

APR 03 2025

NEBRASKA DEPARTMENT  
OF EDUCATION

## BEFORE THE NEBRASKA DEPARTMENT OF EDUCATION



PETITIONERS,

vs.

OMAHA PUBLIC SCHOOLS,  
3215 Cuming Street  
Omaha, NE 68131

RESPONDENT.

CASE NO. 23-36 SE

FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND ORDER

THIS MATTER was heard on November 18 and 21, and on December 11, 2024. Mona (Molly) Burton, the duly qualified and appointed fair Hearing Officer, presided. Petitioners [REDACTED] were represented by their attorney Amy Bonn. Respondent Omaha Public Schools ("OPS") was represented by its attorneys Allison Balus and Kylie Schmidt. The hearing was recorded by Kyanna Buford, court reporter for Great Plains Reporting. On December 11, 2024, the special education due process hearing was adjourned, the record was closed, and the case was taken under advisement.

**I.****INTRODUCTION**

This matter was heard on November 22 and 25 and December 11, 2024. Mona (Molly) Burton, the duly qualified and appointed fair Hearing Officer, presided. Petitioners, [REDACTED] were represented by their attorney, Amy K. Bonn. Respondent, Omaha Public Schools, was

represented by its attorneys, Allison D. Balus and Kiley N. Schmidt. The hearing was recorded by Kyanna Buford, Court Reporter for Great Plains Reporting. The case was adjourned on December 11, 2024, the record closed, and the case taken under advisement.

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

## II.

### ISSUES RAISED BY PETITIONERS

Petitioners filed their Initial Petition on November 30, 2023. On October 21, 2024, with the Hearing Officer's permission, Petitioners filed an Amended Petition and a Supplemental Petition. The Petitions raised the following issues:

1. Whether Respondent's decision in April 2023 to place Petitioners' minor child, [REDACTED], into its Alternate Curriculum Program ("ACP") was a violation of the Least Restrictive Environment ("LRE") requirements of the IDEA and Rule 51.
2. What was [REDACTED] educational placement under her October 2023 IEP.
3. Whether Respondent denied [REDACTED] a free appropriate public education ("FAPE") when it refused to return her to Saddlebrook Elementary School from October 2023 until January 2024 and [REDACTED] was kept at home by her parents.
4. Whether Respondent denied [REDACTED] FAPE by:
  - a. failing to provide Petitioners the criteria applicable for independent educational evaluations; and

- b. refusing to consider the results of [REDACTED] evaluation by Childhood Autism Services until [REDACTED] annual Individualized Education Program ("IEP") meeting in November 2024.

### III.

#### **SUMMARY OF THE EVIDENCE PRESENTED AT THE HEARING**

Over the course of the hearing on November 22 and 25 and December 11, 2024, the following witnesses testified:

1. [REDACTED] Petitioner and Student's father;
2. Torri Smith Tejral, LBA, LIMHP, BCBA. Ms. Smith Tejral is Director of Clinical Services at Childhood Autism Services, Inc. Ms. Tejral Smith completed a functional behavioral assessment ("FBA") and behavioral intervention plan ("BIP") for Student as an independent educational evaluation ("IEE") and testified as an expert witness in the field of behavioral science at the due process hearing;
3. Dr. Johanna Higgins, Ph.D, BCBA-D. Dr. Higgins testified as an expert in the fields of autism and special education at the due process hearing;
4. Kara Saldierna, Special Education Director for OPS;
5. [REDACTED] Petitioner and Student's mother;
6. Amber Winchester, early childhood special education teacher at Saddlebrook Elementary School;
7. Jo Gunderson, special education teaching and learning consultant for OPS;
8. Christine Pereira, special education teaching and learning consultant for OPS;
9. Amber Tapper, special education teacher at Saddlebrook Elementary School;
10. Holly Dixon, occupational therapist employed by the University of Nebraska Medical Center providing occupational therapy services to OPS students on a contractual basis;
11. Christy Martinelli, school psychologist with OPS.

The following Exhibits were received:

Exhibit 1: Rule 51;

Exhibit 2: Rule 55;

Exhibit 3: June 29, 2018, MDT Report;

Exhibit 4: June 29, 2018, PWN for Initial Provision of Special Education;

Exhibit 5: June 29, 2018, Speech Evaluation;

Exhibit 6: November 28th 2018, MDT Report;

Exhibit 7: October 20, 2021, MDT Review;

Exhibit 8: February 16th 2022, AT Screening Consent;

Exhibit 9: April 13, 2022, Behavior Detail Report;

Exhibit 10: April 28, 2022, IEP;

Exhibit 12: February 23, 2023, IEP;

Exhibit 13: April 25, 2023, IEP;

Exhibit 14: September 1, 2023, E-mail Between Petitioner [REDACTED] and OPS;

Exhibit 15: September 5, 2023, E-mail Between Petitioner [REDACTED] and OPS;

Exhibit 16: September 8, 2023, E-mail Between Petitioner [REDACTED] and OPS;

Exhibit 17: September 28, 2023, E-mail between Petitioner [REDACTED] and OPS;

Exhibit 18: October 9, 2023, IEP;

Exhibit 19: October 12, 2023, E-mail Between Petitioner [REDACTED] and Respondent OPS;

Exhibit 20: December 13, 2023, Enrollment History;

Exhibit 21: February 1, 2024, E-mail Between Petitioner [REDACTED] and Respondent OPS;

Exhibit 22: February 15, 2024, E-mail Between Respondent OPS and Petitioner [REDACTED];

Exhibit 23: February 5, 2024, Saldierna E-mail;

Exhibit 24: February 23, 2024, CAS E-mails;

Exhibit 25: April 19, 2024, CAS BIP;

Exhibit 26: April 19, 2024, CASE FBA;

Exhibit 27: April 22, 2024, E-mail CAS-OPS-IEP;



Exhibit 28: April 30, 2024, E-mail CAS-OPS Scheduling;

Exhibit 29: May 4, 2024: E-mails;

Exhibit 30: May 22, 2024, E-mails;

Exhibit 32: Saldierna E-mail to Petitioner [REDACTED] dated July 23, 2024;

Exhibit 33: August 9, 2024, Petitioner [REDACTED] E-mail;

Exhibit 34: August 23, 2024, Petitioner E-Mail;

Exhibit 35: September 9, 2024, Petitioners' E-mail to Boys Town;

Exhibit 36: September 16, 2024, Amanda Lindsay E-mail;

Exhibit 37: September 16, 2024, Petitioner [REDACTED] E-mail to OPS;

Exhibit 38: October 30, 2024, Petitioner E-mail to MMI;

Exhibit 39: November 4th 2024, Draft IEP;

Exhibit 40: Johanna P. Higgins' Education, Certifications, and Employment;

Exhibit 41: Torri Smith Tejral's Personal, Education, and Employment History;

Exhibit 42: Photos of [REDACTED]

Exhibit 43: Health Office Visit Report;

Exhibit 45: March 10, 2023, Progress Report;

Exhibit 46: May 26, 2023, Progress Report;

Exhibit 104: Calendar Entry for Follow Up IEP/Placement Discussion, dated April 25, 2023;

Exhibit 106: May 8, 2023, Email from Jo Gunderson to Kara Saldierna re Change of Placement 23-24 with April 2023 IEP attached;

Exhibit 107: E-mail from Jo Gunderson to [REDACTED]

Exhibit 109: September 5, 2023, Email from Jo Gunderson to Chris Pereira Forwarding Email from [REDACTED] Regarding School Placement;

Exhibit 110: September 5-6, 2023, Email Exchange Between Jo Gunderson, Chris Pereira, and [REDACTED] re [REDACTED] Moving School ASAP;

Exhibit 112: September 7-13, 2023, Email Exchange Between Chris Pereira and [REDACTED]

- [REDACTED] Moving to Another School;
- Exhibit 113: September 8-18, 2023, Email Exchange Between Chris Pereira and [REDACTED]  
[REDACTED] School Placement;
- Exhibit 117: October 10-12, 2023, Email Exchange Between Kara Saldierna and  
Chris Pereira re DL #858795;
- Exhibit 119: September 28 – October 20, 2023, Email Exchange Between Kara  
Saldierna and Chris Pereira;
- Exhibit 121: October 18-22, 2023, Email Exchange Between Chris Pereira and [REDACTED]  
[REDACTED]
- Exhibit 122: October 18-20, 2023, Email Exchange Between Kara Saldierna and [REDACTED]  
[REDACTED] re My Daughter Replacement School;
- Exhibit 123: October 20, 2023, Email Exchange Between [REDACTED] to Chris Pereira re  
[REDACTED] School Replacement;
- Exhibit 124: October 20, 2023, Email Forwarded from Chris Pereira to Kara  
Saldierna re [REDACTED] School Replacement;
- Exhibit 125: October 18-23, 2023, Email Exchange Between [REDACTED] and  
Chris Pereira;
- Exhibit 126: October 23, 2023, Email Exchange Between Kara Saldierna and [REDACTED]  
[REDACTED] ACP Program;
- Exhibit 127: October 18-23, 2023, Email Exchange Between [REDACTED]  
Chris Pereira re [REDACTED] School Replacement;
- Exhibit 128: November 10, 2023, Email Exchange Between Calli Shepherd and [REDACTED]  
[REDACTED] IEP and Attachments;
- Exhibit 130: Calendar Entry for December 1, 2023, re [REDACTED] IEP;
- Exhibit 131: December 7, 2023, Email from [REDACTED] to Kara Saldierna re [REDACTED]  
Back to School;
- Exhibit 132: January 10-11, 2024, Email Exchange Between Kara Saldierna and [REDACTED]  
[REDACTED]
- Exhibit 135: February 9 – April 29, 2024, Email Chain Started by Amber Tapper to  
“Team [REDACTED]” and Related Attachments;
- Exhibit 136: February 22, 2024, Email from CAS to Kara Saldierna re IEE;

