Roberts whom “we feel should be evaluated [for special education services] before the end of the year,” including . (Exhibit 90 p. 3). On March 3, 2022, filed a complaint with the Nebraska Department of Education stating felt that LPS should evaluate for special education services. (Exhibit 91). On March 31, 2022, emailed Dr. Roberts and requested a special education evaluation for . (Exhibit 92, p. 3). On April 1, 2022, Dr. Roberts responded to email indicating that the next step, for LPS, would be to hold an MTSS team meeting to review data and determine whether this problem-solving team is also in recommendation of an evaluation for special education services. (Exhibit 92 p. 2-3).

The MTSS team met on April 12, 2022, to discuss the request for a special education evaluation for . (431:20-25, 432:1-15; Exhibit 95). LPS calls this type of meeting an MDT-1:

[A]n MDT [1] [is] where we really look at all the information, and then determine what assessments would be necessary. So, after looking at all the data, and if we did agree to move forward to an evaluation, then we set that evaluation plan, and that’s really led by the school psychologist after looking at all the information about the student.

(432:9-15).

At the conclusion of the MDT-1 meeting, the MTSS team decided to proceed with a special education evaluation for . (432:20-23). To begin the evaluation process, and to know which assessments Larson would request consent from the Larson requested the

provide him with all prior evaluations that had been completed for :
[W]e wanted to see what assessments had been done. There are specific expectations for each assessment, and so sometimes, you can’t repeat them, or the data is going to be invalid. And so, knowing what was done before is really helpful because it had been pretty recent. And then Seth had a list of the evaluations that were done a year prior from Iowa, so having that information helped him to build the assessment plan.

(433:12-21).

Larson received the evaluations from the _____ on or about April 19, 2022. (433:25, 434:1-16; Exhibit 97 p. 1). Larson gave the _____ consent to evaluate on April 19, 2022, and _____ signed the document on the same day. (Exhibit 102). On April 21, 2022, LPS gave the _____ a copy of the IDEA Part B Procedural Safeguards and a Prior Written Notice detailing the decision of the MTSS team to evaluate _____. (Exhibits 97-98).

As part of the special education evaluation, Larson asked the _____ to complete the BASC, which is an assessment of various behaviors that the student may exhibit. (526:19-25). Parents and teachers generally provide the information that is evaluated in the BASC. (527:1-13). After the _____ completed the BASC, Larson asked them to complete the BASC a second time because:

It was not – showed a validity or F index that was – I guess, produced results that were not accurate. And after looking at _____ check-in/check-out data and kind of what that showed, I didn't feel like it was a – I guess just a – good measurement of _____ behavior – that we've received.

...

Generally speaking, students who receive those scores [given by parents] are considered to be in the top three percentile as far as like—as having the most significant behaviors that an individual can have. We just were not – the data – other data that we had was not supporting that as an accurate measurement.

(527:18-25, 528:1-13).

While LPS was finishing the evaluations for _____, on May 6, 2022, LPS received the final investigation report from the Complaint _____ filed with the Nebraska Department of Education. (Exhibit 24 p. 1). In the report, the investigator concluded LPS should have started the evaluation process for _____ on December 2, 2021, when _____ claimed _____ called LPS and requested information on how to get an IEP for _____. (Exhibit 24 p. 33). During that investigation, the investigator conducted a telephone interview with _____, Sister Buettner, but not anyone at LPS. (435:13-25, 436:1-13). As corrective action, the investigator concluded LPS must provide compensatory education to _____. (438:17-20). The investigator laid out the following steps for LPS to calculate the amount of compensatory education services to provide to

1. Using the initial IEP that was drafted subsequent to the MDT, the IEP team needs to calculate the total weekly minutes of special education services and each related service that were determined to be needed by the Student to receive FAPE.
 - a. Example- If a special education service was documented as 30 minutes per day five days per week, the minutes per week should be calculated to be 150 minutes. This would need to be repeated for each related service required by the IEP.
2. The IEP Team would need to calculate the total number of minutes of

special education services and each related service for which the student did not receive those services. This is calculated by multiplying the weekly minutes for each service in step 1 by 7 (i.e., 7 weeks is the amount of potential missed instruction had the consent for evaluation been obtained upon Parent request on December 2, 2021, minus the 60 calendar days allowed to complete said evaluation and 30 days to draft an IEP and begin services).

- a. Example- The 150 minutes of special education services calculated in Step 1 are multiplied by 7, the resulting product, 1050 minutes, represents the total number of minutes of special education for which the student did not receive those services. This calculation would need to be repeated for each related service required by the IEP.
3. Next, the IEP Team needs to calculate the compensatory service minutes for special education services and each related service for which the student did not receive those services. Using the minutes value calculated by special education services and each related service in step 2, multiply each value by 0.50. Each product represents the number of compensatory services that need to be provided to the Student. The amount identified here represents compensatory services that can reasonably be provided in addition to the services the student would receive as required by the current IEP taking into consideration the amount of time lost and the amount of time needed to assist the student to recoup what was lost as a result of not having services.
 - a. Example- The 1050 minutes of special education services calculated in Step 2 are multiplied by 0.50 to obtain a product of 525 minutes of compensatory services that need to be provided to the student to address the special education services that were not received by the student. This calculation would need to be repeated for each related service required by the IEP.
 4. The values calculated in Step 3 represent the total number of compensatory services minutes for special education services and each related service that needs to be provided to the student. The IEP Team is responsible for developing a plan that ensures all compensatory services are provided to the student. All compensatory services should be provided in full by October 31, 2022.

(Exhibit 24 p. 34-35).

On May 16, 2022, after all the evaluations were completed, LPS conducted an MDT meeting to review the evaluations and determine whether _____ met the criteria for a disability under Nebraska law. (Exhibit 109). At the conclusion of the meeting, the MDT team determined _____ met the verification criteria for a student with Autism and Specific Learning Disability for writing and math. (Exhibit 112 p. 1; Exhibit 113).

IEP team met for the first time on May 23, 2022. (Exhibit 114). An IEP generally includes the parent, a general education teacher, a special education teacher, any specialists that may be needed, and a district representative. (442:7-13). At first IEP meeting, the following individuals were in attendance: Jennifer Fundus, Alyssa Rousseau (occupational therapist), Seth Larson (individual to interpret evaluation results); Mindy Roberts (district representative), Troy Baker (school psychologist), Ashley Risueno (special education teacher); Angela Green (speech-language pathologist), Amy Bonn (attorney), Greg Perry (LPS' attorney), Kaye Kreikemeier (Nonpublic representative), Melissa Peters (Nonpublic representative), Sr. Janelle Buettner (principal of NAM); Whitney Husted (paraeducator), Elaine Simpson (classroom teacher), Monica Nagel (classroom teacher), Molly Cassidy (NAM school counselor). (Ex. 119 p. 1-2).

At the IEP meeting, Ashley Risueno, a special education teacher, who was also a member of MTSS team, came prepared with a draft of IEP. (683:14-16). Risueno prepared a draft because, "we thought it would be nice for the parents to see just a draft of kind of what the IEP would look like and give the parents the opportunity to see – to see kind of what that might look like, and if they have any questions, then they could bring those up at the meeting." (683:18-23). On the draft IEP, there was no baseline data on proposed writing goal because:

I didn't have any – well, I wanted to use – I was proposing to the team that we use an editing rubric for an elementary writing goal, and wanted to get the team's input at that time, of where the team thought that was at in the areas of a topic sentence, capitalization, correct spacing, and punctuation. So, I wanted to get the team's – the team's input, as far as where at on the rubric, and that's what I would've used before the baseline.

(Exhibit 114 p. 6; 684:6-16).

It is not uncommon for a draft IEP to not have baseline data:

[A] lot of times we need to talk about that, and we want to have information from Seth's evaluation and the standardized assessment test. But we also want to know how students are doing in the classroom, and then through intervention data. So, a lot of times we hold on that until we have a discussion as a team to determine where is the student's present level of performance at right now, and then, what's a reasonable goal? (445:6-14).

Additionally, it is common for an IEP team to hold off on gathering baseline data until the IEP team has a chance to determine appropriate goals.

(445:15-18).

proposed writing goal already had a proposed goal measurement as 15/20. (Exhibit 114 p. 6). Risueno was able to propose this goal measurement because:

I kind of heard a little bit about capabilities for writing from previous meetings, so I had a general idea, but I had never actually seen a writing sample. But a 15 would put as proficient, so meeting grade level standards, which is really where we would want to be. The goal of, you

know, special education is to close that gap so that they're on grade level. (684:17-25, 685:1-2).

The proposed goal measurement of 15/20 was also up for discussion with the IEP team, "I mean we could've changed the entire goal to something else if the team had decided. This was just a proposed goal based on what I had heard about capabilities." (685:3-12). Ms. Risueno was able to obtain writing baseline the next day. (686:12-25, 687:1-10).

The draft IEP also included a proposed social skills goal without baseline data, but the IEP team was able to discuss the goal, and Ms. Risueno gathered the baseline through observation the next day. (685:13-25, 686:1-11; Exhibit 114 p. 7). Additionally, the proposed social skills goal measurement of 9/12 "would put , again, at proficiency." (687:14-18). The proposed math goal did include baseline data because "the progress monitoring tool that we were using for the school was the same progress monitoring tool that Martyrs was already using, so that's why I didn't need any additional data for that goal." (689:10-20; Exhibit 114 p. 8). The proposed math goal measurement of 31 pointes was proposed because, "that would put in the 25th percentile at grade level, which is in the average range." (689:21-25; 690:1).

The draft IEP did not include a proposal for special instruction minutes because Ms. Risueno, "wanted that to be a team discussion based on goals and what needed, and, you know, in order to provide all those services, we have to pull out of the classroom, so that's something that the team also needs to take into account." (690:2-11; Exhibit 114 p. 9). During this meeting, the IEP team decided on appropriate service minutes for , but also stated they would meet again before the school year started for adjustments, if necessary. (690:12-17). The finalized IEP reflected would receive 30 minutes of specialized instruction 18 times per quarter. (Exhibit 119 p. 12). The IEP team believed this was a sufficient amount of time because:

One of the things that we would think about is, like, a period of intervention, which is about 30 minutes of time. So, looking at how many interventions does need? He qualified in the areas of math, writing, and as a student with autism, so has kind of a social skill behavior goal. So thinking about 30-minute interventions, 30 minutes for each of those is why we would've recommended those services.

(441:17-25, 442:1-6). The goals that the IEP team ultimately decided upon were:

Given resource instruction, a graphic organizer, and a writing checklist, will write at least 3 sentences related to a given topic without a model of thoughts around a teacher-selected topic including a topic sentence, using capital and lowercase letters correctly, using correct spacing within and between words, and including end punctuation improving from a baseline of 8/20 to 15/20 as measured by the Elementary Writing Goals-Editing Rubric by May 22, 2023.

...

Given instructions in self-awareness and direct social skills instruction which may include explicit instruction social stories, modeling, video modeling, role-playing, discussion, coaching, and visual cues, will improve social

communication skills by appropriately gaining another's attention, appropriately asking for help, and expressing feelings appropriately (rigidity and negative self-talk) when becoming frustrated increasing from a baseline score of 4/12 to as core of 10/12 as measured by the LPS Social Skills 4-Point Scale by May 22, 2023.

...

Given instruction on using drawings to solve problem solving strategies, will improve math concepts and application skills from a baseline of 20 points at the end of 2nd grade level (16th percentile) to 31 points at the end of 3rd grade level (25th percentile) as measured by Acadience Math Concepts and Applications probes by May 22, 2023.

(Exhibit 119, p. 9-11).

The IEP also called for the following classroom accommodations: small group or 1:1 setting, extended time, prepare for schedule changes, Use of a visual schedule to cross things off as completes them, re-teach procedures (like asking for help or getting the teacher's attention), Use of non-verbal's to respond (like pointing to a behavior chart or Boys Town social skills card), provide frequent attention and reinforcement when exhibiting appropriate behavior (like asking for help or attention in an appropriate way) or approximations of desired behavior, respond quickly when asks for help or attention in an appropriate way, provide a word to dictate a sentence and copy it, provide sentence starters for writing, provide graphic organizers with boundaries for writing provide three-lined handwriting paper for for writing activities or visual supporting paper (i.e. graph paper for math), allow use of manipulatives, number line, counters, or other math tools for math as needed, shorten assignment or activity when demonstrates an understanding of the objective; and the following testing accommodations: flexible testing schedule (break tests into sections, provide movement breaks between test sections, test in a small group or 1:1 setting, allow extra time to complete, allow use of manipulatives, number line, counters, or other math tools for math tools as needed. (Exhibit 119 p. 13). The IEP also included program modifications of, "consider modified spelling list (shorter list, multiple choice, separate list, chunked by sound, letter tiles." (Exhibit 119 p. 3). The IEP included occupational therapy and speech-language services as needed. (Exhibit 119 p. 3).

The finalized IEP did not include the use of a paraeducator for . (691:6-9; Exhibit 119). The IEP team agreed against the use of a paraeducator because, "we need to provide students with the least restrictive environment . . . the behavior data that we've seen, was doing really well in the classroom and was able to do things independently . . . having a p[ara] educator would not be providing with the least restrictive environment." (691:10-18). Additionally, LPS "wouldn't recommend that. We very rarely recommend adult support for students, and typically, students who do have adult support are students who need help with feeding, restrooming, transitioning, like, mobility-wise, transitioning. So adult support for students is typically with the highest level of need." (443:14-19). Moreover, there can be a harm in having unnecessary adult support:

Students can become dependent on the adult and sometimes the [para] can also become a distraction because the student is trying to talk with them or engage with them rather than focusing on the teacher. But the independence piece is huge, and we want kids to be able to engage in classroom activities independently.

(443:20-25, 444:1-2). The IEP team met twice to make these decisions, once after the MDT meeting on May 19, 2022, and again on May 23, 2022. (442:24-25, 443:1-3).

Using the service minutes listed in the IEP, and the instructions from Nebraska Department of Education investigation, LPS calculated it was required to provide with 210 minutes of compensatory services. (446:16-21; Exhibit 119 p. 12, Exhibit 121). LPS had to have the schedule for compensatory services approved by NDE. (447:1-8). In addition to the compensatory service minutes, LPS also offered to provide with 6 hours of extended school year services (“ESY”). (Exhibit 119 p. 12, Exhibit 121). LPS made this decision because, “In case, we were looking at kind of special circumstances for ESY that had just been verified. Hadn’t had the opportunity to have those specialized instructions. So, adding some ESY with the compensatory services gave a nice bloc[k] of instruction in the summer of both June and July.” (448:1-6). The signed consent for LPS to provide special education services to on May 23, 2022. (Exhibit 120). However, the also indicated their disapproval of the IEP because they felt the process was inappropriate. (Exhibit 119 p. 20-23).