Exhibit 137: February 8-23, 2024, Continued Email Exchange Between Kara Saldierna and [REDACTED] re Thank you! And Attachments;

Exhibit 138: March 29 Continued Email Exchange Between Kara Saldierna and [REDACTED] re Thank you!;

Exhibit 141: May 22, 2024, Email from Amber Tapper to [REDACTED] re Progress Report and Attachment;

Exhibit 142: [REDACTED] Data Spring 2024;

Exhibit 143: Samples of [REDACTED] School Work;

Exhibit 145: June 13, 2024, Email from Amanda Lindsay to Kara Saldierna re IEE;

Exhibit 146: June 20, 2024, Authorization Letter from Kara Saldierna;

Exhibit 147: June 21 – July 11, 2024, Email Exchange Between Amanda Lindsay, [REDACTED] and Kara Saldierna re Next Steps for Evaluations;

Exhibit 148: July 23, 2024, Email from Kara Saldierna to [REDACTED] re Boys Town;

Exhibit 149: August 9, 2024, Email from [REDACTED] to Kara Saldierna re [REDACTED] IEE;

Exhibit 150: August 13, 2024, Authorization Letter;

Exhibit 151: August 23, 2024, Revised Authorization Letter;

Exhibit 152: September 5, 2024, Email from Amber Tapper re 2024-2025 [REDACTED] Email Chain;

Exhibit 153: August 23, 2024, Email from [REDACTED] to Kara Saldierna re [REDACTED] IEE;

Exhibit 154: September 16, 2024, Email from [REDACTED] to Kara Saldierna re Next Steps for Evaluation;

Exhibit 156: Draft IEP Provided at [REDACTED] November 4, 2024, IEP Meeting;

Exhibit 157: November 7, 2024, Email to [REDACTED] from Kara Saldierna re IEP Follow-up with Attachment;

Exhibit 158: Student Characteristics and LRE Considerations for IEP Teams;

Exhibit 159: Contact Logs for [REDACTED]

Exhibit 160: Audio Recording of November 4, 2024, IEP Meeting.

#### IV.

#### FINDINGS OF FACT

##### A. The Parties

██████████ is the eight-year-old daughter of Petitioners ██████████ (Tr. Vol. I at 19:16–25; Tr. Vol. II at 125:22–23) At the time of the hearing, ██████████ resided within the boundaries of Respondent Omaha Public Schools (“OPS”) and attended ██████████ grade at OPS’s Saddlebrook Elementary School (“Saddlebrook”). (Tr. Vol. I at 19:6–15, 20:1–7) ██████████ has been verified by OPS as a child with a disability who is eligible for special education under the category of Autism. (See, e.g., Ex. 12 at 1)

##### B. ██████████ 2018 Evaluation and Verification and Early Childhood Education at OPS

In 2018, ██████████ was referred to OPS’s Early Development Network for evaluation due to concerns related to speech. (Ex. 3) ██████████ qualified for Early Intervention under the Nebraska Department of Education Rule 52 as a student with a Developmental Delay. (Exs. 3-4) Amber Winchester (“Winchester”) was ██████████ Early Childhood Special Education (“ECSE”) teacher at Saddlebrook. (Tr. Vol. II, 147:11-24, 149:5–16). In the ECSE setting, Winchester worked with ██████████ “[e]very single day” from November 2019 through May 2022. (Tr. Vol. II, 149:11–150:3) Winchester testified during the two-and-a-half years she taught ██████████ it was difficult to assess ██████████ cognitive abilities because ██████████ would frequently refuse to do a task until she wanted. (Tr. Vol. II, 151:7-18) Winchester also testified ██████████ worked best one-on-one. (Tr. Vol. II, 155:6-8, 201:15–202:2, 227:7–228:2) She said ██████████ was a “hands-on and visual learner,” in addition to needing areas for sensory release where she could engage with fidgets and her cube chair. (Tr. Vol. II, 154:10-21) During her time as ██████████ teacher, Winchester testified ██████████ was generally unable to complete a task the first time prompted. Rather, nearly every task required

several redirects, models, and prompts, and the tasks needed to be reduced to each individual step. (Tr. Vol. II, 154:22–155:5)

Winchester also testified to ██████ observed behaviors. In particular, she observed ██████ bang her head with her hand, scratch, rip pages out of books, hump furniture, cry, refuse to wear her shoes, and throw things. (Tr. Vol. II, 151:19–152:22) Winchester and her staff, which included two paraprofessionals (“paras”) and several other faculty and therapists, worked with ██████ (Tr. Vol. II, 153:3-19) However, it was not feasible to completely curb all of ██████ behaviors, even with three adults always present in the room and a class of approximately fifteen students. (Tr. Vol. II, 153:14-16, 155:11-19) Based upon her years of experience, Winchester believed ██████ behaviors were an aspect of her ASD verification and not a separate behavioral concern, as her outbursts were generally the result of “a meltdown due to sensory overstimulation or . . . not getting her way with something.” (Tr. Vol. II, 160:16–161:9, 165:16–166:6)

In October 2021, ██████ team considered whether to re-evaluate ██████ or simply use existing data. (Tr. Vol. II, 157:13-23) During this phase, ██████ were permitted to ask questions and receive explanation about whether or not to re-evaluate ██████ (Tr. Vol II, 157:24–158:1) The team determined reevaluating ██████ would not provide additional information the team did not already know. Accordingly, the team chose not to reevaluate ██████ as her verification and services would not change. (Tr. Vol. II, 157:4-12, 158:2-15) Winchester documented the team’s decision to rely on existing data. (Ex. 7)

In April 2022, the team met to determine ██████ needs. It considered several factors, including ██████ difficulties with attention, fine motor skills, and self-help skills because those were some of the most crucial things she needed to continue working on as she progressed into ██████ (Tr. Vol. II, 159:22–160:15) The team did not consider ██████ to

have behaviors affecting her ability to learn based upon the ECSE classroom setting. (Tr. Vol. II, 161:6–162:16, Ex. 10 at 4) After considering alternatives such as ACP and resource room, [REDACTED] team placed her in the general education classroom for [REDACTED] (Tr. Vol. II, 162:17–21, 164:9–4, Ex. 10) Winchester testified she “was nervous for” [REDACTED] to go to a general education classroom given her needs and the size of a general education classroom. (Tr. Vol. II, 15-22) However, she acknowledged in some ways [REDACTED] possessed skills not all of her peers had, such as recognizing letters and numbers. (Tr. Vol. II, 163:2-14) After considering all of these factors and their obligation to place [REDACTED] in the least restrictive environment, [REDACTED] team placed her in a general education [REDACTED] classroom with resource room as a support, “knowing that the supports could be increased as needed, and placement could be changed if needed come later in her education if things weren’t working as they should be with the supports that were being given.” (Tr. Vol. II, 163:2-14)

C.

Begins

In the fall of 2022, [REDACTED] began [REDACTED] at Saddlebrook, and from the very beginning, she struggled in the general education classroom. Jo Gunderson (“Gunderson”), a Special Education Teaching and Learning Consultant (“TLC”) for OPS, who was recognized during the hearing as an expert with specialized knowledge in special education, testified Saddlebrook reached out to her within the first week or two of the school year because of concerns “around [REDACTED] just getting into her general education classroom consistently.” (Tr. Vol. II, 168:5–169:12, 172:4–173:9; 215:19–25) It became apparent additional assistance was needed, so Gunderson “made a referral to our coaching team so that we could provide more direct support to the classroom.” (Tr. Vol. II, 173:20–175:4) Ellen Keenan (“Keenan”), an OPS Behavior Coach, was assigned to [REDACTED] team to provide additional coaching and modeling of various techniques

her teacher and para could use. (Tr. Vol. II, 175:5–176:9) Keenan created a “work basket system,” modified her curriculum, helped everyone utilize [REDACTED] communication book, and taught staff how to reinforce communication on a regular basis, including prompting [REDACTED] to use her communication tools and reinforcing behavior when she did. (Tr. Vol. II 175:5–176:9) Despite these efforts, [REDACTED] was often “either refusing to go to the [general education] classroom or leaving the classroom.” (Tr. Vol. II, 176:10-16)

The team also consulted school psychologist, Christy Martinelli (“Martinelli”), to assist with [REDACTED] challenges as a new [REDACTED] (Tr. Vol. III, 86:83:2–87:14, 89:9-24, 91:5–19) In particular, Martinelli consulted with [REDACTED] team to provide more structure and establish routines, but her advice was really focused on keeping [REDACTED] in the classroom and understanding the rules and procedures of a general education class. (Tr. Vol. III, 89:9-24) Some of the changes implemented for [REDACTED] at Saddlebrook during first semester of [REDACTED] included moving her from a group table to her own individual defined space, which was marked out in tape on the floor; color-coding her belongings; and providing her increased routines to create structure. (Tr. Vol. II, 173:20-174:16)

Amber Tapper (“Tapper”), a special education teacher at Saddlebrook, and familiar with [REDACTED] testified [REDACTED] in particular, required support with communication. (Tr. Vol. III, 8:1–13, 9:9–23).(Tr. Vol. II, 173:10-19) For example, [REDACTED] required hand-over-hand instruction for how to hold a writing utensil.

After observing and supporting [REDACTED] during the first semester, Gunderson “felt like there was a need for more direct instruction,” so the IEP team scheduled a meeting to add direct service time. (Tr. Vol. II, 176:10-22) In particular, Gunderson testified [REDACTED] struggled “to prioritize in the general education classroom. There was a lot going on, and I think it was difficult for her to,

you know, kind of learn some of those skills in that environment.” (Tr. Vol. II, 176:22–177:1)

**D. [REDACTED] February 2023 IEP**

[REDACTED] IEP Team met on February 23, 2023, in advance of the deadline for her annual IEP meeting, to address how to better support [REDACTED] in her general education [REDACTED] classroom. (Ex. 12; Tr. Vol. II, 178:10–23) Her team determined “that her needs were greater than ... what the previous IEP had indicated” and because it was a “different environment” than what [REDACTED] had been used to. (Tr. Vol. II, 178:10-23) During the meeting, [REDACTED] recognizing [REDACTED] was struggling, requested she spend more time in resource room than in her [REDACTED] classroom because she did better there. (Tr. Vol. I, 72:17–23, 73:23–74:1) To facilitate [REDACTED] request, the team increased her “direct service time with the special education teacher,” tripling the amount of time she spent in the resource room from 30 minutes five times per week to 90 minutes five times per week. (Tr. Vol. II, 179:14-15, 181:9–182:2; Ex. 12 at 10)

One of the things the team discussed was [REDACTED] “screaming and crying,” which were disruptive in the general education classroom. (Tr. Vol. II, 178:24–179:12; Tr. Vol. III, 65:10–66:10) Additionally, [REDACTED] “started to exhibit some aggressive behaviors” such as hitting and kicking staff. (Tr. Vol. II, 179:12-13) To address these concerns, the team added a Functional Behavior Assessment (“FBA”) and a Behavioral Intervention Plan (“BIP”) to her IEP and updated her goals. (Tr. Vol. I, 306:15–309:25; Tr. Vol. II, 78:3–80:25; 178:24–179:15; Ex. 12 at 5–8, 10) The team worked with [REDACTED] to teach her replacement behaviors and “minimize[e] triggers [or antecedents] for her and then also teaching her to communicate her needs” using picture cards, implementing coping strategies, teaching her to access a fidget box, or simply take a break. (Tr. Vol. II, 180:15–181:8) Gunderson explained how OPS’s process for creating a BIP is to identify the function of behavior, which informs the entire intervention plan in looking to reduce or remove



triggers and teach appropriate replacement behaviors. (Vol. II, 225:11–226:1) To implement the BIP, the staff working with [REDACTED] would then have been trained on the plan and how to use the interventions identified in the BIP. (Vol. II, 226:2–227:6)

Another purpose of [REDACTED] February 2023 meeting was to discuss increasing [REDACTED] stamina for “non-preferred activities,” i.e., activities that “the student doesn’t typically gravitate towards.” (Tr. Vol. II, 184:11-16) For [REDACTED] non-preferred activities were typically academic tasks she found particularly challenging or disliked, as well as “functional routines” pertaining to her school schedule. (Tr. Vol. II, 184:5-10, 184:23–185:1-5) To make academic tasks more palatable, the team worked to reduce each task to its most basic elements to give [REDACTED] manageable tasks without overwhelming her. (Tr. Vol. II, 184:23–185:10)

E. [REDACTED] April 2023 IEP

Two months later, [REDACTED] team met to discuss the changes implemented in February. Despite adding and implementing a BIP, the team continued to see increased behaviors. More to the point, [REDACTED] began “self-selecting” not to participate in her general education classroom because “[i]t was very challenging for her to be in that environment. It – it seemed overwhelming . . . for her to be in the classroom for any length of time.” (Tr. Vol. II, 191:14–192:3) Staff observed [REDACTED] “dropping on the floor and refusing to continue walking to transition” to her general education classroom or “crying” when it was time to go to her general education classroom. (Tr. Vol. II, 192:11-21) Gunderson testified she observed [REDACTED] run “out of her [REDACTED] classroom” and into another small office to escape the general education classroom. (Tr. Vol. II, 192:11-21) Even though [REDACTED] IEP stated she *should* be spending more of her day in a general education setting, that was not occurring with [REDACTED] refusal to go to class and self-selecting to be in a different setting. Despite the increased special education time added to [REDACTED] IEP in

February, in April [REDACTED] again asked for additional resource time. (Tr. Vol. I, 74:4-21)

Relying on data gathered throughout the year, and, in particular, from February 24 through April 24, 2023, [REDACTED] IEP team in April 2023 decided to change her placement for the following school year to ACP. (Ex. 13 at 6, 12; Tr. Vol. I, 24:13-16; Tr. Vol. II, 188:18-189:15; Tr. Vol. III, 48:4-18) ACP at OPS involves a separate classroom in which students are taught based on “**an alternate curriculum**” that “focuses on functional academics,” is tied to Nebraska’s extended indicators, and focuses on skills to help students get to grade level standards. (Tr. Vol. III, 101:1-4, 117:11-118:5) (emphasis provided) ACP classes are much smaller than general education classes, typically with three students to one adult, though adults are allocated based upon students’ needs and can include one-to-one instruction. (Tr. Vol. III, 118:6-12) Like ECSE classes, students in ACP classes are all on IEPs. (Tr. Vol. II, 24:5-11, 150:18-151:6; Tr. Vol., 117:11-123:5) Though many of the students in ACP do have verifications of a cognitive disability, ACP is not exclusive to students with cognitive disabilities. (Tr. Vol. III, 100:19-25) In fact, as Saldierna explained, placements cannot be made based solely on disability category, and a student could have characteristics of a cognitive disability without an official intellectual disability verification. (Tr. Vol. III, 135:1-14)

In addition to having fewer students with a higher adult-to-student ratio, ACP classrooms are staffed with special education teachers, many of whom hold additional special education certificates. (Tr. Vol. III, 118:13-119:5) ACP teachers, who all have special education degrees, also receive STAR training, which is founded upon Applied Behavior Analysis (“ABA”) principles, in addition to individualized training based on the students’ needs when new class assignments are made. (Tr. Vol. III, 118:13-119:16, 145:1-146:5) ACP teachers also receive training on “errorless teaching,” which is a teaching method based upon ABA principles. (Tr. Vol.

III, 119:6-25, 145:1-23) Though ABA principles are not uniformly taught within ACP, they may be implemented into an IEP and the team agrees to implement it. (Tr. Vol. III, 148:16–149:10) There was no evidence presented during the hearing [REDACTED] requested [REDACTED] be provided ABA programming or curriculum. (See Tr. Vol. III, 148:16–19) A student’s curriculum in ACP depends on the student’s individual grade level, is generally more visual, and is modified to address each student’s unique needs in a much smaller setting. (Tr. Vol. III, 120:4–121:21)

Students in ACP have opportunities to interact with general education peers, which occur most often during electives (like physical education (“P.E.”), music, library, and art), recess, and lunch, but can also be in other subjects, like math. (Tr. Vol. II, 206:14–23; Tr. Vol. III, 121:22–122:14) The “IEP teams determine the time with general ed peers.” (Tr. Vol. III, 122:3–10) ACP is not a permanent placement, so if a student begins to make observable gains on IEP goals, a student’s placement may change back to general education to correspond with the least restrictive environment. (Tr. Vol. II, 206:1–13; Tr. Vol. III, 122:12–123:5)

The decision to place [REDACTED] in ACP was not taken lightly. OPS only places students in ACP “when it’s necessary in order to meet their specialized needs.” (Tr. Vol. II, 207:11-25) OPS tried less restrictive environments but determined only ACP could provide [REDACTED] what she needed. Gunderson explained how [REDACTED] increasing behaviors were part of the calculation in deciding ACP as the appropriate placement. She testified the Saddlebrook IEP team focused on the replacement behavior of functional communication—being able to communicate her wants and needs, which they saw as a huge part of her special education program. (Tr. Vol. II, 190:7–21) She stated ACP would be better able to support [REDACTED] progress with functional communication because of the higher staff to student ratio and the way the classroom is structured. (Tr. Vol. II, 190:22–191:13)

All members of [REDACTED] April 2023 IEP team, including Petitioners, agreed to place [REDACTED] in OPS's Alternate Curriculum Program ("ACP"). (Tr. Vol. II, 189:16-20) [REDACTED] testified the OPS members of the team recommended ACP as the appropriate placement for [REDACTED] he "totally trust[s]" the OPS members of [REDACTED] IEP team at Saddlebrook, and he understood at the time, ACP was not available at Saddlebrook (Tr. Vol I, 23:5-25, 70:1-6) He also testified during IEP meetings, the IEP team asks him questions and the IEP team answers his questions. (Tr. Vol II, 70:71:1-16) [REDACTED] agreed with the IEP team's reasons for changing [REDACTED] placement to ACP, as set forth in the Prior Written Notice. (Tr. Vol. I, 75:11-77:12; Ex. 12 at 12)

To reduce disruptions to [REDACTED] schedule, [REDACTED] IEP team decided she would finish out her [REDACTED] year at Saddlebrook and then move into ACP for [REDACTED] grade in the fall. (Tr. Vol. I, 29:11-30:3, 75:6-10, 188:21-15) Following [REDACTED] IEP meeting in April 2023, Gunderson sent [REDACTED] IEP to Kara Saldierna ("Saldierna"), OPS's Director of Special Education, who determines students' school locations after IEP teams decide on placement. (Tr. Vol. III, 114:23-115:2) It is always the teams who decide a student's placement. (Tr. Vol. III, 115:20-25) However, to ensure placements conform with the least restrictive environment requirements, if an IEP team knows they may recommend or discuss a more restrictive placement, Saldierna always reviews the data and previous efforts of the team to confirm both more and less restrictive environments are appropriate and supported by data. (Tr. Vol. III, 115:3-19) In particular, before moving a student to a more restrictive environment, Saldierna reviews the academic and behavioral interventions, the student's progress and goals, and the data to reflect the student is performing below grade level. (Tr. Vol. III, 116:1-18) If Saldierna has concerns, she contacts the team for additional information. (Tr. Vol. III, 116:19-117:6) In [REDACTED] case, Saldierna testified she did not recall any concerns with the team changing [REDACTED] placement to