LPS provided with 6 hours of ESY and 3.5 hours of compensatory services over the Summer of 2022. (447:9-14; Exhibit 122). LPS has completed its requirements for under the NDE investigation. (447:9-14).

On August 1, 2022, the requested an Independent Educational Evaluation (“IEE”) in the areas of speech and pragmatic language and gross and fine motor skills for . (Exhibit 123). Dr. Jennifer Fundus provided a list of approved evaluators to the on August 2, 2022. (Exhibit 124).

In the Fall of 2022, IEP team met for an multiple IEP meetings. (Exhibit 125-126, 129). At the first meeting, the IEP team members included: , Jennifer Fundus (District Representative), Mindy Roberts (District Representative), Alyssa Rousseau (Occupational Therapist), Timothy Oehring (Special Education Teacher), Laura Sousek (Speech-Language Pathologist), Amy Bonn (Legal Counsel for the), Elaine Simpson (Nonpublic General Education Teacher), Greg Perry (legal counsel for LPS), Kaye Kreikemeier (Nonpublic District Representative), Melissa Peters (Nonpublic Interventionalist), and Sr. Janelle Buettner (Nonpublic District Representative). The most significant change to IEP was the addition of attendance at a social group at Fredstrom Elementary, an LPS elementary school:

will receive social skills instruction in a special education small group setting. will receive instruction on this goal for 25 minutes, 16 times per quarter by a special education teacher in the public-school setting. Parents have elected to have participate in social skills instruction at an LPS public school on Tuesdays and Thursdays from 1:30-1:55.

A speech-language pathologist will consult with _____ teachers on an as needed basis.

(Exhibit 134 p. 12).

The IEP called for _____ social group to be at an LPS Public School so that _____ could have direct instruction in a group setting, with non-disabled peers:

This gave _____ the opportunity to be around other peers working on those same skills, so _____ has the opportunity to put those into practice as opposed to the one- on-one environment with [Tim Oehring], where we're kind of talking through issues but _____ not putting things into practice.

(721:10-18). This type of interaction cannot happen at NAM because a public school teacher cannot provide instruction to a group of students at a religious school, unless they are working with those students pursuant to an IEP. (450:17-25, 451:1-17, 721:19-25,722:1-7).

The IEP team also offered additional compensatory services to the _____, which they did not accept: "LPS recommended additional compensatory services from October 3 - December 22 at a Lincoln Public Schools site for 25 min per week after school for a total of 300 minutes. Parents declined these compensatory services." (Exhibit 134 p. 12).

On November 7, 2022, LPS sent a prior written notice to the _____ in response to their request for LPS to "provide compensatory services for _____ in the area of social skills at North American Martyrs." (Exhibit 128). The _____ had previously declined compensatory services at LPS "out of concern for the additional transitions for _____ and the challenges that might pose for _____." (Exhibit 128). In the prior written notice, LPS rejected the request because, "providing services at NAM would increase the likelihood of multiple special education teachers providing services, adding to transitions for _____ and the challenges that might pose for _____." (Exhibit 128). LPS offered "to discuss providing social skills instruction for more than the two days per week that parents have agreed to in the IEP." (Exhibit 128).

The IEP team met again on November 29, 2022, to review the results of the independent educational evaluation obtained by the _____ but paid for by LPS. (Exhibit 127, 130, 133). During the meeting, the parents requested:

1. Add Occupational Therapy minutes as a related service
2. Add Speech/Language minutes as a related service
3. Begin social skills instruction at Fredstrom Elementary School on Tuesdays and Thursdays from 1:30-1:55
4. Include additional accommodations in the areas of language, sensory, and response.

(Exhibit 132). In response, the District, "considered all requests and the IEP team agreed to items 3 and 4 while rejecting items 1 and 2 at this time due to _____ current progress, the need for flexibility in supporting him across all educational environments, and IEE recommendations for language needs already being in place and provided by _____ special education teacher." (Exhibit 132).

The _____ signed the IEP on November 30, 2022, declining to answer whether they agreed with the IEP. (Exhibit 135). The _____ wrote, "see pending due process petition."

(Exhibit 135). The [redacted] began sending [redacted] to [redacted] social skills group at Fredstrom in December 2022. (Exhibit 136).

[redacted] has made progress in the 2022-2023 school year:

When looking at [redacted] last progress report data, writing, he is out of ten out 16 on a rubric. And I believe [redacted] started at eight. Math, [redacted] at 32 correct digits . . . [redacted] started . . . six digits . . . and social skill-wise, [redacted] making 87 percent average on [redacted] behavior chart or check in and checkout process, and seeing some good growth in gaining attention appropriately, expression – expressing emotions appropriately, and asking for help appropriately.

(Dr. Mindy Roberts testimony, 448:15-25).

Q. Okay. If we look at [redacted] writing goal on page one of this document, as of October of 2022, [redacted] had a master level of four.

A. Uh-huh

Q. [redacted] what does that tell us?

A. That would show us [redacted] making sufficient progress towards achieving goal within the duration of this IEP

Q. Is having a four on a progress report a good thing?

A. That's huge

Q. That's huge. If we – okay, if we look at [redacted] social skills . . . it looks like as of October 14, 2022, [redacted] mastery level was a three. What does that mean?

A. That the student has demonstrated some progress towards achieving goal. Is showing growth but has not - - not yet met.

Q. Is that normal to have a three on a progress report?

A. I would say no for a student that has just been identified, because typically there's a pretty big gap between their skill set and really the role set for them.

Q. So you would've expected that mastery to be lower, is that what you're saying?

A. Yes, for, I guess, a – a student with – with the same difficulties that has.

Q. And then if we look at the top of page two, which is progress for math goal on October 14, 2022, [redacted] mastery level was a four, is that correct?

A. Yes.

Q. Again, is that a big success?

A. Yes. That's huge.

...

[redacted] was able to show significant progress in a short period of time. I know kids with autism often struggle with big transitions, and I think that transition from, like I said earlier, Iowa to Lincoln, was – was a big for [redacted] and it – it really prevented [redacted] from being successful. I think we're seeing [redacted] settle in and kind of develop [redacted] the teams that helped [redacted] be more successful with is behavior and [redacted] academics.

(Seth Larson, Ed.S testimony, 531:25, 532:1-25, 533:1-8, 533:15-23).

So, for writing, he went up from 12 to 13 out of 20, so it's not a big jump, but it's progress. In social skills, was at a five compared to baseline of four. And for the math goal, went up from 6, to 13, to 15, which is really great growth in a short amount of time.

(Ashley Risueno, Special Education Teacher, testimony, 695:20-25)

continued to make some really great strides in each of those academic areas. For March progress monitoring on math, scored 35 points on that, which bumped up into the average range for math. in the 30th percentile currently for that. For social skills, when we sent out a survey to North American staff, each staff member placed at three out of four points, showing that meeting those classroom expectations and behaviors and social skills as determined by North American Martyrs staff.

...

To achieve grade level expectations in some of those IEP areas from August to February, March, is pretty rapid growth.

(Tim Oehring, Special Education Teacher, testimony (723:18-25, 724:1-2, 724:21-24).

We can see that is making growth in IEP areas and this one goes up through, I believe, December. So, in the social skills area, we started to see some of those classroom teachers and specialists in North American Martyrs start to put forth some of those threes where is meeting those expectations in the classroom. You can see the beginnings of math to really start to shine through. That's on page 6 for math, where bumped up to 17 correct in December. And with the more recent one that will be coming out in March, has even increased since then to 35 correct points. So, is – doing well, and this shows kind of the beginning stages of what we've seen even more recently.

(726:20-25, 727:1-8).

ANALYSIS AND CONCLUSIONS OF LAW

The Hearing Officer makes the following conclusions of law and determines as to mixed questions of fact and law based on the stipulations of the parties made on the record and the evidence presented during the hearing:

I. Standards of Law

1. **Burden of Proof.** The have the burden of proof in this proceeding: "The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief. In this case, that party is [Sarina], as represented by [her mother]." *Schaffer v. Weast*, 546 U.S. 49, 62 (2005). *See also Lathrop R-II School District v. Gray*, 611 F.3d 419 (8th Cir. 2010) ("the burden of persuasion remains with Gray as the party challenging the IEP," *citing Sch. Bd. v. Renollett*, 440 F.3d 1007, 1010-11 (8th Cir. 2006).

2. Free Appropriate Public Education Standard. The ultimate issue is whether a free appropriate public education (“FAPE”) has been provided or made available to [redacted]. The United States Supreme Court in *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1000 (2017), gave us the following FAPE standard: “[redacted] educational program must be appropriately ambitious in light of [redacted] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives.” *Id.* A child is to be provided with “an educational program reasonably calculated to enable [redacted] to make progress appropriate in light of [redacted] circumstances.” *Id.* At 1001.

3. Procedural Issues. The IDEA has both procedural and substantive components. With regard to alleged procedural violations of the IDEA, a hearing officer may find a violation of the IDEA only if the violation “(I) impeded the child’s right to a free appropriate public education; (II) significantly impeded the parents’ opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents’ child; or (III) caused a deprivation of educational benefits.” *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 525-26 (2007). *See also* Ex. 109, 92 NAC 55-008.03; *W.K. v. Harrison Sch. Dist.*, 509 F. App’x 565, 566 (8th Cir. 2013) (*citing Sch. Bd. Of Indep. Sch. Dist. No. 11 v. Renollett*, 440 F.3d 1007, 1011 (8th Cir. 2006) (“in determining that school district provided free appropriate public education, noting that individualized educational program should be set aside only if procedural inadequacies compromised student’s right to appropriate education, caused deprivation of educational benefits, or seriously hampered parents’ opportunity to participate in formulation process”); *Fort Osage R-1 Sch. Dist. V. Sims*, 641 F.3d 996, 1002-03 (8th Cir. 2011).

II. Child Find Issue

The [redacted] allege LPS failed its child find obligations related to [redacted] by failing to evaluate [redacted] for special education services until May of 2022. (Exhibit 3). Nebraska law requires that:

All children with disabilities residing in the state, including children with disabilities who are homeless children or wards of the State and children with disabilities attending nonpublic schools, regardless of the severity of their disabilities, and who are in need of special education and related services, shall be identified, located, and evaluated and a practical method shall be developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.

92 NAC § 51-006.01A.

Whether a violation of child find is procedural or substantive has not been decided by the 8th Circuit Court of Appeals. *See Indep. Sch. Dist. No. 413 v. H.M.J.*, 123 F. Supp. 3d 1100 (D.

Minn. 2015). However, circuits which have made a determination have concluded a violation of child find is a procedural violation under the IDEA. *See, e.g., Mr. F. v. MSAD # 35*, No. 2:20-cv-00220-NT, 2021 U.S. Dist. LEXIS 100636, at *7-8 (D. Me. May 21, 2021); *N.P. v. West Hartford Bd. of Educ.*, 885 F.3d 735, 750 (2nd Cir. 2018) (“In accord with other Courts of Appeals, we consider a violation of Child Find obligation a procedural violation of the IDEA.” (citing *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249 (3d Cir. 2012); *D.A. ex rel. Latasha A. v. Houston Indep. Sch. Dist.*, 629 F.3d 450, 453 (5th Cir. 2010); *Bd. of Educ of Fayette Cnty., Ky. v. L.M.*, 478 F.3d 307, 313 (6th Cir. 2007))); *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 1118-19, 1124 (9th Cir. 2016 (analyzing a child-find error as a violation of the ‘procedural requirements of the IDEA’); *see also, e.g., R.M.M. v. Minneapolis Pub. Sch.*, 2016 U.S. Dist. LEXIS 15773, at *52-53 (D. Minn. Feb. 8, 2016) (analyzing a child find violation under the guidelines for a procedural violation).

In order to meet their burden of proof related to this issue, Petitioners “must show that school officials overlooked clear signs of disability and were negligent in failing to order testing, or that there was no rational justification for not deciding to evaluate.” *Ja.B. v. Wilson Cty Bd. of Educ.*, 61 F.4th 494 (6th Cir. 2023) (quoting *Bd. of Educ. of Fayette Cty v. L.M.*, 479 F.3d 307, 313 (6th Cir. 2007). “Child Find does not demand that schools conduct a formal evaluation of every struggling student.” *Id.* (quoting *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 249 (3d Cir. 2012)). Indeed, “[a] school’s failure to diagnose a disability at the earliest possible moment is not *per se* actionable, in part because some disabilities are notoriously difficult to diagnose and even experts disagree about whether [some] should be considered disabilities at all.” *Id.*

A school district’s child find obligation is triggered when children “are suspected of being a child with a disability . . . even though they are advancing from grade to grade.” 34 C.F.R. § 300.111(c)(1); *see also J.M. ex rel. C.M. v. Summit City of Bd. of Educ.*, 39 F.4th 126, 142 (3d Cir. 2022). Districts must act “within a reasonable time after school officials are on notice of behavior that is likely to indicate disability.” *D.K. v. Abington Sch. Dist. v. O.W. ex rel Hannah W.*, 961 F.3d 781, 791 (5th Cir. 2020). A school district must begin the evaluation process within a reasonable time after the district is on notice of a likely disability.” *W.A. v. Hendrick Hudson Cent. Sch. Dist.*, 927 F.3d 126, 144 (2d Cir. 2019). “A delay is reasonable when, throughout the period between notice and referral, a district takes proactive steps to comply with its child find duty to identify, locate, and evaluate students with disabilities.” *Spring Branch Indep. Sch. Dist. v. O.W.*, 961 F.3d 781, 793 (5th Cir. 2020), *cert denied*, 141 S. Ct. 1389, 209 L. Ed. 2d 129 (2021). The IDEA does not specify a time limit between when the child find obligation is triggered and when an evaluation must occur. *Mr. F. v. MSAD # 35*, No. 2:20-cv-00220-NT, 2021 U.S. Dist. LEXIS 100636, at *57 n. 30 (D. Me. May 21, 2021). Cases which have been found to have an unreasonable delay involve delays greater than six months. *Id.*

Importantly, Nebraska law does not allow the immediate evaluation of children with suspected disabilities:

For a school age student, a general education student assistance team or comparable problem-solving team **shall be used** prior to referral for

multidisciplinary team evaluation. The SAT or comparable problem-solving team shall utilize and document problem solving and intervention strategies to assist the teacher in the provision of general education. If the student assistance team or comparable problem-solving team feels that all viable alternatives have been explored, a referral for a multidisciplinary evaluation shall be completed.

92 NAC § 51-006.01B (emphasis provided). This is not a requirement of the IDEA, instead it is an extra step Nebraska chose to include in its special education regulations. *Compare* 92 NAC 51-006.01B *with* 34 C.F.R. § 300.111. This is a requirement other states have included as well. *See e.g.*, Ala. Admin. Code § 290-8-9-.01(4) (“[b]efore a child is referred for special education evaluation or concurrently during the valuation process, intervention strategies must be implemented in the general education program and monitored by a Problem-Solving Team (PST) for an appropriate period of time (a minimum of eight weeks) and be determined unsuccessful.”). That is why it is important to distinguish between cases wherein the court determined a school violated its child find obligation by not completing an evaluation quickly enough under the IDEA, or their own state law, from the facts of this case. Relevant cases will be those which also require a school district to try pre-referral, tier-two, interventions prior to a special education evaluation.

The entered into evidence a letter from the US Department of Education dated January 21, 2011, and titled A Response to Intervention (RTI) Process Cannot Be Used to Delay-Deny an Evaluation for Eligibility under the Individuals with Disabilities Education Act (IDEA). (Exhibit 25). The Petitioners allege this letter supports their contention that LPS could not engage in the MTSS process (the name of the problem-solving process at LPS) and instead must have evaluated as soon as their Child Find obligations were triggered. The letter does not support the claim MTSS is not allowed. In fact, the letter clearly states:

OSEP supports State and local implementation of RTI strategies to ensure that children who are struggling academically and behaviorally are identified early and provided needed interventions in a timely and effective manner. Many LEAs have implemented successful RTI strategies, thus ensuring that children who do not respond to interventions and are potentially eligible for special education and related services are referred for evaluation; and those children who simply need intense short-term interventions are provided those interventions.

(Exhibit 25 p. 2). Therefore, as long as MTSS, or another problem-solving process, is used appropriately, and as long as a child is continuing to respond to lower level interventions, schools are encouraged to use a problem solving process prior to referral for special education.

Petitioners failed to fulfill their burden to prove LPS violated its child find obligations or that it unreasonably delayed a special education evaluation for LPS’ Child Find obligation was triggered on October 18, 2021, when Molly Cassidy from North American Martyrs emailed school psychologist, Seth Larson, stating that had just moved to Lincoln, was previously on an IEP, had been dismissed from special education, but was exhibiting significant

behaviors in school; and when Mr. Larson was presented with signed permission from [redacted] to have [redacted] start the SAT process. (Exhibits 65-66).

Petitioners assert at this time, LPS should have recognized [redacted] was a student with a disability and should have proceeded to obtain parental consent for a special education evaluation. However, that contention ignores the requirements of Rule 51 and Ms. Cassidy's specific request for Tier 2 interventions. Instead, LPS appropriately complied with Rule 51 by engaging in the MTSS process. LPS quickly convened its MTSS team on October 26, 2021 (9 days after Cassidy's email to Larson), to discuss possible interventions for [redacted] (Exhibit 67 p. 42-43). The MTSS team, which consisted of special education teachers, a school psychologist, a school counselor, and general education teachers from NAM planned for Larson to observe [redacted] to prepare and FBA and a BIP. The MTSS team also recommended NAM implement other tier-two interventions such as use of a timer, visual schedules, opportunities to earn break, etc. (Exhibit 67 p. 43-44). Seth Larson observed [redacted] on October 28, 2021. (500:5-11; Exhibit 68). The MTSS team met again on November 9, 2021, to discuss [redacted] (Exhibit 67 p. 33, 42). The team discussed the BIP prepared by Larson would be implemented at NAM for 4-6 weeks, along with a check-in-check-out process. at NAM. (Exhibit 67 p. 42). The team also recommended the use of social stories for [redacted] Larson prepared an FBA and BIP by November 10, 2021. (Exhibit 69 p. 2; Exhibits p. 70-71). This BIP, while tailored to [redacted] needs, is not the same as specialized instruction. It is a general education process that can be implemented in the general education classroom. (393:7-10).

Again, Petitioners argue at this juncture, LPS should have recognized [redacted] was a child with a disability and should have made a referral for a special education evaluation. However, at this time, [redacted] had been enrolled at NAM for less than a month and LPS was aware [redacted] had just recently been dismissed from special education and that [redacted] was evaluated in May of 2021 and determined to not qualify for special education services. Dr. Roberts testified:

Q. What did you learn about [redacted] past special education involvement before coming to LPS?

A. So in talking with the team, we learned that [redacted] did have a verification previously, and I believe that was out of state, maybe Louisiana. And then when we moved to Iowa, they accepted that verification for [redacted], and then dismissed [redacted] in May, I think, of 2020. Then May of 2021, Iowa did a new evaluation, at which time they found [redacted] did not qualify. And I think some of the things I talked about where [redacted] was being successful with accommodations at that time. [redacted] had been, like, on some virtual instruction, which the pandemic let a lot of students – gave them that opportunity. So that's, you know, another piece – a factor to think about, was that strong instruction, and that they at that time did not see an impact on educational performance. So that was in May, you know, just six months or so before enrolled at Martyrs. So we looked at that as a factor of data.

(416:16-25, 417:1-9).

Another important piece of data the MTSS team considered was the fact the [redacted] had just moved from [redacted] to Nebraska. Everyone was aware of how significant the move was for [redacted]. [redacted] testified:

[redacted] did not handle the move well, we were – I – I say we were blindsided by [redacted] behaviors when we were initiating the move. Here we had a – a well-mannered eight year old, knew [redacted] manners, polite, “yes, ma’am. No, ma’am.” Of course [redacted] would have the – the meltdown of – of wanting to do things [redacted] way, and – and there were – there were struggles along the way. But it – it flipped a switch for us when – when [redacted] was approached with moving and – and losing a lot of that comfortability and familiarity of where [redacted] was.

(44:8-22). [redacted] even testified that prior to Sister Buettner suggesting the idea, the idea that [redacted] could have autism was not even on the family’s radar. (45:6-17).

[redacted] similarly testified:

It was a rough time for [redacted] was struggling emotionally with the move. I know at first [redacted] didn’t want to, I guess when [redacted] came to that realization. And I know emotionally [redacted] was struggling with it and I think that just trickled over into [redacted] academics and it’s kind of like [redacted] shut down on some things or I guess most things. [redacted] was kind of fighting us on that. It has gotten better since then, but – yeah.

(153:12-25, 154:1). The move was significant to the MTSS team in determining how to proceed with [redacted] because:

We knew that [redacted] had come to North American Martyrs from a different state. [redacted] moved states, [redacted] moved schools, [redacted] moved new houses – or a new house. So a lot of changes for a second grader. So we needed to give time to adjust to [redacted] new environment. We also knew that . . . we knew that [redacted] had been dismissed from special education at [redacted] previous school, and it said in there that [redacted] was doing fine with accommodations in the classroom. So that was also a factor. We just needed to get some more time to get to know [redacted].

(675:21-25, 676:1-10).

Petitioners also asserted by the November 2021 MTSS meeting, LPS was aware had a medical diagnosis of autism, and therefore, they should have referred [redacted] for a special education evaluation. The assertion is not correct for two reasons. First, several experts testified as to why a medical diagnosis of autism does not result in an automatic referral for special education services. Dr. Roberts, testified:

It's always one factor. So we would take any information a parent brings to us and consider that as data to include in looking at the big picture of – of a student. So a medical diagnosis would be one factor. You know, when you get down to end of an evaluation, you have three questions you have to answer. And one of those is, “Does the student have a disability?” So if they

have a medical diagnosis, likely we could say yes to that question. The other two are – are about is there an adverse effect on their education, and then, do they need specialized instructions? So the medical diagnosis doesn't help us answer those other two questions . . . The other two questions are answered through the MTSS process and following that process of intervention, progress monitoring and problem solving.

(411:22-25, 412:1-19). Dr. Roberts also explained the MTSS team did not take immediate steps with knowledge of medical diagnosis because:

Probably because we hadn't had those other foundational pieces in, the FBA and the BIP. And also because information we had regarding previous school records told us, you know, was being successful with accommodations only. And so you know, we were really targeting behavior, too, at that point. Because that was North American Martyrs biggest concern was behavior in, like, that October, November period.

(421:14-24). Similarly, Larson testified:

Just having a medical diagnosis of any kind does not immediately mean that we need to evaluate. We really look at how adverse of an impact that medical disability is having on their education. And with , we were feeling good about the interventions that we were trying and – and the growth that been making.

(516:20-25, 517:1-8). Hess, another School Psychologist, testified:

Q. If the student has a medical diagnosis of autism, does that automatically mean that the autism team needs to be involved?

A. No.

Q. Why not?

A. It – it's going to depend on the – the needs of the student. So I've done many evaluations without the use of the autism team because the – the student didn't show a need to have additional levels of support or expertise brought in, so – and – and they don't – they aren't the ones that do a full evaluation anyway.

...

Q. And then what is the difference between a medical diagnosis for autism and a verification for special education services of autism?

A. Sure, so medical diagnose would be looking at the ICD codes or the DSM to give – to say that a student meets diagnostic criteria under the DSM for autism. An educational verification is us looking at atypical development across three different areas and saying that it is impacting them socially, emotionally, behaviorally, academically in the school, whereas in - a medical diagnosis does not have to show that same impact.

Q. So it's possible for a student to have a medical diagnosis of autism that does not impact them socially, emotionally, behaviorally, and academically?

A. Correct. It may not show it to the level of need where they need specialized instruction.

(574:22-25, 575:1-25, 576:1-3). Morgan, who is specially trained to work with students with autism testified:

[W]e have many students that come in with medical verification of autism, which is a piece of evidence that we can use for the process of an evaluation if that's the path we are going on for that specific student. Just because they have a medical diagnosis doesn't mean they automatically shift in to get an educational verification. Some students have medical diagnoses and it doesn't impact their education, they're still able to keep up with the grade level curriculum, socialize and things like that. And so it's not a, if you have one you get the – you get one in school too. Through the verification within the educational setting, there's still that three criteria to – to process through. There's additional testing and adaptive skills that go into place to ensure that, if we go through a verification of autism that it is impacting their education, not just because a medical professional has given them a diagnosis means that they automatically get a school verification.

(609:18-25, 610:1-14). Morgan also testified there can be a harm in starting special education services for autism before going through lesser interventions:

[I]f there are interventions in place that can help support the students at that tier two level to help keep them in that general ed and then they're sustaining and making growth, then jumping straight to special education services can harm them. Depending on if that student is going to be pulled out for multiple periods or long periods of time for that intervention, if the teacher is putting them in a small group, whatever it might be, we're reducing their ability to tap into that general education environment depending on the service delivery. And again, to kind of go back to what Mrs. Hess has said, you know, verifying a student as disabled is a big decision, and so we want to make sure that we've exhausted all of our interventions out there before we jumped to that – that diagnosis or that verification.

(610:19-25, 611:1-9).

The second reason the assertion regarding medical diagnosis is incorrect is because the did not have a medical diagnosis of autism for . The diagnosis was given until February of 2022. (Exhibit 11). Therefore, I conclude LPS did not violate its child find obligation by not referring for a special education evaluation as soon as they became aware of medical diagnosis for autism.

The MTSS team met again on December 21, 2021, to discuss progress. (Exhibit 67 p. 27, 31). At this point, had been a student at North American Martyrs for two months. Staff at NAM noted negative self-talk was down but was still consistent. (Exhibit 67 p.

31). However, as noted by Larson:

[W]e definitely seen improvements in behavior . . . we were in the stages of implementing what's called check-in/checkout. That's an intervention that we do with students to track, one, their performance based on the interventions that we're providing, and it in – in itself is also an intervention. It gives that feedback to students to see, 'hey, you're doing a great job,' or, 'hey, you're – you're kind of struggling here.' We oftentimes will check in with a student at the beginning of the school day to just let them know kind of what's coming up, anything that they might be – or want to discuss. And then we also at the end of the day talk about difficulties that they may have had as well as things that they need to prepare for the next day.

(518:16-25, 519:1-10).

The MTSS team recommended the next level of intervention was a referral to LPS' Autism Team to provide additional support for . (Exhibit 67 p. 31). This was also requested by Sister Buettner. The referral to the Autism Team took place approximately 6-8 weeks after behavioral intervention plan was first implemented. Dr. Roberts testified that this was a reasonable time frame for the referral because, "six to eight weeks is what we would expect us to implement a behavior intervention plan. And then if we're not seeing good growth, we would want to add in levels of support." (421:7-13). It was also reasonable to not bring the Autism Team in to assist sooner because, "the information we had regarding previous school records told us that, you know, was being successful with accommodations only. And so, you know, we were really targeting behavior, too, at that point. Because that was North American Martyrs biggest concern was behavior in, like, that October November period." (421:17-24).

The record reflects was responding well to the lower level interventions and the interventions were allowing to actively participate in the general education classroom because by the time Morgan observed on January 27, 2022, she saw:

was a super sweet boy, very talkative when went back to math. But was in the classroom participating, engaged, had very similar – you know, when you sit in the back of a classroom, especially in like first or second grade, you get to see a nice variety of kids' behaviors. And was very age appropriate where, you know, sometimes we fiddle on our desk a little bit or we're kind of looking around or talking to a peer when the instruction is going on. But just fit in very nicely with the group. I would never have pinpointed as a student that was having a concern. The only reason I know that was the student there was specifically because the adult was right there with . And so, I was able to kind of work through that. participated in class, raised hand, answered questions, did great with peer that they did partner like during talk exchanges within that whole group instruction.

(613:7-24).

During the hearing, the _____ expressed concern with the fact Ms. Morgan did not observe _____ until January 27, 2022. However, this observation date is reasonable because of the scheduling conflicts between LPS, NAM, and the _____. Originally, the observation was scheduled for January 5, 2021, because LPS and NAM were on Winter break from December 23, 2021, until January 4, 2022. (Exhibit 76 p. 2; Exhibit 74; Exhibit 75). The January 5, 2022, observation was cancelled by NAM because of its Christmas program. (Exhibit 76 p. 2). The observation was rescheduled to January 11, 2022, but was cancelled by NAM due to _____ being sick from January 10-14, 2022. (Exhibit 76 p. 2, Exhibit 138). Then, LPS offered January 18, 19, or 20 for an observation, but the first date that worked for both schools was January 27, 2022. (Exhibit 76 p. 2).

Ms. Morgan additionally observed _____ a second time to ensure that her observations were accurate. Ms. Morgan chose to complete another observation of _____ because _____ family had informed _____ that _____ would be observed, and Ms. Morgan wanted to observe _____ on a day with a flexible schedule and where _____ did not know _____ would be observed. (617:17-25, 618:1-12). This observation took place just a few days after her first observation, on February 3, 2022. (Exhibit 81 p. 5). Ms. Morgan's second day of observations further established the tier-two strategies developed by the MTSS team were working for _____ :

I think the only difference was that they were practicing for communion. So, Father had come in, which had like interrupted a lesson, which was great to see that he had come in, had to stop what _____ was doing and then they were practicing for a communion that was going to occur that weekend. I think once _____ had asked why _____ had to hold _____ hands in a certain position when going up and getting offers. And so that was the only kind of – as the para had classified it defiance, I would not call it defiance, I would call it questioning as to why. _____ just wanted to know why. And so that was the only quote, 'behavior' that I saw during the observation.