ACP in April 2023. (Tr. Vol. III, 117:7-10) She informed Gunderson the two schools with ACP classrooms and availability for the fall were Prairie Wind and Boyd. [REDACTED] chose Prairie Wind. (Tr. Vol. II, 193:17-194:13; Exs. 106-107)

**F. Prairie Wind and [REDACTED] October 2023 IEP**

When [REDACTED] began school at Prairie Wind in ACP in August 2023, it was expected the beginning of the year would be a challenge for her. A characteristic of autism is “resistance to environmental change or change in daily routine.” (Ex. 1 at 006.04B; Tr. Vol. I, 119:7-120:4). [REDACTED] specifically had previously shown difficulty with transitions, even to a new activity or a new location and especially at the beginning of the year. (Tr. Vol. I, 194:13-23; Tr. Vol. II, 172:1-19, 185:11-186:6; Tr. Vol. III, 12:20-14:6, 25:4-26:3) Additionally, Prairie Wind’s ACP classroom faced several uncommon challenges in the fall of 2023. First, the ACP teacher was new, and the TLC assigned to Prairie Wind, Calli Shepherd Hogan, was on maternity leave, so Christine Pereira (“Pereira”) was covering, in addition to supporting the schools to which she was regularly assigned. (Tr. Vol. II, 27:6-22, 106:19-107:7, 231:7-18, 232:25-233:14) In addition, many of the students in [REDACTED] class had autism and communication difficulties; many were also either [REDACTED] grade students, who did not have significant experience with school routines. (Tr. Vol. II, 108:4-20, 232:6-17). Moreover, not all of the designated paras had been hired at the beginning of school, so Prairie Wind created a schedule of staff support from both the school and district special education staff to ensure sufficient staffing, which, unfortunately, created “almost a revolving door coming in and out with different people.” (Tr. Vol. II, 107:8-19, 232:6-234:14) Both Saldierna and Pereira testified this was not typical of OPS ACP classrooms, and the district was working to address the issues. (Tr. Vol. II, 106:19-108:3, 232:18-234:14) Prairie Wind was the only elementary school ACP classroom Petitioners visited. (Tr. Vol. I, 77:13-15; Tr. Vol. II,

131:3–132:17).

As she does at the start of every school year, in August 2023, Pereira visited the ACP classes to ensure teachers and staff have the support needed and “just to be out as an extra hand.” (Tr. Vol. II, 231:19–232:5) This was especially needed at Prairie Wind given the additional challenges it faced. (Tr. Vol. II, 231:19–232:24) Pereira worked closely with Prairie Wind staff, district instructional coaches, and personally with the classroom teacher. (Tr. Vol. II, 233:15–234:14) During one of her observations, she learned ██████ had been scratched by another student with an autism verification, who was also nonverbal and “seemed to have a lot of sensory needs.” (Tr. Vol. II, 235:2–15) ██████ also testified about ██████ being scratched by another student. (Tr. Vol. II, 133:14–22) She was called by the nurse and told ██████ had been scratched in class, so she went to Prairie Wind and looked ██████ over. (Tr. Vol. II, 140:8–14) By the time she got there, ██████ had calmed down, and ██████ agreed she would stay at school the rest of the day. (Tr. Vol. II, 140:15–23) Pereira did not believe the other student’s scratching of ██████ had been anything malicious—“just kind of a spur-of-the-moment, impulsive, I needed to run—and ██████ was “an easier target” because “she didn’t move, didn’t fight back” or “push away” like the other kids did. (Tr. Vol. II, 235:2–236:7) Even ██████ admitted students with autism, including ██████ when they cannot communicate, sometimes hit or hurt others, though they do not mean to hurt anyone. (Tr. Vol. II, 139:6–140:7) The adults in the ACP classroom tried to monitor this student and to block or redirect him when he tried to squeeze or scratch ██████ or other students. (Tr. Vol. II, 236:8–22). OPS administration was also working to “obtain more structure and routines for the students” in the Prairie Wind ACP classroom “to try to make it safer for all of them.” (Ex. 112; Tr. Vol. II, 242:3–11) While concerned about the safety of all of the students in the ACP classroom, with respect to ██████ Pereira saw her unwillingness to participate in classroom instruction as a

greater concern. (Tr. Vol. II, 236:23–237:8)

Three weeks into the new school year, on the evening of Friday, September 1, 2024, [REDACTED] emailed Gunderson asking to meet to address [REDACTED] being scratched by the boy in her class. (Tr. Vol. II, 194:23–195:1; Ex. 109) On the next business day, Gunderson, who was not the TLC for Prairie Wind, forwarded the email to Pereira and also had a phone call with [REDACTED] (Tr. Vol. II, 194:23–198:8, 237:24–238:7; Exs. 109, 159 at last page) [REDACTED] indicated they wanted to transfer [REDACTED] and both Gunderson and Pereira worked with them on how to accomplish a transfer to another ACP classroom at a different school because Prairie Wind only had one ACP classroom. (Exs. 110–111; Tr. Vol. II, 198:9–199:5, 240:6–3) Perhaps due to misunderstanding, [REDACTED] requested [REDACTED] return to her [REDACTED] class, so Pereira informed her [REDACTED] had aged out but they were working with her ACP classroom and teacher at Prairie Wind to “obtain more structure and routines for the students to try to make it safer for all of them.” (Tr. Vol. II, 241:4–24; Ex. 112) [REDACTED] continued to withhold [REDACTED] from school “until there is a safe place for her at school,” so Pereira suggested an IEP meeting to discuss the options, hoping to get [REDACTED] back in school. (Ex. 113; Tr. Vol. II, 242:23–244:4)

[REDACTED] Prairie Wind IEP Team met on October 9, 2023, to address [REDACTED] continued absence from school and to get her back in a classroom [REDACTED] were comfortable with. (Tr. Vol. II, 244:5–13) None of the Prairie Wind IEP team members were from Saddlebrook. (Tr. Vol. I, 81:20–25) At that time, [REDACTED] had only attended 17 days of school at Prairie Wind, which was not enough time to determine whether ACP had helped. (Tr. Vol. II, 253:23–254:3). The Prairie Wind IEP team also had not observed her in school long enough to identify necessary behavior interventions beyond those she was already getting in the ACP classroom. In the short time she had been at Prairie Wind, no one had observed [REDACTED] exhibit “aggressive behaviors”; so, Pereira

testified, the team “didn’t have a lot of data to say she needed a behavior plan at that time.” (Tr. Vol. II, 246: 3–247:9). The Prairie Wind IEP team determined the “academic, developmental, and functional needs” of [REDACTED] required “[t]he **alternative curriculum program**,” which it described as “a modified instructional program [that] will include a structured setting, visual and verbal cues, repeated instruction and directions, extended time, choice making activities and manipulatives.” (Ex. 18 at 6) (emphasis provided) Pereira testified this was the “current program that [REDACTED] was in” at Prairie Wind, i.e. ACP. (Tr. Vol II., 247:15–25)

[REDACTED] biggest concern was [REDACTED] safety, and they refused to return her to Prairie Wind; they were adamant they wanted [REDACTED] returned to Saddlebrook. (Tr. Vol. I, 81:20–82:10; Tr. Vol. II, 244:14–245:21–2; Ex. 18 at 9) OPS offered to transfer [REDACTED] to Oak Valley’s ACP classroom, but [REDACTED] rejected the option because they wanted her to go to Saddlebrook. (Tr. Vol. I, 82:19–83:4; Tr. Vol. II, 245:16–20; Ex. 18 at 9) [REDACTED] would have refused any option other than [REDACTED] returning to Saddlebrook. (Tr. Vol. I, 83:9–11). So the Prairie Wind IEP team told [REDACTED] [REDACTED] could return to “her home school,” which was Saddlebrook. (Ex. 18 at 9; Ex. 117; Tr. Vol. II, 249:7–13) The IEP team “really wanted [REDACTED] back in school.” (Tr. Vol. II, 245:21–246:2) Pereira explained: “And just to get her back in school, we didn’t – we didn’t look at the data and the procedures that we should have followed. It was more just to get her back in school. That was our heartfelt.” (Tr. Vol. II, 248:4–13).

**G. OPS Offers to Transfer [REDACTED]**

After the Prairie Wind IEP team decided [REDACTED] could return to Saddlebrook, Pereira emailed Saldierna to inform her of the situation. (Ex. 117; Tr. Vol. II, 248:14–249:13) Saldierna responded:

I’m concerned about this because the IEP includes many statements about ACP and this statement on the Educational Needs section “The alternative curriculum



program is a modified instructional program and will include a structured setting, visual and verbal cues, repeated instruction and directions, extended time, choice making activities and manipulatives.”

Reading the IEP and the PWN, I am concerned that the team did not actually think that the [home school] was FAPE, but that this was done as a parent request. If that is not the case, I think additional information needs to be added to the IEP and the PWN (unless it’s been sent home already) regarding the appropriateness of this placement. I just worry that this is not reasonable for the school based on what is written on the IEP.