(618:16-25, 619:1-4).

Shortly after Ms. Morgan's observations, on February 9, 2022, the MTSS team met with the _____ and additional members of _____ support team to discuss her recommendations for changes to _____ tier-two interventions. At the meeting, Morgan recommended: So again, just pretty basic tier two interventional supports. So, providing that visual schedule, letting _____ know ahead of time when a change is going to happen or occur, you know. And then the biggest pieces that check in and check out are getting data. So, the data that we had received from the BIP that Seth had written

and then implemented was all he had done with the data. So, there was no concrete evidence to tell us what the duration, frequency, or intensity of behaviors were. It was a good day or a bad day, or at this or that. So, it gave me absolutely nothing to go off of for like, how often is this occurring? How intense is it? At what time of day is it occurring to where we need to pinpoint additional strategies? So, the check in and check out was one big recommendation that Seth recommended. And then when I went out, it was not implemented. And so that was my big piece was like, 'we have to get this going to get solid data to tell us what time of day this is occurring, how often it is, which will guide us on where our interventions go.' And so, through that, this meeting, we talked about that check in and check out and we talked with the family on how most of the time we have reinforcers, students we want 80 percent better. And then based upon our reinforcements, like what would like to earn? Do we want to do it at school? Do we want to do it at home? Kind of what that process is. Just because as kids get older, there's you know, not a ton of really motivating things in school when Fortnite and Xboxes are at home, they'd rather earn some time on that than a pop in from their teacher. So, kind of partnering with the family on how we could embed a check in and check out system with that triaging for to process through. Because ultimately, we need to stop, reflect upon behaviors, and then what we can do better next time. Tying that to a score for that is concrete so can help process through that, and then earning a prize for that behavior and then how can we process it next day and refix it. So that was a big piece of my recommendation was that check in and check out, and then how we can tie that into a reinforcement system, whether it's at home or in school. They were already within the classroom doing second steps, which is a social emotional curriculum less than daily. And so, my – one of my recommendations was to make sure that in that – that class period, like time of day to ensure getting those lessons. But then was also getting a meeting with a counselor once a week to also target specific social skills instructions. And so, through that, I had written a few pieces of like, winning and losing I know was a hard skill that was struggling with. Not finishing during a set period of time, so some kids, you know, we have to pause, and we'll come back later. That was also a concern of theirs that they had mentioned – that North American Martyrs had mentioned. So really focusing in on those targeted social skills during that time with the counselor, but then also still keeping – making sure is in that class for that social/emotional curriculum.

...

[T]he biggest piece is getting that para pulled off of I don't want to have learned helplessness, which is where is just reliant on that adult to ask rather than truly, critically thinking and problem solving, and then working through that process and then asking for help when needed. Learned helplessness is just kids not wanting to put that effort forward in problem solving, and so they just seek adults to help them get by. And then great adults in this world, but a lot of times they overly prompt them to get kids that answer. And so that is something I really didn't want to learn long term, because does have the skills to listen, participate in full group. able to problem solve and scan and imitate what other kids are doing, which is a great skill to be able – has those foundational skills to be able to problem solve within that classroom environment.

...

[W]e want in that general ed, tier one group instruction again. One, so we could get some data to support like, which is truly occurring during that 60 minutes that is causing to escalate or get upset. Like, what's occurring within that time frame, and then also to ensure that certified staff are providing with that instruction.

(620:3-25, 621:1-25, 622:1-25, 623:1-15).

During the February 2022 MTSS meeting, Morgan also emphasized to NAM staff the importance of Larson's earlier recommendations, such as check in and check out. (623:22-25, 624:1-2). Morgan noted according to the data presented by NAM, those interventions were not being implemented by the classroom teachers with fidelity. (623:22-25, 624:1-12). Based on the lack of fidelity in MTSS programming, Morgan, Green, and Risueno recognized NAM staff needed additional training and support in how to best support . To assist, Morgan, Green and Risueno:

[W]e sent them three different templates of check-in and check-out and sheets that they could customize to We created social stories for them, we created a grid outline of the scores to help break them down and become concrete . . . and then worked with Summer on like, which one was going to be the best for formatting wise. We created a Google spreadsheet to embed all of the data so we could create graphs and trendlines and all of that from the data. And then Social Story . . . I sent them a template of how to create a social story, just a guidance for them, and then let them know like, if you guys have specific skills that you're wanting, let us know because we have banks of social stories that we can help provide.

(625:5-7, 626:3-19).

The testified at the time of the February 2022 meeting, and at all times before, behaviors were such that LPS should have referred for a special education evaluation. While I sympathize with the concerns for their I find LPS's witnesses on this point credible. In Iowa, when a group of special education experts evaluated , they

found did not qualify for special education services because the previous year, was doing well without special education services and behaviors were age appropriate. Nevertheless, during this same time, the claimed behaviors were far above average in terms of intensity and severity. (Exhibit 64 p. 9, 15-16). Additionally, as discussed later in this Order, when Larson later evaluated using the BASC Larson had to ask the to complete the BASC a second time because:

It was not – showed a validity or F index that was – I guess, produced results that were not accurate. And after looking at check-in/check-out data and kind of what that showed, I didn't feel like it was a – I guess just a – good measurement of behavior – that we've received.

...

Generally speaking, students who receive those scores [given by parents] are considered to be in the top three percentile as far as like—as having the most significant behaviors that an individual can have. We just were not – the data – other data that we had was not supporting that as an accurate measurement.

(527:18-25, 528:1-13). Therefore, I do not find LPS violated its child find obligations simply because the believe behaviors were out of control.

Finally, Petitioners argue because eventually qualified as a student with autism and needing special education services, that LPS should have made that determination sooner. Again, this is not consistent with the expert testimony presented at the hearing. Hess testified:

I think that, again, we look at the data, we look at the progress that they're making. If students need special education, we want to move towards that, but if students are having their – their needs met through lesser restrictive means, they're entitled to that legally, so that's what – that's where we meet their needs. And so I know in some areas was making progress, at least that I can see in the data, and there were others that – that the team said, "Okay, we need additional intervention or we need evaluation at this point for those areas.

(580:4-19). Oehring also testified:

was responding to interventions along the way. And so that would show us that what we were doing were – was responding to. We did get to a point where we needed a higher level of intervention and that's why they went to special education testing. But that doesn't mean that would have made progress if would've been verified sooner.

(743:3-13). Therefore, the fact did qualify for special education services does not mean LPS violated its child find obligations prior to verification. Again, I find LPS's witnesses credible.

Petitioners also argue LPS took too many steps before evaluating and verifying as a student with a disability and therefore LPS violated its child find obligations. Morgan, testified the steps LPS took were very common and beneficial:

Q. So Ms. Morgan, prior to your team getting involved and making these great recommendations for _____, you had to schedule two observations, had to already have a behavioral intervention plan, _____ had to go through a couple months of other interventions; is that too many steps?

A. Well, that's very common. You know, we have kids that are on check-in and check-out systems or kind of that behavioral monitoring system for years, and they aren't in special education. It is just something that helps kids become accountable for their behavior triage and work through it, get concrete data to support with, that is what needs to occur next time, and then try again. And so, it's not something that is just for special education, it is something that is utilized for all students, and if they're successful in it, [sic] continuing it. I also – because the BIP was not implemented to Fidelity, we had zero data to support that these behaviors were as intense, and as frequent, and as long as they were occurring. So, we needed solid data to tell us when it was occurring, how often, to guide our intervention.

(623:16-25, 624:1-12).

Furthermore, the record indicates LPS had rational justifications to proceed with each of the steps it took during the MTSS process for _____ prior to conducting a special education evaluation in May of 2022. LPS had knowledge _____ was recently dismissed from special education due to _____ behaviors being similar to _____ non-disabled same age peers. Additionally, LPS had knowledge _____ had even more recently gone through an evaluation process and deemed to not qualify for special education because _____ was very successful in the classroom with accommodations only. LPS also knew _____ just moved to Lincoln and that transitions can be difficult for children with autism. *See Ja.B. v. Wilson Cty. Bd. of Educ.*, 61 F.4th 494, 503-04 (6th Cir. 2023) (concluding that a school district did not violate its child find obligation when it was aware the child recently moved and began exhibiting concerning behaviors after the move).

Importantly, LPS was obligated under Nebraska law to participate in a problem-solving team process (MTSS) to ensure that all reasonable alternatives had been explored and exhausted prior to referral to a special education evaluation. 92 NAC § 51-006.01B. The MTSS team and _____ teachers were seeing improvements in _____ behavior. In addition, by going through the MTSS process, LPS was able to discover the root of _____ disability was not behavioral, but rather more of a learning disability. (583:16-25, 584:1-8). Throughout the time _____ was involved in the MTSS process, _____ was receiving individualized tier-two interventions that allowed _____ to make progress.

Finally, LPS also had reasonable justification to finish the MTSS process before evaluating _____ for special education so as to ensure they were not disproportionately identifying students as disabled. Several of the experts in this case testified as to the potential harm for holding an IEP evaluation prior to the completion of the MTSS process. Dr. Roberts testified:

Well, a lot of times students just haven't had the opportunity to learn, and so that's why we have to provide those opportunities, or they need instruction

in a different way first. And so, I think it would be very harmful to give a student a disability – to – to say they have a disability if we haven't tried those things before moving in that direction.

(395:4-10)

School Psychologist Polly Hess testified that false positives are very concerning:

So, identifying a student that we're saying is disabled when really it may be a situational or a cultural factor at that time that is not actually indicative of a disability that we see across time, across environments . . . calling a child disabled when they're not, when it may be situational or environmental, I would say is – could have a significant impact on that child and their family.

(570:25, 571:1-17).

Bridgette Morgan, who specializes in ABA therapy and is a provisional board certified behavioral interventionist, testified the harm in starting special education services for autism before going through lesser interventions is:

If there are interventions in place that can help support the students at the tier two level to help keep them in that general ed and then they're sustaining and making growth, then jumping straight to special education services can harm them. Depending on if that student is going to be pulled out for multiple periods or long periods of time for that intervention, if the teacher is putting them in small group, whatever it might be, we're reducing their ability to tap into that general education environment depending on the service delivery. And again, to kind of go back to what Mrs. Hess has said, you know, verifying a student as disable is a big decision, and so we want to make sure that we've exhausted all of our interventions out there before we jumped to that – that diagnosis or that verification.

(610:26-25, 626:1-9).

Timothy Oehring, a special education teacher, testified:

[W]hen you kind of jump into [special education services] and move quickly, you can kind of miss maybe the underlying problem that's occurring. So, with , when initially started at North American Martyrs, behavior was that key component that was a really big issue that was brought to our attention. And as we moved to November, that kind of faded away, and that's when the academics

started to bubble up as concern. So, if you jump straight to that evaluation, you end up looking at behavior and you entirely miss the root of the problem and some of those other needs that happened and showed up down the road . . . [MTSS] gives the student the opportunity to be in the least restrictive environment. As you look from universal strategies all the way up to intensive strategies, you're trying to find that spot that the student can be without being too intrusive into their general education instruction.

(718:16-25, 719:1-18).

To further support the notion it is important to provide lower level interventions to students prior to receiving special education services, Morgan testified students are capable of receiving a FAPE through the MTSS process. (642:22-25, 643:1-16). This notion was discussed at length during the cross examination of Morgan. However, Morgan testified:

That is the framework for MTSS. So all students are receiving that tier one and all students have access to tier two if that's the level of support that they need. So all students are provided a free and appropriate public education whether they're in special ed or not. My opinion and professional understanding of it is that it encompasses for all students. Yes, Rule 51 and special education is specific for that piece, but all students have access to these interventions through the framework is how I view it.

(665:6-19). Morgan explained LPS does *not* have its own definition of FAPE. (666:6-10).

Even if I were to determine LPS did wait too long to evaluate (which I do not find), I cannot conclude this potential procedural error entitles Petitioners to redress. In order recover in a due process hearing for a procedural error, a complainant must show the procedural error impeded the child's right to a free appropriate public education or early intervention services; significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public or early intervention services to the parents' child; or caused a deprivation of educational benefit. *See* 92 NAC § 55-008.03.

Petitioners failed to meet their burden to prove any of these three prongs. The expert witnesses testified the decision to evaluate in May of 2022 as opposed to anytime earlier did not impede right to a FAPE. (456:17-25, 457:1-6 (Testimony of Mindy Roberts, Ed.D); 529:5-25, 530:1-3 (Testimony of Seth Larson, school psychologist); 582:12-25 (Testimony of Polly Hess, school psychologist); 644:15-25, 645:1-2 (Testimony of Bridgette Morgan, certified behavior interventionist); 694:11-24 (Testimony of Ashley Risueno, special education teacher); 728:25, 729:1-10) (Testimony of Timothy Oehring, special education teacher); 751:25, 752:1-13 (Testimony of Jennifer Fundus, Ed.D). A child is afforded a free appropriate public education when they are able to make appropriate progress in light of their unique circumstances. *Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 403 (2017) The expert testimony reflects did make appropriate progress throughout the 2021-2022 and the 2022-2023 school year. Dr. Mindy Roberts, who has a Doctor of Education and is certified with the state of Nebraska in the areas of elementary K-6, Principal 7-12, SPED Behavior Int Subj PK-12, and SPED

Supervisor B-12 testified that [redacted] right to FAPE was not impeded by LPS' decision to evaluate [redacted] in May of 2022 as opposed to earlier because:

My opinion is that we followed the process, and we allowed [redacted] opportunities to learn and grow in the least restrictive environment. And [redacted] when we saw that growth was not at the rate we needed and we had tried and exhausted all options, we moved to evaluation at that point and were able to verify [redacted] as a student with autism and a student with a specific learning disability in the areas of math and writing.

(456:24-25, 457:1-6).

Seth Larson, who has an educational specialist degree in Educational Psychology and who is certified through the Nebraska Department of Education testified:

My opinion is that the supports that we were providing [redacted] as well as the work that [redacted] was making, show that [redacted] was accessing [redacted] education . . . [redacted] is meeting expectations – consistently meeting expectations after April 25, 2022, expectations would be at 80 percent . . . for the most part [redacted] was able to be successful with normal approaching.

. . .

This shows that even prior to the provision of special education services, [redacted] was exceeding what was expected of [redacted] general education peers in regard to [redacted] behaviors.

(529:12-25, 530:1-19).

Polly Hess, who has an educational specialist degree and a master's in Educational Psychology and who is certified with the Nebraska Department of Education, testified:

[W]hen you look at the progress [redacted] made, when you look at the progress reports, [redacted] was making progress in those areas with lesser restrictive interventions, which is – is wonderful. I think that's what we all like to see is a student making progress in any intervention . . . it doesn't mean that there weren't still skills that [redacted] was needing to build on, but that they had targeted that problem behavior and that [redacted] [redacted] was no longer one they were struggling with or that was happening with great intensity or frequency would show that those were quickly addressing trial.

(582:12-25, 583:1-15).

Brigitte Morgan, who is a provisional board-certified behavior interventionist and a masters in psychology with a specialty in applied behavior analysis, testified that [redacted] right to FAPE was not impeded because:

We were providing interventions and trying to ensure that there was Fidelity behind the interventions to provide the data to support the need for moving forward. If that was the process during that time to an evaluation, if [redacted] was continuing to make significant growth to close those skill deficits, great. We don't need to move into an evaluation, but we're still providing [redacted] that FAPE in those interventions [redacted] needs . . . Based upon the progress report

that we have seen within this entire year and a half, [redacted] made significant growth in all of [redacted] areas. And so just the interventions that [redacted] was receiving during that time that [redacted] was not being evaluated shows that [redacted] was getting access to what [redacted] needs.

(643:24-25, 644:1-25, 645:1-2).

Ashley Risueno, a special education teacher who is certified with the Nebraska Department of Education, testified, “[redacted] was getting services through the MTSS process, [redacted] was getting interventions based on the areas that [redacted] needed to work on, and [redacted] was making good growth.” (694:21-24).

Timothy Oerhring, a special education teacher who is certified through the Nebraska Department of Education, testified that [redacted] right to FAPE was not impeded because:

The way that [redacted] has grown in a rapid manner in some of our IEP metrics and [redacted] ability to grow in that tier two model as well show me that [redacted] was kind of on the right trajectory, and where we are now certainly is a good spot for [redacted] to be.

(729:6-10).

Finally, Dr. Jennifer Fundus, who has a doctorate in education and is certified with the Nebraska Department of Education in the areas of Elementary K-6, Mild/moderate disabilities K-9, Principal PK-8, and Superintendent PK-12 testified:

I feel like Lincoln Public Schools did their due diligence to make sure [redacted] would meet the different prongs of autism, and to make sure that they were trying all of the interventions and strategies within the classroom, before they went to verifying [redacted] with a disability.

(752:7-13)

The Petitioners did not present any expert witness testimony. Instead, the Petitioners put on evidence that [redacted] right to a FAPE has been impeded by having [redacted] testify:

When we look at scores and numbers, maybe it does show that the numbers have gone up now. I do know [redacted] workload is decreased at Martyrs, so it’s not a full workload maybe to say what [redacted] peers are doing. So, to me, if we see an increase in – in [redacted] scores, then we’d be seeing [redacted] do a full day’s work *and exactly what [redacted] peers do*. That’s what I would like to see.

(166:24-25, 167:1-5) (emphasis provided).

This testimony misunderstands the standard for FAPE. FAPE is not measured based on whether a child with a disability is doing exactly what [redacted] peers do. Rather, FAPE is measured by whether a child with a disability is able to make appropriate progress in light of [redacted] unique abilities. *See Andrew F., supra.* Based on the testimony of the expert witnesses in this case, who I find credible, [redacted] has made progress in light of [redacted] unique abilities. Therefore, assuming arguendo LPS committed a procedural error by delaying [redacted] evaluation, this error did not impede [redacted] right to a free appropriate public education.

Likewise, this alleged procedural error did not significantly impede Petitioners opportunity to participate in the decision-making process regarding the provision of a free

appropriate public education for [redacted]. Since [redacted] started the MTSS process, the [redacted] were involved. [redacted] signed consent for Seth Larson to evaluate [redacted]. The [redacted] were aware Brigette Morgan was evaluating [redacted]. The [redacted] met with Brigette Morgan on February 9, 2022, to discuss her evaluation. Once the [redacted] requested an evaluation on March 31, 2022, they were represented by an attorney at multiple MDT meetings and IEP meetings. LPS also paid for the [redacted] to obtain an independent educational evaluation for [redacted], which was considered by LPS. I cannot find any evidence that shows that any alleged delay in evaluating [redacted] significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education.

Finally, I also cannot find LPS' decision to evaluate [redacted] in May of 2022 as opposed to any time earlier caused a deprivation of educational benefit for [redacted]. Each of the experts in this case testified [redacted] did not sustain a deprivation of educational benefit. Dr. Roberts testified [redacted] did not have a deprivation of educational benefit because, "I don't think [redacted] would be having the growth we see now where [redacted] is really making progress socially, emotionally and academically if – if that would've been harmful." (457:7-16).

Seth Larson testified, "I don't believe it caused deprivation because [redacted] was still growing in [redacted] skills, and we were still able to make adjustments and intensify intervention to support [redacted]. [redacted] looking at [redacted] math scores, I know they're not consistently growing, but [redacted] went from 12th percentile all the way to 16 as far as the 20th in just those skills alone with the minimal instruction that we provided." (530:20-25, 531:1-14). Further, in discussing [redacted] progress reports, "The rapid growth [redacted] has made. [redacted] was able to show significant progress in a short period of time. I know kids with autism often struggle with big transitions from, like I said earlier, Iowa to Lincoln, was – was big for [redacted] and it – it really prevented [redacted] from being successful. And I think we're seeing [redacted] settle in and kind of have developed the teams that helped [redacted] be more successful with [redacted] behavior and academics." (533:9-23). Mr. Larson testified he would not expect to see the type of growth [redacted] has made for a student with a deprivation of educational benefit. (535:21-25, 536:1-2).

Polly Hess testified in her opinion, [redacted] did not sustain a deprivation of educational benefit because, "[T]he growth that you see. I know that, again, there were still needs that the team was seeking in terms of those academics, but behaviorally speaking, those were – those were areas that they were seeing great growth in." (584:17-25, 585:1-8).

Brigette Morgan testified evaluating [redacted] in May of 2022 did not cause a deprivation of educational benefit for [redacted] because, "just based upon the progress report that we have seen within this entire year and a half, [redacted] made significant growth in all of [redacted] areas. And so just the interventions that [redacted] was receiving during that time that [redacted] was not being evaluated shows that [redacted] was getting access to what [redacted] needs." (644:15-25, 645:1-2). Ms. Morgan also testified she would not expect to see the type of growth [redacted] made in a student who sustained an educational benefit: "Usually, the growth would be a lot slower or stagnant. We would see kind of a, either a – a flat line or a decrease and trend line . . . [redacted] continued to make progress." (645:3-10). Ms. Morgan also testified, when we look at like, developmental skills, every – every skill in there is individualized. And so, we all have strengths and weaknesses in them, and so all kids are going

to have areas where they need to close those skill gaps, we all do. And so, what [redacted] was receiving was closing those individual skill gaps to help him get closer to grade level.” (646:1-15).

Ashley Risueno, a special education teacher, testified [redacted] did not have a deprivation of educational benefit because, “[redacted] was making growth in all of – or in [redacted] goal areas, and as some other people have testified, you know, [redacted] wasn’t really becoming stagnant or declining in those focus.” (694:25, 695:1-10). Ms. Risueno also testified she would not expect to see the type of growth [redacted] had had in a student who had a deprivation of educational benefit. (696:1-4).

Timothy Oehring testified [redacted] did not have a deprivation of educational benefit because, “that progress that [redacted] made has shown that [redacted], with some tools in place, [redacted] been able to make some pretty rapid growth to meet some new goals and continue to progress. (729:11-21).

Dr. Fundus testified, “I think if there had been a deprivation, we would’ve saw a lot more of decline in services, especially from the summertime. But we didn’t see that. In fact, we have seen really nice steady progress that [redacted] been making.” (752:14-24).

In conclusion, I find LPS’s witnesses credible and LPS had several legitimate reasons to evaluate [redacted] in May of 2022 instead of earlier. I also find LPS’ decision did not impede right to FAPE, significantly impede the [redacted] opportunity to participate in the decision making for [redacted] education, nor cause [redacted] a deprivation of educational benefit.

III. Referral Issue

Petitioners allege LPS erred by failing to recognize the [redacted] and NAM were referring [redacted] for a special education evaluation in the Fall and early Spring of the 2021- 2022 school year. (Exhibit 3). Nebraska Rule 51 states “referral, notice to parents (See 92 NAC 51-009.05), and parental consent, shall be completed within a reasonable amount of time. The initial multidisciplinary team evaluation shall be completed within 45 school days of receiving parental consent for the evaluation.” 92 NAC § 51-009.04A1. Additionally, Rule 51 states, “Consistent with the consent requirements in 92 NAC § 51-009.08A, a parent of a child, the Nebraska Department of Education, or another State agency or a local school district or approved cooperative or nonpublic school may initiate a request for an initial evaluation to determine if the child is a child with a disability.” 92 NAC § 51-006.02B. Rule 51 defines “referral” as, “the submission of a request by a parent, school personnel or approved agency for an individual evaluation of a child suspected of having a disability.” 92 NAC 51-003.48.

A. Date of Referral

LPS agrees a referral for a special education took place on March 31, 2022 when [redacted] emailed Dr. Roberts requesting a special education evaluation. However, the [redacted] allege there was a referral, as defined by Rule 51, for special education evaluation on October 18, 2021. On October 18, 2021, [redacted] emailed Sr. Janelle Buettner and Summer Utrup, both staff at NAM, asking what [redacted] needed to do to have [redacted] reevaluated for an IEP. (Exhibit 27). In response to this request, on October 18, 2021, Molly Cassidy, the school counselor at NAM, emailed Seth Larson stating, “We are looking for **tools and practical Tier 2 steps** that can take right away to set up this student for success.” (Exhibit 65 p. 3) (emphasis provided). This series of

communications is not a request for a special education evaluation. To support this, on October 18, 2021, the [redacted] signed a “permission for specialist’s participation” in “Lincoln Public Schools Student Assistance Process.” (Exhibit 66). The signed document specifically states, “This permission form does not consent for special education or section 504 evaluations.” (Exhibit 66).

There was also not a referral for a special education evaluation at the first MTSS meeting on October 26, 2021. The notes between NAM and LPS do not reflect a request for a special education evaluation. (Exhibit 67 p. 43-44). This is consistent with Sister Buettner’s testimony that while she felt she wanted to request a special education evaluation, she did not. (184:4- 16).

Similarly, there was not a referral for a special education evaluation on the second MTSS meeting of November 9, 2021. (Exhibit 67 p. 42). After the MTSS meeting on November 9, 2021, Sister Buettner sent an email to Dr. Roberts and other members of the MTSS team. (Exhibit 69 p. 3). In that email, Sister Buettner stated there is “not much other than verbal data and now some data in SAP [sic, SAT] file . . . to suggest need for an IEP.” (Exhibit 69 p. 3). Sister also stated “*if its going to require a verification*” to get the **Autism team** to see [redacted], that she would want one. (Exhibit 69 p. 3) (emphasis provided). She also stated, “I don’t want to push unnecessarily for early eval if there is a way to get the **autism team** out to help with this, but if it takes a verification, then what do you need from me.” (Exhibit 69 p. 3) (emphasis provided). Shortly after the email, Angie Green, a speech pathologist who was a member of the MTSS team, emailed Sister Buettner stating it would not take a verification for the Autism Team to be involved. (Exhibit 69 p. 2). This is consistent with Sister Buettner’s testimony that she sent the November 9, 2021, email because she wanted the Autism Team to observe [redacted]. (185:12-25, 186:1-20). Sister Buettner also testified that in sending this email she specifically was requesting data through the MTSS process. (202:12-25, 203:1-3). Sister Buettner did not testify that at this time she made a referral for special education services for [redacted]. Accordingly, I find as of November 9, 2021, a referral, as defined by Rule 51, had not been made for [redacted].

[redacted] testified on December 2, 2021, she called LPS to request an IEP for [redacted] (64:3-16). [redacted] testified during the phone call she was told she needed to speak with her special education coordinator. (64:14-16). After the phone call, [redacted] emailed Sister Buettner and the assistant principal at NAM. (64:17-24; Exhibit 31). [redacted] testified does not know who at LPS she spoke with, and [redacted] testified does not know which department [redacted] called. (64:25, 65:1-3, 129:10-13). In fact, [redacted] testified the first time [redacted] specifically asked LPS for an IEP was in an email on March 31, 2022. (129:17-25). There is no evidence in the record to show either [redacted] or anyone at NAM ever informed LPS of the December 2, 2021, phone call. I find Petitioners failed to meet their burden a referral was made on December 2, 2021.

The MTSS notes for December 21, 2022, have a note that says, “parents have requested testing at LPS at Student services, I see no reason to hold off on doing this one. We have solid data to suggest the need.” Risueno testified she believed the language was added by Sister Buettner. (713:1-6). However, it is unclear whether this request was made orally at the meeting, or when this language was added to the MTSS agenda. Risueno testified:

When I look at that now, it does seem like it would start the process. But again, I don't recall that being talked about at the meeting, so I don't know. I question when that was put into the agenda, or how that was communicated. I don't remember that.

(713:17-25).

Others testified no one made a request for an evaluation prior to March 31, 2022. (521:3-5 (testimony of Seth Larson); 681:19-22 (testimony of Ashley Risueno); 430:6-22 (testimony of Mindy Roberts)). Curiously, Sister Buettner was not asked whether she made a request at the December 21, 2022, meeting and/or whether she was the author of the statement. This hearing officer cannot fill in the blanks and finds a request for evaluation was not made until March 31, 2022.

B. Remedies

For argument sake, if a referral was made for a special education evaluation on December 23, 2021, I find Petitioners have not met their burden to show they are entitled to a remedy. I have determined any potential procedural error did not impede right to FAPE, significantly impact the opportunity to participate in the decision making for education, or cause a deprivation of educational benefit. The evidence further shows and the have already been fully compensated for any alleged failure to evaluate.

1. Compensatory Education

In the state complaint filed by the , the investigator concluded LPS should have considered phone call on December 2, 2021, to be a referral for a special education evaluation. (Exhibit 24 p. 33). As a result of this conclusion, LPS was ordered to provide compensatory education to :

1. Using the initial IEP that was drafted subsequent to the MDT, the IEP team needs to calculate the total weekly minutes of special education services and each related services that were determined to be needed by the Student to receive FAPE.
 - a. Example-If a special education service was documented as 30 minutes per day five days per week, the minutes per week should be calculated to be 150 minutes. This would need to be repeated for each related service required by the IEP.
2. The IEP Team would need to calculate the total number of minutes of special education services and each related service for which the student did not receive those services. This is calculated by multiplying the weekly minutes for each service in step 1 by 7 (i.e., 7 weeks is the amount of potential missed instruction had the consent for evaluation been obtained upon Parent request on December 2, 2021, minus the 60 calendar days allowed to complete said evaluation and 30 days to draft an IEP and begin services).
 - a. Example- The 150 minutes of special education services calculated in Step 1 are multiplied by 7, the resulting project, 1050 minutes,

represents the total number of minutes of special education for which the student did not receive those services. This calculation would need to be repeated for each related service required by the IEP.