(Ex. 117) Pereira testified when she received Saldierna’s email, she knew she had made a mistake—the team was “just trying to get a student who was not coming to school back to school” but she knew “without having good data,” they should not have agreed to move her to a less restrictive environment. (Tr. Vol. II, 249:14-250:14)

Saldierna acted quickly and emailed [REDACTED] directly, only four days after the October 9 IEP meeting, to inform him “Saddlebrook unfortunately does not have adequate staff and services to implement the IEP”. She offered “to transfer [REDACTED] to Oak Valley” instead. (Exs. 118-119 and 122) Saldierna testified she offered Oak Valley to [REDACTED] because it was “the next closest school to their home” and because there were “a lot of similarities between Saddlebrook and Oak Valley,” so she “thought that that might be a place where [REDACTED] would feel comfortable taking her and [REDACTED] would feel comfortable going back to school.” (Tr. Vol. II, 115:22–116:10) [REDACTED] could have started in the Oak Valley ACP classroom within a day or two. (Tr. Vol. II, 116:11–13) However, [REDACTED] responded he did not want [REDACTED] **“in the ACP program any more.”** (Ex. 119) (emphasis provided) Pereira emailed [REDACTED] to apologize and reiterate Saddlebrook was not an option and again offered the Oak Valley ACP. (Exs. 121, 123-125; Tr. Vol. II, 250:19–251:25) Discussions continued, but they led to little or no progress. (Exs. 120-121, 123-127) [REDACTED] did not accept a transfer to Oak Valley. (Tr. Vol. I, 82:19–83:8; Tr. Vol. II, 252:3-5) In fact, [REDACTED] testified he would not accept any school other than Saddlebrook, though if Saddlebrook had an

ACP classroom, he would agree to placing her in an ACP classroom at Saddlebrook. (Tr. Vol. I, 81:20–83:11)

**H. Hearing Officer's Initial Stay Put Order and [REDACTED] Return to Saddlebrook**

In early November 2023, the Prairie Wind IEP team scheduled another IEP meeting for December 1, 2023, at 3:30. (Exs. 128, 130; Tr. Vol. I, 84:1–85:25) However, on November 30, 2023; the day before the IEP meeting, [REDACTED] filed their due process Petition. (Tr. Vol. I, 83:12–15; see Petitioner's original petition filed November 30, 2023; Tr. Vol. II, 121:22–122:2) At the IEP meeting, which [REDACTED] attended with his attorney, there was no discussion about a new IEP for [REDACTED] because [REDACTED] insisted she needed to be returned to Saddlebrook. (Tr. Vol. I, 85:22–86:7)

Following the December 1, 2023 IEP meeting, [REDACTED] emailed Saldierna and copied his attorney, informing Saldierna his Petition meant [REDACTED] placement could not be changed. (Ex. 131) On December 27, 2023, Petitioners filed a Motion for Enforcement of Stay-Put Placement, requesting [REDACTED] remain at Saddlebrook, during the pendency of the due process procedure. The Hearing Officer entered an order on January 10, 2024, finding for purposes of the IDEA's pendency provision, "pursuant to the October 9, 2023, Individualized Education Program (IEP), the last agreed-upon educational placement for the minor child [REDACTED] is alternative curriculum instruction at her home school, Saddlebrook Elementary." (See January 10, 2024 Stay Put Order)

In compliance with the Stay Put Order, OPS returned [REDACTED] to Saddlebrook on January 16, 2024. (Ex. 132) Saddlebrook adjusted its resources in an attempt to satisfy [REDACTED] IEP's service requirements and goals within a school that does not offer ACP. (Tr. Vol. II, 249:3–251:25; Tr. Vol. III, 118:13–121:21, 137:4–138:6; Ex. 121) Specifically, Saddlebrook added a para, adjusted faculty's and staff's schedules, and provided additional adapted and modified curriculum

because of [REDACTED] sub-grade level ability. (Tr. Vol. III, 118:13–121:21, 124:8–126:24, 137:4–138:6)

[REDACTED] has been at Saddlebrook since her return in January 2024 and is currently in the [REDACTED] grade. (Tr. Vol. I, 19:24–20:5). Since returning to Saddlebrook, [REDACTED] has been “spending most of her time with a special education teacher. She’s not spending very much time in general education.” (Tr. Vol. III, 227:7–228:2) She spends most of her day in the resource room. (Tr. Vol. I, 109:4–6) [REDACTED] does better in smaller settings, where stimulation is reduced, with more individualized instruction at a level she can comprehend. (Tr. Vol. I, 269:25–270:15; Tr. Vol. II, 153:22–156:3; Tr. Vol. III, 13:7–26:12, 48:19–49:3) In fact, at [REDACTED] most recent IEP meeting, Petitioners asked, through their attorney, about the possibility of having [REDACTED] assigned more time in the resource room and less time in the general education classroom. (Tr. Vol. I, 110:22–109:3; Tr. Vol. III, 129:1-13; Ex. 160)

Currently at Saddlebrook, each day begins with Tapper or another adult collecting [REDACTED] from [REDACTED] vehicle or at the doors of the school, where she is walked to class. (Tr. Vol. III, 11:7-25, 25:1-3) The team learned to remove [REDACTED] shoes and socks and even her backpack and lunch pail before walking to Tapper’s room to avoid [REDACTED] throwing the items over the bannister. (Tr. Vol. III, 11:7-25, 125:25–127:23) [REDACTED] remains in Tapper’s room until 11:00 a.m., when she goes to recess (Tr. Vol. III, 18:1-6), so for the first few hours of her day, [REDACTED] receives near-individualized instruction either from Tapper or a para in the resource room. (Tr. Vol. III, 12:1–15:9) Because Tapper teaches in the resource room, she has several small groups, ranging from kindergarten to fourth grade, enter and exit several times throughout the morning for targeted instruction. (Tr. Vol. III, 12:1–15:9) Given the disruptions and lack of instruction at [REDACTED] grade level, it is not uncommon for her to refuse to participate once she is no longer

interested in the task. (Tr. Vol. III, 14:14–16:3) According to Tapper, she will generally work for approximately “three to five minutes” at any given task. (Tr. Vol. II, 201:15–202:2, 227:7–228:2; Tr. Vol. III, 17:4-21)

Around 11:00 a.m., a para escorts ██████ to recess for time with her general education peers, and the para remains with ██████ throughout recess. (Tr. Vol. III, 18:1-6) ██████ then returns to Tapper’s room for reading in a larger group, but she only participates about ten percent of the time. (Tr. Vol. III, 18:7-25) She spends the rest of session working with her para on a task box, worksheet, puzzle, or learning to use a keyboard until lunch. (Tr. Vol. III, 18:7-25, 61:2–62:6) ██████ para escorts her to and remains with her in the cafeteria for lunch, but ██████ refuses to eat at school. (Tr. Vol. III, 18:7–20:9) Because the cafeteria is a large, loud room with increased stimulation, ██████ typically begins to display unwanted behaviors, so after approximately ten minutes of encouraging ██████ to eat, the para escorts her to the sensory room for approximately fifteen minutes. (Tr. Vol. II, 152:14-25, 178:24–179:15, 201:15–202:2 Tr. Vol. III, 19:3-18, 36:25–37:15)

Once ██████ is calmed in the sensory room, the team faces one of the greatest struggles of the day when a para transitions ██████ to her general education classroom. This transition leads to increased behaviors, including removing her shoes, dropping, hitting, outbursts, and spitting on students’ desks. (Tr. Vol. II, 152:14-25, 178:24–179:15, 201:15–202:2 Tr. Vol. III, 19:3-18, 36:25–37:15) The team has not been successful getting ██████ to work in her general education classroom for more than a few minutes. (Tr. Vol. III, 20:10–21:6) In the general education classroom, ██████ works on task boxes. (Tr. Vol. III, 36:10–12) She does not work on what the rest of the class is working on or listen to lectures the teacher is giving to the students. (Tr. Vol. III, 36:13–18) She does not interact with or model any of her general education peers. (Tr. Vol.

III, 36:19–24, 126:10–127:23; *see also* Tr. Vol. II 153:22–154:9) At times, [REDACTED] is disruptive in the general education classroom---throwing things, dropping to the ground, kicking, “kind of screaming.” (Tr. Vol. III, 36:25–37:15) Depending on the severity of [REDACTED] behaviors, she may remain in her general education classroom for approximately five minutes before her para removes her to an empty classroom. (Tr. Vol. III, 20:10-21:6) The empty classroom offers a space for [REDACTED] to deescalate and receive individualized instruction at her academic level. (Tr. Vol. III, 21:7-11) At the end of this period, which should be her time in the general education, [REDACTED] transitions to another sensory break. (Tr. Vol. III, 21:12-20)

[REDACTED] afternoon winds down with specials, which include physical education (“P.E.”), music, art, library, and guidance, scheduled from 2:00-3:00. (Tr. Vol. III, 21:21–22:4) [REDACTED] does fairly well with P.E. and music where she participates in her own way. (Tr. Vol. III, 22:5-20) She is less successful in art, particularly because [REDACTED] continues to work on grasping items in her hands. (Tr. Vol. III, 59:22–61:1) She is not very successful in library because she does not like to sit. (Tr. Vol. III, 22:5-20) She should return to her general education classroom after specials, but the team has “stopped fighting” that battle, and she returns to the empty classroom for additional one-on-one instruction with her para. (Tr. Vol. II, 201:15–202:2; Tr. Vol. III, 23:11-23) Once [REDACTED] learned she was not returning to the general education classroom after specials, the team stopped seeing as many unwanted behaviors, and time is more productive for [REDACTED] because she can receive the one-on-one instruction she needs. (Tr. Vol. II, 152:14-25, 178:24–179:15, 201:15–202:2; Tr. Vol. III, 19:3-18, 23:11–24:9, 36:25–37:15) She cannot go to the resource room with Tapper at the end of the day because both Tapper and another resource teacher have [REDACTED] grade math groups and [REDACTED] would not be successful in trying to work with Mrs. Tapper the same time she is working with the [REDACTED] graders. (Tr. Vol. III, 23:24–24:9)

After the one-on-one time in the empty classroom, [REDACTED] prepares for [REDACTED] to pick her up. (Tr. Vol. III, 24:14-25) For a period of time, from about August 28 to October 31, 2024, [REDACTED] was experiencing such distress about specials and her afternoon time in the general education that [REDACTED] chose to pick [REDACTED] up from school every day around 2:15 p.m., even though dismissal was not until 4:00 or 4:05 p.m. (Tr. Vol. III, 24:20–22, 47:2–58:3, 138:7–140:11; Exs. 108, 159) Even when [REDACTED] stays for the full school day, Tapper walks [REDACTED] out to her mother at about 3:50 p.m. to avoid the chaos of dismissal. (Tr. Vol. III, 24:23–25). [REDACTED] cannot navigate the school without an adult helping her at all times. (Tr. Vol. III, 25:1–3).

As part of her autism verification and IEP, [REDACTED] receives related services consisting of occupational therapy, provided by Occupational Therapist Holly Dixon (“Dixon”), and speech therapy, provided by Speech and Language Pathologist (“SLP”) Madison Fell (“Fell”). Both Dixon and Fell have worked with [REDACTED] throughout her time at Saddlebrook. (Exs. 10 at 2, 11 at 2, 12 at 2–3, 13 at 2–3) As [REDACTED] has progressed through grade levels, her services have also increased. (Tr. Vol. III, 56:13–57:23) After years of working with [REDACTED] Dixon testified [REDACTED] is not making occupational gains equal to her peers and “the gap is kind of widening on where she’s – her skill versus her peers.” (Tr. Vol. III, 63:24–64:24). Neither is she progressing at the same rate as even those peers who also have disabilities. (Tr. Vol. III, 137:4–138:6) Fell works with [REDACTED] on using her assisted technology device to communicate. (Exs. 5, 45-46, 103-104, 106, 135, 141, and 144) Fell’s commentary in the IEPs indicates [REDACTED] continues to struggle when refusing or rejecting tasks, which is a primary source of her frustration and behaviors. (Exs. 5, 103, 106, and 144)

Nearly all of [REDACTED] academic instruction occurs either in resource room with Tapper or in an empty classroom with her paraprofessional as she requires an adult at all times. (Tr. Vol. II,

227:7–228:2; Tr. Vol. III, 22:25–23:10, 25:1-3) [REDACTED] does not do any on-grade level work (Tr. Vol. III, 24:10-13) and does not appear to gain much benefit during the few minutes she is present in the general education classroom. (Tr. Vol. III, 35:24–36:24) For example, while the general education class took a math test, [REDACTED] either scribbled on the paper, pointed to incorrect numbers as a modified version of the test, or chose not to participate. (Ex. 143 at 10; Tr. Vol. III, 32:7–33:12) For [REDACTED] to write legibly with a utensil, an adult assists with hand-over-hand. When [REDACTED] does attempt to write, the letters appear illegible even when tracing. (Tr. Vol. III, 34:22–35:12, 126:3–127:23; Ex. 143 at 15) According to Tapper, [REDACTED] has gotten better at writing her name: “it’s pretty legible, and it is -- she is doing a much better job writing smaller as well.” (Ex. 143 at 16; Tr. Vol. III, 35:13-23) Despite the modifications the team provides, [REDACTED] is unable to write or type a sentence or string together written words, and she has not grasped the concept of inserting a “space” between written words. (Tr. Vol. III, 62:7-18)

Since her return to Saddlebrook, her team has documented antecedents to her behaviors in an attempt to better understand the antecedents and functions and redirect her to desired behaviors. (Tr. Vol. II, 79:12–81:3; Tr. Vol. III, 26:13–30:2; Ex. 142) Tracking these behaviors also enables her team to observe how many minutes [REDACTED] remains on task for the day as well as how many prompts staff give [REDACTED] before she completes any given task. (Tr. Vol. II, 201:15–202:2; Tr. Vol. III, 28:11–31:25; Ex. 142) In tracking her behaviors, the team has noticed she generally avoids writing tasks and going to her [REDACTED]-grade classroom. (Tr. Vol. III, 27:4–28:10) To redirect, her team uses many tactics including timers, “first-then” promptings, choice items that tend to be sensory items, and bubbles. (Tr. Vol. III, 16:4-15, 127:24–128:8; Ex. 13) In fact, using her assistive communication device, [REDACTED] recently learned to say “I want bubbles.” Tapper testified the first time [REDACTED] did this, to reinforce it, Tapper stopped the work of the group she was working with

to go get bubbles for [REDACTED] (Tr. Vol. III, 16:13–17:3).

In addition to her academic struggles, which often precipitate the behaviors her team has been working on, [REDACTED] continues to need assistance with functional daily living tasks, in particular, toileting. (Ex. 135; Tr. Vol. II, 185:11–186:6) [REDACTED] team maintains constant communication with the team members, including Petitioners, to collaborate on best ways to communicate task steps with [REDACTED] including toileting. (Ex. 135 at 1-2, 9-15; Tr. Vol. III, 38:23–39:23; *see also* Ex. 152) Staff use sequencing images to assist [REDACTED] with toileting steps, and while she is able to disrobe consistently, she struggles to redress. (Tr. Vol. III, 40:3-10, 41:1-) Additionally, [REDACTED] does not alert staff she needs to use the restroom, so there are scheduled restroom breaks to change her pullups. (Tr. Vol. III, 39:24–40:3) No other students at Saddlebrook require the same level of toileting assistance. (Tr. Vol. II, 185:11–186:6; Tr. Vol. III, 40:11-14)

**I. [REDACTED] Request for and Scheduling of an IEE**

Less than a month after [REDACTED] returned to Saddlebrook, (Tr. Vol. II, 40:13–45:15; Tr. Vol. III, 94:24–95:10) the parties filed a Joint Motion to Continue the due process hearing, which had been scheduled for February 26 and 28, 2024, “to allow time” for the parties “to pursue an independent educational evaluation (“IEE”) of [REDACTED]” (*See* Joint Motion to Continue, filed February 8, 2024; Tr. Vol. II, 85:13–17) The motion was granted the same day. (*See* February 8, 2024 Order)

[REDACTED] contacted Saldierna on February 1, 2024, to “formally request an independent educational evaluation (IEE), to include a functional behavioral assessment (FBA) and an assistive technology evaluation, for [REDACTED]” (Ex. 21) In support of his request, [REDACTED] said he “disagree[d] with the district’s most recent evaluation of [REDACTED] because it was not comprehensive



and did not assess her disability-related needs.” (Ex. 21) He also asked for “official documentation of the school district’s criteria for IEEs” (Ex. 21)

In response, on February 5, 2024, Saldierna provided two lists of providers: one identified “approved providers for psychological evaluations” and the other, a list of Board Certified Behavioral Analysts (“BCBA”) in case [REDACTED] “prefer[ed] a BCBA [to do] the FBA over a psychologist.” (Ex. 23 at 250–257) These lists of providers came from NDE’s website. (Tr. Vol. II, 87:25–88:2) Munroe-Meyer Institute, which is sometimes referred to as MMI and is part of the University of Nebraska Medical Center, was listed on the list of psychologists. (Ex. 23 at 254; Tr. Vol. II, 52:2–25) Saldierna also told [REDACTED]

Once you determine a provider and make an appointment, they will require a letter of authorization from me. Please have them reach out to me directly and I will then the authorization for payment. If there is a provider that is not on this list, let me know and I will check to see if they are appropriately certified/licensed. After the evaluations are complete, the evaluator will send them to me and we will schedule an MDT to consider the results.

(Ex. 22 at 250) [REDACTED] responded the following week indicating he intended to complete only the FBA portion of the IEE. (Ex. 22 at 250) Saldierna responded to inform [REDACTED] she had authorized Terri Newton (“Newton”), a BCBA from Childhood Autism Services, Inc. (“CAS”), to complete the FBA and specifically asked whether [REDACTED] intended to use “another agency for the rest of the IEE.” (Ex. 22 at 249) [REDACTED] responded, “I won’t be using an additional agency,” so Saldierna offered one of OPS’s school psychologists to complete the remainder of the IEE and sought his consent. (Ex. 137) Saldierna testified [REDACTED] three-year reevaluation was coming due and she had thought in agreeing to an IEE, they had agreed to a comprehensive evaluation. (Tr. Vol. II,

90:1–12, 92:9–20).<sup>1</sup> She said, “[I]f he wasn’t going to use another agency, I wanted us to be able to conduct the rest of the evaluation.” (Tr. Vol. II, 92:9–20). [REDACTED] responded in late March asking whether Saddlebrook was able to complete the evaluation in October. (Ex. 138) Saldierna reiterated that [REDACTED]’s three-year evaluation was due in October 2024 and again asked whether CAS was completing the entire IEE or just the FBA. (Ex. 138) [REDACTED] responded: “My understanding is that we can see what the evaluation results are from Childhood Autism Service soon and that would let us know what more information might be needed. I want to be sure we know what [REDACTED] needs.” (Ex. 138)

CAS was the first provider Petitioners contacted about [REDACTED] IEE. (Tr. Vol. II at 88:13–15). Torri Smith Tejral (“Tejral”), a BCBA, Registered Behavior Technician (“RBT”), and the Director of Clinical Services for CAS, interviewed [REDACTED] parents on February 29, 2024; observed [REDACTED] at home on March 11, 2024; and observed [REDACTED] at Saddlebrook on April 3, 2024, and April 8, 2024. (Ex. 26) On April 22, 2024, Tejral provided Saldierna an FBA and a proposed BIP. (Exs. 25-27) Tejral recommended [REDACTED] receive ABA therapy, but she did not have a recommendation for the location of the intervention—whether in a general education classroom or elsewhere. (Ex. 26 at 7; Tr. Vol. I, 192:10–19, 195:21–196:5) CAS normally provides ABA therapy in a clinical or home setting. (Tr. Vol. I, 185:6–9) Tejral also recommended implementing ABA principles, such as replacement behaviors, into [REDACTED] school day. (Ex. 26 at 8–9; Tr. Vol. I, 171:2–174:22; *see also*, 209:13–211:9 (replacement behaviors are an ABA principle))