3. Next, the IEP Team needs to calculate the compensatory service minutes for special education services and each related service for which the student did not receive those services. Using the minutes value calculated by special education services and each related service in step 2, multiply each value by 0.50. Each product represents the number of compensatory services that need to be provided to the Student. The amount identified here represents compensatory services that can reasonably be provided in addition to the services the student would receive as required by the current IEP taking into consideration the amount of time lost and the amount of time needed to assist the student to recoup what was lost as a result of not having services.
 - a. Example- The 1050 minutes of special education services calculated in Step 2 are multiplied by 0.50 to obtain a product of 525 minutes of compensatory services that need to be provided to the student to address the special education services that were not received by the student. This calculation would need to be repeated for each related service required by the IEP.
4. The values calculated in Step 3 represent the total number of compensatory services minutes for special education services and each related service that needs to be provided to the student. The IEP Team is responsible for developing a plan that ensures all compensatory services are provided to the student. All compensatory services should be provided in full by October 31, 2022.

(Exhibit 24 p. 34-35). Using the service minutes listed in the IEP and the instructions from Nebraska Department of Education investigation, LPS calculated that it was required to provide with 210 minutes of compensatory services. (446:16-21; Exhibit 119 p. 12, Exhibit 121). LPS had to have the schedule for compensatory services approved by NDE. (447:1-8). In addition to the compensatory service minutes, LPS also offered to provide with 6 hours of extended school year services. (Exhibit 119 p. 12, Exhibit 121). LPS provided with 6 hours of ESY and 3.5 hours of compensatory services over the Summer of 2022. (447:9-14; Exhibit 122). LPS has completed its requirements for under the NDE investigation. (447:9-14).

Petitioners argue the compensatory education provided by LPS to was insufficient because the IEP which the compensatory education was based on was not properly developed. Compensatory education is an equitable remedy that “should aim to place disabled children in the same position they would have occupied but for the school district’s violations of the IDEA. *Reid ex rel. Reid v. District of Columbia*, 401 F.3d 516, 518, 523 (D.C. Cir. 2005). A Hearing Officer cannot determine the amount of compensatory education that a student requires unless

the record provides “insight about the precise types of education services [the student] needs to progress. *Branham v. Gov’t of the Dist. of Columbia*, 427 F.3d 7, 12 (D.C. Cir. 2005). Relevant evidence includes “the nature and severity of the student’s disability, the student’s specialized educational needs, the link between those needs and the services offered by the [school], the placement’s cost, and the extent to which the placement represents the least restrictive educational environment. *Id.* An “award [is] not adequately individualized or supported by the record” when a Hearing Officer is not provided with any information about a student’s current grade level of functioning. *See Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt*, 532 F. Supp. 2d 121, 125 (D. D.C. 2008).

In this case, the [redacted] failed to meet their burden to show [redacted] is entitled to additional compensatory services. Rather, the only evidence in the record suggests [redacted] has been adequately compensated for any potential deficit [redacted] experienced based on the potential procedural violation by LPS. Sister Buettner testified [redacted] is currently “doing very well. [redacted] a child that has autism, so [redacted] will struggle for probably [redacted] whole life. That being said, given disability [redacted] functioning very well in the classroom and doing very well with [redacted] peers.” (215:8-17). Sister Buettner testified this improvement is seen in [redacted] academics and behaviors. (215:18-24).

Whitney Husted, [redacted] paraeducator, testified:

I don’t work directly with [redacted] right now; however, I do see [redacted] and [redacted] around the school all the time, and I think [redacted] is doing a wonderful job. I mean, some days

– like, [redacted] come into the para room with me over lunch because [redacted] hasn’t finished [redacted] work and sometimes, [redacted] does get frustrated, but we’ll talk about it, and [redacted] sit down, and [redacted] do [redacted] work, and [redacted] get it done and – that’s a huge improvement from prior. Before it would take a long time for [redacted] to even start [redacted] work, so now [redacted] just gets [redacted] little frustrations out and I’m kind of different because [redacted] – [redacted] can vent to me and I know [redacted] doesn’t really mean [redacted] words that [redacted] says and – and then I say, “Okay, [redacted], now it’s time to start,” and [redacted] will just start and [redacted] get it done, so I think there’s a huge improvement.

(269:21-25, 270:1-11).

Dr. Roberts testified LPS has resolved any gap that [redacted] may have experienced: [redacted] making really good progress. When looking at [redacted] last progress report data, writing, [redacted] is out of ten out 16 on a rubric. And I believe [redacted] started at eight. Math, [redacted] at 32 correct digits, which I think – let’s see where we started . . . six digits . . . and social skill-wise, [redacted] making 87 percent averages on [redacted] behavior chart or check in and checkout process, and seeing some good growth in gaining attention appropriately, expression –expressing emotions appropriately, and asking for help appropriately.

(448:15-25).

Dr. Roberts indicated she would not expect the type of progress made in a student who required additional compensatory education. (449:11-21). Dr. Roberts explained the compensatory education already provided to :

[W]ere very well planned. It was – we intentionally spread them out so that had time over two months, and really targeted social skills during that time as well as some academic needs. I feel like the notes we received from the summer school teacher was also very helpful in helping start strong in the fall.

(461:13-25, 462:1-2).

Hess testified she believed made up any gap may have had as a result of a delayed evaluation based on the progress had made so far. (590:18-25, 591:1-2). Ms. Hess testified she would not expect to see the type of progress in a student who still needed additional compensatory services. (591:10-13). She testified that instead she would expect to see:

[A] whole range of things depending on – but in my experience in the past, when I have seen students who are in need of more services, we tend to see little or no growth, just kind of stagnant, no change in behavior, whether that’s academic behavior or social, emotional behaviors, and that, from what I can see and then from what I have heard in terms of needs, is not currently a student that is – I use language like “on my radar.” So as the current psychologist that serves North American Martyrs, I’ve reviewed recent BIP for Tim [Oehring] just because due for that yearly evaluation, and again, those behaviors that were part of the initial concerns, none of those behaviors are even a part of that planning anymore, so again, made great progress with what’s been put in place by the team.

(591:15-25, 592:1-5).

Morgan testified based on her experience in working specifically with students with autism the lack of regression for is a large indicator that had been adequately compensated:

[T]he services that was provided were continuing to maintain the small areas that needed to close those skill gaps. And as started off, again, didn’t regress significantly at the beginning of the year, so those hours within the summer helped maintain the skills that needed to start off fresh, the ‘22/’23 school year.

(647:14-25, 648:1-18).

current special education teacher, Oehring, testified:

I think that [the compensatory education] did kind of cover that gap there because , when we took in the summer, was doing second grade in probes, and that prepared to start this year immediately on grade level probes. So that’s what really helped to push and propel forward to

start our rigorous third grade curriculum that we wanted to work with on this year.

(730:7-22).

Dr. Fundus testified the combination of compensatory education services and extended school year services remedied any gap may have had as the result of a potentially delayed evaluation because:

Well, the way that extended school year works as a rule of – kind of as a rule of thumb guidance, it says if a student regresses the first nine weeks of school more than where they ended the school year, they would need extensive extended school year the following year or during breaks. We did not see that regression in the first nine weeks of the school year. In fact, we were seeing nice growth on IEP. So, during those breaks, we did not see that there is a need for extended school year.

(748:6-21).

It is also important to recognize that LPS provided several hours of extended school year to :

[T]here is a provision under extended school year that says the student is at a critical point of instruction. And since was just getting verified at the end of the school year, we were not able to get some of special education services up and running. So we felt like it was our due diligence as a Lincoln Public Schools District to provide extended school year, so could get some services prior to second grade year.

(747:19-25, 748:1-5).

Even has noticed improvement with :

is – – he’s showing some – some signs of – of improvement. is – before, there was no consistency with when would explode, when there was a meltdown, when there were those negative talks, There was – we – we could not pinpoint what was going on, and now it seems like we can – we can kind of gear and – and have some direction to where some of those behaviors and – hopefully try to intersect those before they occur. Doesn’t always happen, but we’re starting to – to see some progress there. Before, there was – it would take hours sitting next to to try to get to calm down. mind would get stuck on – on those negative thoughts about hurting and not wanting to be here anymore. And now taking initial steps to help to self-regulate knows that, okay, well I’m going to take a little break here. able to remain in the classroom more.

able to excel with – with some of those math concepts. There are still areas of – of struggling, and there is a very long road ahead for But there are certainly - - compared to last year, there are certainly some shines of light where we can take a breath here and there, where last year we could not.

(106:8-25, 107:1-7).

MAP scores in Math at the very end of spring 2022 semester showed demonstrated “High Growth” in math, with “growth from Winter 2022 to Spring 2022 in the 88th percentil, which means they made more progress than 88% of their peers.” (Exhibit 48 p. 1).

Based on the above evidence, I find is not entitled to additional compensatory education, even if LPS should have begun the evaluation process on December 23, 2021. is currently making appropriate progress in light of unique abilities and has shown does not have any additional deficit from the lack of services earlier.

2. Other Remedies Sought

Even if LPS should have begun the evaluation process for based on Sister Buettner’s alleged referral on December 23, 2021, I cannot award the the other remedies they seek such as reimbursement for a paraeducator, reimbursement for tuition, or reimbursement for a math tutor.

Starting with the request for reimbursement for a paraeducator, the paid approximately \$3,699.00 to North American Martyrs for the use of the paraeducator, Whitney Husted, to work one on one with during the Spring Semester of 2022. (Exhibit 13). Sister Buettner told the she felt a one-on-one paraprofessional would be appropriate for to remain enrolled at NAM. (189:18-25, 190:1). The paraprofessional started working with in December of 2021. (259:15-17). The assert had LPS evaluated and verified sooner, that they would not have been required to pay for a paraeducator to assist In order to be entitled to reimbursement, the must prove a causal connection between LPS’ failing and the need for a paraeducator. *See e.g. T.D. v. La Grange Sch. Dist. No. 102*, 349 F.3d 469, 473 (7th Cir. 2003). I do not believe Petitioners met their burden.

As explained above, I find LPS appropriately proceeded through the MTSS process when enrolled in NAM. I also find an evaluation was not made until March 2022. However, assuming the December 23, 2021, notation allegedly from Sister Buettner was a referral for special education, LPS would have had 60 days to complete an investigation from the time they obtained parental consent. See Memorandum: Clarification on guidance for 92 NAC 51 – 009.04 and IDEA 60 Day Timeline for School Age Children, The NDE-Office of Special Education (December 3, 2019). Then, LPS would have had 30 days to prepare an IEP. 92 NAC 51- 009.04A2. Therefore, LPS would have been required to provide special education services by March 23, 2022. The record shows by March of 2022, the paraeducator worked less and less with :

Q. Were you working with less as the year progressed?

A. Towards – after March, yes.

Q. Okay. And so – can you explain that a little bit for us?

A. So I was in there, but we were trained to transition to third grade so wouldn’t have a para. So, I was – we started transitioning basically to a couple days a week

Q. So towards the end of that spring semester of 2022, were you needing to take [redacted] out of the room as often as you had previously?

A. No

Q. Approximately, just ballpark, how often would you be –

A. Maybe once a week

Q. Okay. And compared to the beginning of your time working with [redacted], it would've been?

A. Five days a week.

(265:7-25, 266:1-22). Summer Utrup also testified [redacted] was having less outbursts by the time she went on maternity leave in March of 2022. (293:20-22).

Petitioners failed to meet their burden to prove [redacted] needed a paraeducator in the classroom. Before Husted started working with [redacted], the LPS staff working on the MTSS team warned NAM staff about the potential harm that a one-on-one para could pose for [redacted] such as learned helplessness. (Exhibit 67 p. 42). The MTSS team recommended NAM staff work on other coping mechanisms with [redacted] through the behavior intervention plan and social stories. (Exhibit 67 p. 42). Despite these warnings and concerns, Sister Buettner encouraged the [redacted] to hire Husted as a full-time paraeducator for [redacted]. When Morgan, an expert on ABA therapy and a specialist on students with Autism, observed [redacted] in January of 2022, she felt Husted was hindering [redacted] ability to learn in the general education classroom. (616:3-10). Morgan stated:

When you have an adult, again, that's the most restrictive strategy or support you can provide within the general education environment. They tend to focus or hyper focus on the students that they're with, which then turns to a lot of redirections that typical children do. Lots of kids dig in their desks or pick at their nails or kind of staring off, counting ceiling tiles, like whatever it is. Then that adult redirected [redacted] constantly, which to me caused a withdrawal from the tier one [instruction], that full group instruction. So then [redacted] is] focusing on nail picking and missing out on what is occurring. I also didn't see as much academic support as I was assuming going into the picture. When I go in and there's a student that has close supervision, they need a ton of additional support. And so, I see paras usually sitting for long periods of time or not prompting. My personal notes are also in evidence, and so you can see time periods where I saw large chunks of time where the para didn't do anything, was just sitting there supporting [redacted] by sitting. But [redacted] was participating, actively engaged, completing the work in a timely manner. So yes, I do – I do believe it was hindering [redacted] ability to – to process and learn and to be able to problem solve through observation and age-appropriate behavior.

(616:6-25, 617:1-11).

On February 9, 2022, Morgan recommended [redacted] no longer have a paraeducator in the classroom:

So, the biggest piece is getting that para pulled off of [redacted] I don't want to have learned helplessness, which is just where [redacted] is reliant on that adult to ask rather than truly, critically thinking and problem solving, and then, working through that process and then asking for help when needed. Learned helplessness is just kids not wanting to put that effort forward in problem solving, and so they just seek to the adults to help them get by. And then great adults in this world, but a lot of times they overly prompt them to get kids that answer. And so that is something that I really didn't want [redacted] to learn long term, because [redacted] does have the skills to listen, participate in full group. [redacted] able to problem solve and scan and imitate what other kids are doing, which is a great skill to be able – [redacted] has those foundational skills to be able to problem solve within that classroom environment.

(622:12-25, 623:1-6).

Equally important is the behavior Ms. Morgan warned about was exhibited through the testimony of [redacted] general education teachers. Nagel testified:

[I]f [the paraeducator] would step out to do something and [redacted] even independently would have to be on [redacted] own or a 20-minute time period during that day, [redacted] would struggle to – to do that on [redacted] own. And [redacted] would ask constantly like, 'when is – when is someone coming in to help me? When am I going to get help with this? I don't understand this. I need someone to check this.' So, [redacted] just wanted it to be, like I said, [redacted] – strove for perfection and everything that [redacted] did, and [redacted] wanted it to be perfect. So, when [redacted] couldn't do that on [redacted] own, [redacted] would get very frustrated because [redacted] wanted it to be perfect the first time.

(313:24-25, 314:1-15). And, according to Summer Utrup, [redacted] had a paraeducator in every setting: "She also went with [redacted] to specials where I would not have been with [redacted] For a while she was at recess. I think she was always at recess with [redacted]" (291:23-25, 292:1).

Ultimately, I cannot find Petitioners met their burden to show the actions of LPS caused [redacted] to need a paraeducator in the general education classroom during the Spring of 2022. The evidence shows the paraeducator actually resulted in [redacted] having further outbursts and behavioral concerns as [redacted] leaned towards learned helplessness. Moreover, by the time LPS may have been required to provide special education services to [redacted] in late March of 2023, the majority of the spring semester was over, and [redacted] was showing improvements in [redacted] behavior. The paraeducator remained with [redacted] based on NAM's perceptions [redacted] continued to need one against the advice of LPS.

The [redacted] also seek reimbursement for the tuition they paid to NAM in the Spring of 2022. (Exhibit 3). "When a school district fails to provide a FAPE, parents [have] a right of unilateral withdrawal and a right to reimbursement for private tuition, so long as the placement

was proper under the [IDEA] and the award furthers the purposes of the Act.” *D.L. v. St. Louis City Sch. Dist.*, 950 F.3d 1057, 1066 (internal citations and quotations omitted); *see also Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 247 (2009) (“[W]e conclude that IDEA authorizes reimbursement for the cost of private special-education services when a school district fails to provide a FAPE and the private-school placement is appropriate, regardless of whether the child previously received special education or related services through the public school.”). “When a court or hearing officer concludes that a school district failed to provide a FAPE and the private placement was suitable, it must consider all relevant factors, including the notice provided by the parents and the school district’s opportunities for evaluating the child, in determining whether reimbursement for some or all the cost of the child’s private education is warranted.” *Id.* at 247-48.

The key to being entitled to reimbursement of private school tuition is the denial of FAPE. As discussed above, the [redacted] failed to prove [redacted] was denied a FAPE by LPS, and what is more, all of the expert testimony in this case shows [redacted] was provided a FAPE by LPS because [redacted] is able to make appropriate progress in light of [redacted] unique abilities. The [redacted] did not present any expert testimony to contradict these conclusions. Moreover, in the cases supporting private school tuition reimbursement to parents, the parents must go to a private school to *seek* special education services because they could not obtain them at a local public school. *See e.g. Florence Cnty. Sch. Dist. v. Carter*, 510 U.S. 7, 15 (1993). The [redacted] confuse the meaning of “appropriate placement” as discussed in these cases. A placement is “appropriate” if that is where a child can receive special education services. *See Forest Grove*, 557 U.S. 230 at 234 (“Advised by the private specialist that respondent would do best in a structured, residential learning environment, respondent’s parents enrolled [redacted] at a private academy that focuses on educating children with special needs.”). [redacted] special education needs cannot be met through NAM. NAM relies on LPS to provide all special education services. NAM is not a school focused on educating children with special needs. The [redacted] did not present any evidence NAM has staff with knowledge or expertise in special education.

The final reimbursement remedy that the [redacted] seek is for payments they made to a math tutor for [redacted] (Exhibit 3). The [redacted] argue because [redacted] is entitled to math services now through IEP, [redacted] would have been entitled to those services earlier; and had [redacted] received those services earlier, the [redacted] would not have needed to pay for a math tutor. (79:21-25, 80:1-7). When [redacted] arrived at NAM for second grade, [redacted] was only able to do math work at a kindergarten or first grade level. (56:13-17). The [redacted] agree that LPS did not cause [redacted] to have this level of math skills. (138:7-18). As part of the MTSS process, [redacted] worked with NAM’s math interventionist, Melissa Peters, three times per week during the school day. (257:8-14, 423:4-23, 424:11-15). However, Sister Buettner recommended [redacted] receive additional math tutoring after school at a cost to the [redacted] (165:22-24, 242:13-25, 243:1-15). No one at LPS recommended [redacted] receive math tutoring. (165:14- 21). Dr. Roberts testified if the MTSS team felt [redacted] needed additional math help, they would not have recommended tutoring at the cost of the [redacted]. (424:16-24).

I conclude Petitioners are not entitled to reimbursement for the expenses they paid to a math tutor. The [redacted] failed to meet their burden to show the need for a math tutor was the result of LPS' failure to provide a FAPE. When [redacted] enrolled at NAM, [redacted] was already at an educational deficit for math. [redacted] received math intervention services at no cost. There is no evidence in the record to suggest whether the improvement in [redacted] math skills in the 2022-2023 school year is due to the intervention services, the tutoring, or a combination of both. Regardless, the evidence shows that [redacted] has been and is continuing to receive FAPE from LPS. In conclusion, even if LPS should have started the special education evaluation process for [redacted] after December 23, 2021, but before March 31, 2022, the [redacted] have already been adequately compensated for any potential procedural violation that occurred as the result of a delayed evaluation. I will not award additional remedies to the [redacted] for the potential procedural violation by LPS because the [redacted] failed to meet their burden to show [redacted] requires additional compensation. 92 NAC § 55-008.03.

IV. Procedural Safeguards Issue

Petitioners allege LPS failed to provide them with a copy of the procedural safeguards upon their request for an evaluation. Rule 51 requires:

009.06A A copy of the procedural safeguards available to the parents of a child with a disability shall be given by the school district or approved cooperative to the parents only one time a school year, except that a copy shall also be given to the parents:

009.06A1 Upon initial referral or parental request for evaluation

009.06A1 Upon request by the parent.

92 NAC § 51-009.06A.

Petitioners allege the failure to provide a parent with a copy of the procedural safeguards “is in itself outcome determinative,” and the failure to provide the procedural safeguards amounts to a denial of FAPE, citing to *Hall v. Vance Cnty. Bd. of Educ.*, 774 F.2d 629, 635 (4th Cir. 1985). In *Hall*, the court concluded the consistent failure to inform a parent of their procedural rights *and the failure to develop a proper IEP* amounted to a denial of FAPE. *Hall*, 774 F.2d at 635. The failure to provide parents with a copy of the procedural safeguards is a procedural violation and thus is reviewed under the three-prong analysis in 92 NAC § 55-008.03. *See, e.g. Dougall v. Copley-Fairlawn City Sch. Dist. Bd. of Educ.*, 2020 U.S. Dist. LEXIS 13560, at *61 (N.D. Ohio Jan. 28, 2020).

LPS should have provided a copy of the procedural safeguards to the [redacted] when there was a referral for a special education evaluation. § 51-009.06A. Discussion about when a referral took place is discussed in the previous section. Even if Sister Buettner properly referred [redacted] for a special education evaluation on December 23, 2021, [redacted] right to a FAPE was not impeded and [redacted] did not sustain a deprivation of educational benefit. However, the [redacted] assert the failure to provide them with a copy of the procedural safeguards significantly impeded their ability to participate in the decision making for [redacted] education. [redacted] testified, “I – we would have been able to request those services or – or – or request an IEE evaluation or – or request something sooner to get things in place quicker for [redacted]” (70:14-22).

Even if the [redacted] parental rights were impeded by the failure to provide them with a copy of the procedural safeguards earlier, the [redacted] have already been adequately compensated for this error through the Nebraska Department of Education complaint they filed in March of 2022 wherein they raised this same issue. I decline to award the [redacted] any of the other remedies they seek such as reimbursement for the paraeducator, math tutor, and tuition for the reasons stated above. The [redacted] failed to meet their burden to show the costs were the result of LPS' failure to provide a FAPE to [redacted].

V. Prior Written Notice Issue

Petitioners allege LPS failed to provide them with prior written notice of their denial to evaluate [redacted] (Exhibit 3). Nebraska Rule 51 requires:

009.05A Prior written notice shall be given to the parents of a child with a disability a reasonable time before a school district or approved cooperative:

009.05A1 Proposes to initiate or change the identification, evaluation, or educational placement of a child or the provision of a free appropriate public education; or

009.05A2 Refuses to initiate or change the identification, evaluate, or educational placement of the child or the provision of a free appropriate education to the child.

92 NAC § 51-009.05A. This issue is closely intertwined with the previous section regarding procedural safeguards because the regulations require as part of the prior written notice, a school district must provide, “a statement that the parents of a child with a disability have protection under the procedural safeguards . . . if this notice is not an initial for evaluation, he means by which a copy or description of the procedural safeguards can be obtained.” 92 NAC § 51-09.05B6. [redacted] testified if [redacted] had received a prior written notice or a copy of the procedural safeguards she would have known how “if we disagreed with a – a particular evaluation and – and what that looked like, what our rights were for that as well as some of the – the timelines for receiving information for a complaint process.” (70:9-13).

The evidence shows LPS never refused to evaluate [redacted] for special education services because they never considered there to be a referral for special education services until March 31, 2022. Therefore, I cannot find a particular violation of this procedural requirement. Even if LPS committed this procedural violation, for the same reasons discussed earlier in this Order, the Petitioners were adequately compensated through the Nebraska Department of Education state complaint. Nevertheless, I conclude even if LPS should have provided the [redacted] with prior written notice, that potential violation did not amount to a denial of FAPE for [redacted]. Importantly, once LPS acknowledged the referral for a special education evaluation on March 31, 2022, LPS regularly sent the [redacted] prior written notices at each stage of the referral, MDT, and IEP process. (Exhibits 94, 95, 98, 101, 102, 106, 111, 112, 113, 115, 120, 127, 128, 130, 131, 132, 133, 135, 137).

VI. Delay in Obtaining Parental Consent for Evaluation

Petitioners assert even after they made a referral for special education services on March 31, 2022, LPS unreasonably delayed obtaining parental consent to evaluate [redacted] until April 19, 2022. The evidence does not support the claim. On March 31, 2022, [redacted] emailed Dr. Roberts and requested a special education evaluation for [redacted]. (Exhibit 92, p. 3). On April 1, 2022, Dr. Roberts responded to [redacted] email indicating the next step, for LPS, would be to hold an MTSS team meeting to review [redacted] data and determine what the problem-solving team would recommend. (Exhibit 92 p. 2-3).

The MTSS team met on April 12, 2022, to discuss the [redacted] request for a special education evaluation for [redacted]. (431:20-25, 432:1-15; Exhibit 95). LPS calls this type of meeting an MDT-1:

[A]n MDT [1] [is] where we really look at all the information, and then determine what assessments would be necessary. So, after looking at all the data, and if we did agree to move forward to an evaluation, then we set that evaluation plan, and that's really led by the school psychologist after looking at all the information about the student.

(432:9-15).

At the conclusion of the MDT-1 meeting, the MTSS team decided to proceed with a special education evaluation for [redacted]. (432:20-23). To begin the evaluation process, and to know which assessments Larson would ask the [redacted] to give consent, Larson requested the [redacted] provide him with all prior evaluations that had been completed for [redacted]. Dr. Roberts explained Larson took this step because:

[W]e wanted to see what assessments had been done. There are specific expectations for each assessment, and so sometimes, you can't repeat them, or the data is going to be invalid. And so, knowing what was done before is really helpful because it had been pretty recent. And then Seth had a list of the evaluations that were done a year prior from Iowa, so having that information helped him to build the assessment plan.

(433:12-21).

Larson received the evaluations from the [redacted] on or about April 19, 2022. (433:25, 434:1-16; Exhibit 97 p. 1). Larson gave the [redacted] the consent to evaluate form on April 19, 2022, and [redacted] signed the document on the same day. (Exhibit 102).

LPS moved swiftly as soon as [redacted] referred [redacted] for a special education evaluation. LPS did not commit a procedural error relating to the timing in obtaining parental consent.

VII. IEP Development Issues

At the Hearing, the [redacted] claimed both substantive and procedural violations of the IDEA and Rule 51 related to LPS' development of the IEPs for [redacted] in the Spring of 2022 and the Fall of 2022.

A. Substantive Issues

Petitioners argue the IEPs created for [redacted] in Spring of 2022 in the Fall of 2022 were not reasonably calculated to provide [redacted] with a FAPE. (Exhibit 3). Specifically, Petitioners want an IEP that provides [redacted] with three hours of special education services per week (1 hour in writing, 1 hour in math, and 1 hour in social skills), provided at the NAM campus during the 2022-2023 school year. (Exhibit 3 p. 24). [redacted] current IEP calls for special instruction in these subjects 18 times per quarter for 30 minutes each session as well as 25 minutes in a social group at Fredstrom 16 times per quarter. (Exhibit 134 p. 12).

The failure to properly develop an IEP is a substantive violation of the IDEA. In order for a claimant to prove a district failed to properly develop an IEP, the claimant needs to show the IEP was not reasonably calculated to allow [redacted] to make appropriate progress in light of unique disability. *See Andrew F. supra*. In this case, the evidence shows both of [redacted] IEPs were reasonably calculated to allow [redacted] to make appropriate progress and [redacted] actually made excellent progress in light of [redacted] disability. Dr. Roberts testified,

When looking at [redacted] last progress report data, writing, [redacted] is out of [sic . . .] ten out of 16 on a rubric. And I believe [redacted] started at eight. Math, [redacted] at 32 correct digits . . . [redacted] started . . . six digits . . . and social skill-wise, making 87 percent average on [redacted] behavior chart or check in and checkout process, and seeing some good growth in gaining attention appropriately, expression – expressing emotions appropriately, and asking for help appropriately.

(448:15-25). Seth Larson, a School Psychologist, testified:

Q. Okay. If we look at [redacted] writing goal on page one of this document, as of October of 2022, [redacted] had a master level of four.

A. Uh-huh

Q. What does that tell us?

A. That would show us [redacted] making sufficient progress towards achieving [redacted] goal within the duration of this IEP

Q. Is having a four on a progress report a good thing? A. That's huge.

Q. That's huge. If we – okay, if we look at [redacted] social skills . . . it looks like as of October 14, 2022, [redacted] mastery level was a three. What does that mean?

A. That the student has demonstrated some progress towards achieving [redacted] goal. Is showing growth but has not - - not yet met.

Q. Is that normal to have a three on a progress report?

A. I would say no for a student that has just been identified, because typically there's a pretty big gap between their skill set and really the role set for them.

Q. So you would've expected that mastery to be lower, is that what

you're saying?

A. Yes, for, I guess, a – a student with – with the same difficulties that has.

Q And then if we look at the top of page two, which is progress for math goal on October 14, 2022, mastery level was a four, is that correct?

A Yes.

Q Again, is that a big success? A Yes. That's huge.