In late April 2024, [REDACTED] stated he wanted “to get more information about [REDACTED]

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<sup>1</sup> Petitioners’ expert, Dr. Higgins, also testified that she understood an IEE to include a number of different assessments or evaluation tools—not just an FBA. (Tr. Vol. I., 273:24–274:5)

learning” regarding math, reading, written language, speech, ABLLS-R, ADOS-2, asking whether Dr. Johanna Higgins (“Dr. Higgins”) could perform those additional assessments. (Exs. 139-140) Saldierna testified OPS could not approve Dr. Higgins to perform those parts of the evaluation because “the rule states that the -- we have to use the same criteria for assessments that we use internally. And we -- our BCBAs are not -- they’re not involved with any assessments or evaluations outside of conducting FBA and then helping to write of it. They don’t conduct any -- any additional assessments.” (Tr. Vol. II, 95:2–96:8; Ex. 1 at 006.071). She explained, internally, OPS had psychologists, speech language pathologists, educational diagnosticians, occupational therapists, and physical therapists perform other parts of the evaluations. (Tr. Vol. II, 95:13–17) Dr. Higgins is not a psychologist. (Tr. Vol. I, 274:24–25)

On June 13, 2024, Amanda Lindsay (“Lindsay”) from MMI emailed Saldierna, stating, “I got a call from the mother of [REDACTED] ... stating that you have approved an IEE. Can you please send me the authorization letter?” (Ex. 145) Saldierna provided the authorization letter on June 20, 2024. (Ex. 146) On July 11, 2024, Lindsay emailed [REDACTED]

At this time, we do not have a psychologist that is available to do this evaluation, so you will need to choose another agency for psychological testing. We are able to provide PT, OT and speech therapy, so please let me know if you would like to schedule those services at MMI, or if you would like another agency to do the entire evaluation.

(Ex. 31)

On July 15, 2024, [REDACTED] emailed Saldierna about the email from Lindsay, saying: “I am going to reach out to Boys Town to try to get the rest of the IEE done for [REDACTED] In the meantime, though, can we go ahead and schedule a meeting with the Childhood Autism Services evaluator to discuss the results of the FBA in the spring?” (Ex. 38) Saldierna responded OPS would not agree to meet “until the full evaluation is complete.” (Ex. 38). Saldierna testified when the IEE was

authorized in February, she assumed it would be complete by May; then during the summer when she realized Petitioners were just now seeking the rest of the evaluation, she assumed it would be complete by August. (Tr. Vol. II, 103:8–19)

On July 23, 2024, Saldierna emailed [REDACTED] an “individual from Boys Town called and left a voicemail” saying he had “asked them to call [her] regarding information needed for [REDACTED] IEP.” (Ex. 148) Saldierna said the individual had not left a name and the phone number they left is not in service; she said, “[i]f there is someone you would like me to speak to, can you please provide me with their name, contact information, and a signed release of information outlining what information you would like me to share with them,” and attached a release form. (Ex. 148). [REDACTED] did not respond directly to this inquiry and never provided a signed release that would have allowed Saldierna to talk to Boys Town about the IEE. (Tr. Vol. II, 101:0–15) Instead, he emailed a couple weeks later to say he had “gotten confusing information” from Boys Town, adding, “I think the problem is that OPS has not provided me with an initial authorization letter that I can provide to Boys Town in order to get on their schedule. I would welcome your help in getting this started.” (Ex. 149).

Saldierna provided an authorization letter to [REDACTED] (Tr. Vol. I, 101:25–102:7; Ex. 150). [REDACTED] however, came back and asked for a more specific authorization letter listing the specific evaluations [REDACTED] had requested and OPS had authorized back in April 2024. (Tr. Vol. I, 102:21–103:10; Ex. 153). Saldierna provided the more specific authorization letter, even though OPS does not typically include this level of information in the authorization letters “because evaluators are able to decide with the family what the best assessments are to do, and we wouldn’t want to restrict them in any way.” (Ex. 151; Tr. Vol. 103:17–20, 105:21–106:9)

Saldierna testified the email and lists of providers she sent [REDACTED] on February 5, 2024, was a “typical” response to IEE requests. (Tr. Vol. II, 88:3–6) She also testified the “typical” process is for the parent to reach out to a provider, like MMI, and for the provider to contact Saldierna for an approval letter. (Tr. Vol. II, 98:20–23, 104:13–23) She has never had any difficulties getting IEEs scheduled in a timely manner similar to those [REDACTED] has reported in scheduling an IEE for [REDACTED] (Tr. Vol. II 88:18–22). In November 2024, OPS again offered to have an OPS psychologist complete an evaluation of [REDACTED] and provided [REDACTED] with a consent form. (Tr. Vol. II, 93:17–21). [REDACTED] never responded to either of OPS’s requests for consent to evaluate [REDACTED] (Tr. Vol. I, 94:4–18; Tr. Vol. II, 93:14–24) Despite Saldierna providing additional providers, Petitioners only reached out to CAS, Dr. Higgins, MMI, and Boys Town. (Tr. Vol. I, 89:13–90:23) The only evaluation [REDACTED] has received since [REDACTED] requested an IEE back in February 2024 is the FBA and BIP performed by Tejral. (Tr. Vol. I, 104:2–6)

**J. Hearing Officer’s Second Stay Put Order and [REDACTED] November 2024 IEP**

In September 2024 and again in October 2024, OPS reminded [REDACTED] annual IEP was due in October and suggested scheduling an IEP meeting; [REDACTED] refused. (Tr. Vol. I, 104:7–15, 104:22–24; Exs. 154, 155). On October 7, 2024, Petitioners filed a Second Motion for Enforcement of Stay-Put Placement, seeking to preclude Respondent from holding an IEP team meeting. (See Petitioners’ October 7, 2024 Motion; Tr. Vol., 123:25–124:6) Respondent opposed the motion, and the Hearing Officer overruled it. (See Respondent’s Opposition to Second Motion for Enforcement of Stay-Put Placement, submitted October 9, 2024; Order on Second Motion for Enforcement of Stay-Put Placement, filed October 18, 2024; Tr. Vol. III, 123:25–124:6) Accordingly, [REDACTED] IEP team held her annual IEP on November 4, 2024, which lasted several hours. (Tr. Vol. II, 199:24–200:11; Tr. Vol. III, 128:9-25) [REDACTED] attended the IEP along with his

attorney, Respondent's counsel, Tejral, Saldierna, Tapper, Fell, Dixon, Martinelli, [REDACTED] grade general education teacher, and the Saddlebrook principal. (Tr. Vol. II, 200:12–201:14; Tr. Vol. III, 91:20–22, 128:9–25)

At the start of the meeting, a draft IEP was circulated so “everybody at the meeting could fully participate and have something in front of them to refer to as [the team] went through and discussed each section.” (Tr. Vol. III, 130:4–12; Ex. 156) During the meeting, the Saddlebrook IEP team again asked [REDACTED] for his input. (Tr. Vol. I, 105:21–106:22) The team discussed [REDACTED] support services, new and continued behaviors, her present levels of academic and functional performance, and her progress at Saddlebrook. (Tr. Vol. II, 201:15–202:2) Some of the new behaviors included “spitting on classroom materials.” (Tr. Vol. II, 201:15–202:2) The team discussed [REDACTED] “appeared overwhelmed in the general education classroom” with noise, sensory input, and the structure of the environment, causing her distress. (Tr. Vol. II, 202:3–15; Tr. Vol. III, 137:4–138:6) The team also discussed a continued concern regarding [REDACTED] eating habits. (Tr. Vol. II, 202:23–203:8; Ex. 157 at 6 (“[REDACTED] dad and the team also have a concern that [REDACTED] is not eating or drinking during the school day.”)) Petitioners asked, through their attorney, about the possibility of having [REDACTED] assigned more time in the resource room and less time in the general education classroom. (Tr. Vol. I, 110:22–109:3, Tr. Vol. III, 129:1–13; Ex. 160)

In [REDACTED] November 2024 draft IEP, the IEP team implemented Tejral's FBA and incorporated the vast majority of her recommended BIP. (Tr. Vol. I, 194:8–12) However, it did not drastically change what the team was already doing for [REDACTED] (Tr. Vol. III, 94:8–96:25) Martinelli, who helped Tapper rewrite the FBA and BIP in preparation for the IEP meeting, testified the team was already “using a lot of prompts, a lot of mands, a lot of visuals.” (Tr. Vol. III, 94:24–96:19) She felt Tejral's input was “a helpful addition. But the staff was using a lot of

these tools.” (Tr. Vol. III, 95:17–19; *see* Tr. Vol. II, 78:3–80:25)

On November 7, 2024, Saldierna sent [REDACTED] an updated version of the IEP shared during the meeting. (Tr. Vol. I, 107:9–18; Ex. 157) In her email, she explained, as she had at the meeting, the OPS team was recommending ACP for [REDACTED] but recognized it could not be implemented at this time because of the Stay Put Order. (Tr. Vol. I, 107:19–108:3; Tr. Vol. III, 129:14–23, 132:17–138:2; Ex. 157) Instead, Saldierna proposed until the due process petition was resolved, [REDACTED] service time would “take place in Special Instruction at Saddlebrook with the documented related services we discussed.” (Ex. 157 at 2) Petitioners did not respond to OPS about the November 2024 IEP. (Tr. Vol. I, 108:4–7; Tr. Vol. III, 133:3–5)

**K. Evidence Presented on [REDACTED] Least Restrictive Environment**

With the exception of Petitioners, most of the witnesses familiar with [REDACTED] testified ACP was the appropriate placement or least restrictive environment for [REDACTED] Tapper, who has worked with [REDACTED] since she started [REDACTED] at Saddlebrook and is trusted by Petitioners, (Tr. Vol. I, 70:7–11; Tr. Vol. II, 142:15–21, Tr. Vol. III, 11:2–6) testified she believed ACP was appropriate for [REDACTED] so she can receive all of the services and support she needs to be successful. (Tr. Vol. III, 48:19–49:3) Similarly, Dixon testified [REDACTED] has been making small steps toward her goals, but her progress was insufficient to remain successful in a general education classroom. (Tr. Vol. III, 70:24–72:7) She agreed with the IEP team decision to place [REDACTED] in ACP because “the gap was already widening where she still wasn’t, you know, starting to write words or letters” and is still needing “more help with toileting, still needing help with all those fine motor things that were difficult for her.”