(531:25, 532:1-25, 533:1-8). Larson further testified,

was able to show significant progress in a short period of time. I know kids with autism often struggle with big transitions, and I think that transition from, like I said earlier, Iowa to Lincoln, was – was a big for and it – it really prevented from being successful. I think we're seeing settle in and kind of develop the teams that helped be more successful with is behavior and academics.

(533:15-23). Risueno, a special education teacher, testified:

So, for writing, went up from 12 to 13 out of 20, so it's not a big jump, but it's progress. In social skills, was at a five compared to baseline of four. And for the math goal, went up from 6, to 13, to 15, which is really great growth in a short amount of time.

(695:20-25). Oehring, another special education teacher, testified:

continued to make some really great strides in each of those academic areas. For March progress monitoring on math, scored 35 points on that, which bumped up into the average range for math. in the 30th percentile currently for that. For social skills, when we sent out a survey to North American staff, each staff member placed at three out of four points, showing that meeting those classroom expectations and behaviors and social skills as determined by North American Martyrs staff.

...

To achieve grade level expectations in some of those IEP areas from August to February, March, is pretty rapid growth.

...

We can see that is making growth in IEP areas and this one goes up through, I believe, December. So, in the social skills area, we started to see some of those classroom teachers and specialists in North American Martyrs start to put forth some of those threes where is meeting those expectations in the classroom. You can see the beginnings of math to really start to shine through. That's on page 6 for math, where bumped up to 17 correct in December. And with the more recent one that will be coming out in March, has even increased since then to 35 correct points. So, is – doing well, and this shows kind of the beginning

stages of what we've seen even more recently.
(723:18-25, 724:1-2, 724:21-24, 726:20-25, 727:1-8).

Because [redacted] has made appropriate progress, I cannot find LPS failed to provide with a FAPE under either of [redacted] IEPs.

Petitioners also allege a specific substantive violation relating to [redacted] November 2022 IEP. Specifically, they allege this IEP was not properly developed for [redacted] because the IEP calls for some of [redacted] services to be provided at Fredstrom Elementary, an LPS elementary school. On November 29, 2022, [redacted] IEP team met for an annual IEP meeting.

(Exhibit 125-126, 129). At the IEP meeting, the team added instruction in a social group: [redacted] will receive social skills instruction in a special education small group setting. [redacted] will receive instruction on this goal for 25 minutes, 16 times per quarter by a special education teacher in the public-school setting. Parents have elected to have [redacted] participate in social skills instruction at an LPS public school on Tuesdays and Thursdays from 1:30-1:55. A speech-language pathologist will consult with [redacted] teachers on an as needed basis.

(Exhibit 134 p. 12).

Petitioners argue the transition from NAM to Fredstrom Elementary twice a week is too great a transition for [redacted]. (108:7-24). However, [redacted] progress reports reflect [redacted] is making appropriate progress in [redacted] behaviors and [redacted] social skills. The concern is not supported by the evidence. (Exhibit 137).

Petitioners also assert [redacted] misses nearly an hour of school to attend a 25-minute session at Fredstrom. (233:11-25, 234:1-23). However, Petitioners could not account for why [redacted] would miss that much school. Every witness who testified about the distance between NAM and Fredstrom testified that it was less than five minutes away. (451:20-24, 454:22-25, 798:17-29).

Finally, LPS presented evidence regarding why they recommended the social skills group at Fredstrom. For legal reasons, such as the First Amendment, LPS staff are not able to work with non-disabled students at a religious school. (450:17-25). If [redacted] would have a "social group" at NAM, then [redacted] would not be able to be in a group with non-disabled peers. (451:1-5). The IEP team felt it was important that [redacted] work in a social group with non-disabled peers to learn and observe more skills. (451:10-17). Based on the growth [redacted] has made in [redacted] goals and LPS' legitimate reason for having [redacted] attend a social skills group with non-disabled peers, I will not order LPS to provide all of [redacted] services at NAM. Based on this evidence, and the progress [redacted] is making in all of [redacted] IEP goals, I conclude LPS appropriately developed November of 2022 IEP and that it allows [redacted] to make appropriate progress in light of [redacted] unique abilities.

B. Procedural Issue

In addition to substantive issues with [redacted] IEPs, Petitioners have also asserted a procedural issue relating to [redacted] IEPs – that the services and goals in the IEP developed in the Spring of 2022 were predetermined and, as a result, Petitioners were not able to adequately

participate in the development of goals, accommodations, or services. (95:8- 11; Exhibit 119 p. 20-21).

In *M.M. v. Lancaster Cnty. Sch.*, 702 F.3d 479, 488 (8th Cir. 2012), the Eighth Circuit Court of Appeals defined the standard for predeterminations in the IEP setting in a case involving Lincoln Public Schools. The court initially identified what is prohibited:

The IDEA requires that the parents of a child with a disability either be ‘present at each IEP meeting or [be] afforded the opportunity to participate.’ [*Lathrop R-II Sch. Dist. v. Gray*, 611 F.3d 419, 427 (8th Cir. 2010)]. (citation omitted). A school district cannot refuse to consider parents’ concerns when drafting an IEP. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 53 (2005). The IDEA explicitly requires school districts to include the parents in the team that drafts the IEP, to consider ‘the concerns of the parents for enhancing the education of their child,’ and to address ‘information about the child provided to, or by, the parents.’ 20 U.S.C. § 1414(d)(3)(A)(ii), (d)(4)(A)(ii)(III). A school district cannot predetermine the educational program for a disabled student before meeting with parents. *Deal*, 392 F.3d at 859. Such a predetermination could amount to a procedural flaw in the IEP because it could deprive parents of a meaningful “opportunity to participate in the formulation process.” *Lathrop R-II Sch. Dist.*, 611 F.3d at 424 (citation omitted).

M.M. v. Lancaster Cty. Sch., 702 F.3d 479, 488 (8th Cir. 2012).

The court in *M.M.* determined a prohibited predetermination had not occurred where the parents “were given notice of IEP meetings, attended them, and shared their views about [their] behavior intervention plan.” *Id.* The court recognized that while the parents disagreed with a component of the behavior plan in the IEP, the “IDEA does not mandate that parental preferences guide educational decisions.” *Id.*

The court further determined that:

The District did not predetermine [the student’s] IEP or behavior intervention plan, and it did not refuse to listen to suggestions from L.M.’s parents or [the student’s private therapist.] To the contrary, the District participated in numerous meetings with KKI and L.M.’s parents and adopted a behavior intervention plan for L.M. that included almost all of the institute’s recommendations. See *Fort Osage R-I Sch. Dist. v. Sims ex rel. B.S.*, 641 F.3d 996, 1005 (8th Cir. 2011). We therefore conclude that L.M.’s parents were given a meaningful opportunity to participate in the creation of fourth grade IEP.

Id. at 488-89.

In this case, LPS did not predetermine goals, even though proposed goals were drafted prior to the meeting. A school district may review evaluations, form initial opinions, and compile information in preparation or an IEP meeting without violating the IDEA. *J.G. v. Kiryas Joel Union Free Sch. Dist.*, 777 F. Supp. 2d 606, 2011 U.S. Dist. LEXIS 4118, at *103

(S.D.N.Y. March 31, 2011); *N.L. v. Knox County Schs.*, 315 F.3d 688, 694 n.3 (6th Cir. 003). A draft IEP is permissible if there is an opportunity for substantive parental input. *See S.M. v. Branchburg Twp. Bd. of Educ.*, No. 20-8991, 2021 U.S. Dist. LEXIS 234023, at *26-27 (D.N.J. 2021); *see also M.M. ex rel. A.M. v. N.Y.C. Dep't of Educ.*, 583 F. Supp. 2d 498, 506 (S.D.N.Y. 2008) (“School evaluators may prepare reports and come with pre formed opinions . . . as long as they are willing to listen to the parents and parents have the opportunity to make objections and suggestions.”); *W.S. ex rel C.S. v. Rye City Sch. Dist.*, 454 F. Supp. 2d 134, 147-48 (S.D.N.Y. 2006) (Equating draft IEPs containing proposed placements with predetermination “will inevitably lead to gamesmanship in the preparation of IEPs . . . with the district withholding points of view that ought to be out on the table and subject to discussion and parental challenge (which may or may not be successful) prior to the document’s finalization.”).

At the IEP meeting, Ashley Risueno, a special education teacher, came prepared with a draft of IEP. (683:14-16). Risueno prepared a draft because, “we thought it would be nice for the parents to see just a draft of kind of what the IEP would look like and give the parents the opportunity to see – to see kind of what that might look like, and if they have any questions, then they could bring those up at the meeting.” (683:18-23). On the draft IEP, there was no baseline data on proposed writing goal because:

I didn’t have any – well, I wanted to use – I was proposing to the team that we use an editing rubric for an elementary writing goal, and wanted to get the team’s input at that time, of where the team thought that was at in the areas of a topic sentence, capitalization, correct spacing, and punctuation. So I wanted to get the team’s – the team’s input, as far as where at on the rubric, and that’s what I would’ve used before the baseline.

(684:6-16; Exhibit 114 p. 6).

It is not uncommon for a draft IEP to not have baseline data:

[A] lot of times we need to talk about that, and we want to have information from Seth’s evaluation and the standardized assessment test. But we also want to know how students are doing in the classroom, and then through intervention data. So a lot of times we hold on that until we have a discussion as a team to determine where is the student’s present level of performance at right now, and then, what’s a reasonable goal?

(445:6-14). Additionally, it is common for an IEP team to hold off on gathering baseline data until the IEP team has a chance to determine appropriate goals. (445:15-18). However,

proposed writing goal did already have a proposed goal measurement as 15/20. (Exhibit 114 p. 6). Risueno was able to propose this goal measurement because:

I kind of heard a little bit about capabilities for writing from previous meetings, so I had a general idea, but I had never actually seen a writing sample. But a 15 would put as proficient, so meeting grade level standards, which is really where we would want him to be. The goal of, you know, special education is to close that gap so that they’re on grade level.

(684:17-25, 685:1-2).

Nevertheless, the proposed goal measurement of 15/20 was also up for discussion with the IEP team, “I mean we could’ve changed the entire goal to something else if the team had decided. This was just a proposed goal based on what I had heard about capabilities.” (685:3-12). Ms. Risueno was able to obtain writing baseline the next day. (686:12-25, 687:1-10).

The draft IEP also included a proposed social skills goal without baseline data, but the IEP team was able to discuss the goal, and Ms. Risueno gathered the baseline through observation the next day. (685:13-25, 686:1-11; Exhibit 114 p. 7). Additionally, the proposed social skills goal measurement of 9/12 “would put , again, at proficiency.” (687:14-18). The proposed math goal did include baseline data because “the progress monitoring tool that we were using for the school was the same progress monitoring tool that Martyrs was already using, so that’s why I didn’t need any additional data for that goal.” (689:10-20; Exhibit 114 p. 8). The proposed math goal measurement of 31 points was proposed because, “that would put in the 25th percentile at grade level, which is in the average range.” (689:21-25; 690:1).

The draft IEP did not include any proposal for special instruction minutes because Ms. Risueno, “wanted that to be a team discussion based on goals and what needed, and, you know, in order to provide all those services, we have to pull out of the classroom, so that’s something that the team also needs to take into account.” (690:2-11; Exhibit 114 p. 9). During this meeting, the IEP team decided on appropriate service minutes for , but also stated that they would meet again before the 2022-2023 school year started for adjustments, if necessary. (690:12-17). The finalized IEP reflects would receive 30 minutes of specialized instruction 18 times per quarter. (Exhibit 119 p. 12). Based on the IEP team’s collective experience, the IEP team knew this was a sufficient amount of time. Dr. Roberts, explained:

One of the things that we would think about is, like, a period of intervention, which is about 30 minutes of time. So, looking at how many interventions does need? qualified in the areas of math, writing, and as a student with autism, so has kind of a social skill behavior goal. So, thinking about 30-minute interventions, 30 minutes for each of those is why we would’ve recommended those services. (441:17-25, 442:1-6).

The goals the IEP team ultimately decided upon were:

Given resource instruction, a graphic organizer, and a writing checklist, will write at least 3 sentences related to a given topic without a model of thoughts around a teacher-selected topic including a topic sentence, using capital and lowercases letters correctly, using a correct spacing within and between words, and including end punctuation improving from a baseline of 8/20 to 15/20 as measured by the Elementary Writing Goals-Editing Rubric by May 22, 2023.

...

Given instructions in self-awareness and direct social skills instruction which may include explicit instruction social stories, modeling, video modeling,

role-playing, discussion, coaching, and visual cues, will improve social communication skills by appropriately gaining another's attention, appropriately asking for help, and expressing feelings appropriately (rigidity and negative self-talk) when becoming frustrated increasing from a baseline score of 4/12 to as core of 10/12 as measured by the LPS Social Skills 4-Point Scale by May 22, 2023.

...

Given instruction on using drawings to solve problem solving strategies, will improve math concepts and application skills from a baseline of 20 points at the end of 2nd grade level (16th percentile) to 31 points at the end of 3rd grade level (25th percentile) as measured by Acadience Math Concepts and Applications probes by May 22, 2023.

(Exhibit 119, p. 9-11).

The evidence establishes goals and services in the May 2022 IEP were not predetermined by LPS. The IEP team met twice to make these decisions, once after the MDT meeting on May 19, 2022, and again on May 23, 2022. (442:24-25, 443:1-3). Both parents, along with their special education rights attorney, were present. (Exhibit 114 p. 1-2). The IEP team discussed each of the proposed goals and tailored them to Any missing baseline data was quickly obtained. Therefore, LPS did not commit a procedural error as alleged by the

IT IS THEREFORE ORDERED AS FOLLOWS:

1. Petitioners failed to meet their burden of proving Respondent violated the child find mandate of the IDEA and Rule 51 and failed to provide a free appropriate public education to in accordance with federal and state law and applicable regulations.
2. The Petitioner's Special Education Petition is dismissed as it relates to Chapter 55 of Title 92 of the Nebraska Administrative Code, the Nebraska Special Education Act, Neb. Rev. Stat. § 79-1110 et seq., and The Individuals with Disabilities in Education Act, 20 U.S.C. § 1400 et seq.
3. Subject matter jurisdiction is lacking to address Petitioners claims pursuant to the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973. Said claims are dismissed without prejudice. Petitioners have exhausted their administrative remedies for these claims.
4. Petitioners shall pay their own costs; it being specifically determined Respondent is not responsible for any attorney fees or costs incurred by Petitioners.

5. The Hearing Officer's Findings of Fact and Conclusions of Law are hereby adopted in all respects and made a part of this Order by this reference to the same extent and with like effect as though such Findings of Fact and Conclusions of Law were fully set forth verbatim herein.

Dated: June 22, 2023.

Mona L. Burton

Mona L. Burton, Hearing Officer

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and correct copy of the above and foregoing was duly served on the 22nd day of June 2023, via email and certified mail as follows:

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