Gunderson, who has worked with [REDACTED] since kindergarten and was recognized at the hearing as an expert witness with specialized knowledge in special education (Tr. Vol. II, 172:4–19), testified [REDACTED] would benefit from ACP because “her work is required to be modified and adapted”; she is “working on extended indicators from our -- our state standards”; and she “requires a high level of reinforcement and adult support throughout her day in order to learn her functional routines at school, to reinforce her receptive and expressive communication.” (Tr. Vol. II, 204:11–205:8) Gunderson said all of those things “can really be supported through” ACP. (Tr. Vol. II, 205:4–5) Moreover, Gunderson opined, with the amount of time [REDACTED] is currently spending outside of general education, ACP is not necessarily a more restrictive environment; yet ACP would provide greater structure than the resource room. (Tr. Vol. II, 227:7–228:11)

Saldierna, who was also recognized during the hearing as an expert witness with specialized knowledge in education, also agreed that ACP is the most appropriate placement for [REDACTED] (Tr. Vol. III, 114:12–17, 137:4–138:6) She explained how an IEP team might evaluate [REDACTED] using a recent document created by the District “to support IEP teams as they work to determine what the least restrictive environment is for specific student.” (Tr. Vol. III, 133:6–138:6; Ex. 158) The document identifies various categories of characteristics to consider, such as communication or self-help/self-care. (Ex. 158) [REDACTED] characteristics are most often in line with those that would fall under considerations for ACP—things like requiring a significantly modified curriculum and instruction; an inability to communicate wants and needs without significant adult support; needing constant adult support to use the toilet, eat, or navigate the school independently. (Ex. 158) Saldierna explained because [REDACTED] is currently spending most of her time with a special education teacher, is spending little time in general education, is not making progress at the same rate as her peers, is exhibiting indications she is stressed and overwhelmed, needs a significant



amount of assistance with restrooming, and cannot independently utilize her communication device—"[a]ll of those things taken as a whole" indicate [REDACTED] "needs a separate classroom and she needs something more restrictive on the continuum that [the District is] required to offer." (Tr. Vol. III, 137:4–6)

Martinelli, who was recognized as an expert witness in school psychology, explained why ACP was an appropriate placement even though [REDACTED] has not been verified as having a cognitive or intellectual disability: "the data that we have collected over the last several years with the level of support that she has received would indicate that that is appropriate for her and least restrictive. The verification a student has does not drive placement or programs. We need to look at a student's needs to determine what is least restrictive for them educationally." (Tr. Vol. III, 87:10–14, 92:22–93:8) Martinelli said the data shows ACP is appropriate for [REDACTED] because "she is performing well below age peers in all areas, and that has been consistent over time." (Tr. Vol. III, 93:9–13) She also pointed out while [REDACTED] is "definitely gaining skills," the gap between her skills and those of her same-age peers "just gets bigger as time goes on." (Tr. Vol. III, 93:14–17) Martinelli also explained why a more recent evaluation was not necessary to the decision because OPS has "an abundance of evidence and data that would support that [ACP] is a good fit for her." (Tr. Vol. III, 93:18–23) She also explained why the DAYC-2 assessment conducted of [REDACTED] in 2018 does not undermine the decision to place [REDACTED] in ACP because "it is a developmental screener" and "not predictive of future skills and abilities." (Tr. Vol. III, 107:5–21) She expects, based on "the skills that she is showing every day," if [REDACTED] took the DAYC-2 today, it would rate her as being "significantly delayed." (Tr. Vol. III, 107:22–108:12) In Martinelli's opinion, what ACP would give [REDACTED] "that is difficult to replicate, even with all of the things that have been implemented right now, would be an environment that is structured better to meet her learning needs"; staff "are

trained and have experience with supporting those types of learning needs”; more “focus on adaptive skills, which [REDACTED] is struggling with, as well as functional academics”; and “the opportunity to be more independent.” (Tr. Vol. III, 97:8–25)

Even Petitioners’ experts, who had limited knowledge about [REDACTED] provided testimony supporting ACP as [REDACTED] least restrictive environment. Tejral observed [REDACTED] on only three occasions for a total of about five hours. (Ex. 26; Tr. Vol. I, 143:15–19) She did not form an opinion as to the appropriate setting [REDACTED] should be taught behavior skills, and an assessment of [REDACTED] academic functioning was outside her expertise. (Tr. Vol. I, 193:16–194:7) Nonetheless, she agreed with OPS witnesses [REDACTED] does best in one-on-one teaching interactions. (Tr. Vol. I, 188:13–16) She observed [REDACTED] exhibited higher rates of interfering behavior when she was not engaged, such as while watching an instructional video in a general education classroom. (Tr. Vol. I, 188:21–7) Tejral observed OPS staff using behavior interventions with [REDACTED] her recommendation was it could be done more consistently. (Tr. Vol. I, 191:21–192:1) According to Tejral, [REDACTED] currently needs “in-the-moment prompting” to teach replacement skills and intensive instruction to address one-step instructions. (Tr. Vol. I, 192:7–9, 193:9–12)

Petitioners’ other expert witness, Dr. Higgins, is a BCBAD and a professor of special education courses and courses in applied behavior analysis. (Tr. Vol. I, 199:11–202:4) She was recognized during the hearing as an expert witness in the field of special education and autism. (Tr. Vol. I, 202:9–16) She opined [REDACTED] IEPs from February 2023 through October 2023 were not reasonably calculated to enable her to make appropriate progress in light of her particular circumstances, primarily because of what the IEPs said about how [REDACTED] behaviors would be addressed. (Tr. Vol. I, 214:11–239:7) She opined [REDACTED] like any child with autism, is a good candidate for intensive instruction involving ABA methodologies. (Tr. Vol. I, 252:1–12) In her

opinion, ABA is an essential component for all students with autism as part of their IEP or special education program. (Tr. Vol. I, 265:4-7)

The only information Dr. Higgins had specific to [REDACTED] on which to base these opinions were 11 records, including the three IEPs. (Tr. Vol. I, 206:4-208:10, 263:15-264:5) She never met [REDACTED] never observed her, never watched videos of her, and never talked to her parents or teachers. (Tr. Vol. I, 263:17-264:1) Dr. Higgins also had no knowledge about how [REDACTED] IEPs were implemented. (Tr. Vol. I, 265:17-19) Dr. Higgins did a paper review and no direct observation.

Dr. Higgins confirmed, though, that the best setting for [REDACTED] currently is "in a classroom that's not with typical peers for some, maybe even the majority of her day." (Tr. Vol. I, 267:6-17) She confirmed [REDACTED] "needs a skill-based program that is developed for her that also addresses her challenging behaviors." (Tr. Vol. I, 267:20-24) She testified [REDACTED] needs a behavior intervention plan wrapped into her academic program and one-on-one support most of the day. (Tr. Vol. I, 269:25-270:6) Dr. Higgins also agreed [REDACTED] needs "a focus on increasing her independence" so she can "potentially transition back into typical classrooms, to the extent possible." (Tr. Vol. I, 270:7-11) She testified [REDACTED] should have some access to typical peers, such as on the playground or in gym class. (Tr. Vol. I, 270:16-24) She said [REDACTED] needs a program developed for her to be able to pay attention and independently complete activities. (Tr. Vol. I, 271:3-6) In Dr. Higgins' opinion, [REDACTED] could not effectively receive the intensive teaching she needs "in a general education classroom if she was there all day. It would be difficult for her to receive that type of program. Yes." (Tr. Vol. I, 267:13-271:22) One reason is because [REDACTED] challenging behaviors could be pretty disruptive in a general education classroom. (Tr. Vol. I, 271:18-22) Dr. Higgins had no first-hand knowledge about OPS's ACP program, any training

ACP teachers receive, or what resources might be available in an ACP classroom as compared to what is available at Saddlebrook. (Tr. Vol. I, 271:23–272:25)

V.

**ANALYSIS AND CONCLUSIONS OF LAW**

The Hearing Officer makes the following conclusions of law and determinations 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:

**L. Burden of Proof**

██████████ 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.” *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)).

**M. Least Restrictive Environment is ACP**

A preponderance of the evidence presented at the hearing supports Respondent’s determination in April 2023 that ██████████ LRE is in an ACP classroom. Based on the factual record developed during the hearing, ACP was in April 2023, and remains as of January 2025, the educational placement that will enable ██████████ to make meaningful progress toward reasonable goals in light of her circumstances. ██████████ placement in ACP therefore comports with the IDEA.

**1. Applicable Legal Standards**

The ultimate issue is whether a free appropriate public education (“FAPE”) has been provided or made available to ██████████ By statute, an IEP developed for a child with disabilities must set measurable annual goals for the child’s academic and functional progress and identify the

aids and services needed to attain those goals. See 20 U.S.C. § 1414(d)(1)(A); *see also* 92 NAC § 51.007.07. “To meet its substantive obligation under the IDEA [to provide a FAPE], a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Endrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 399, 137 S. Ct. 988, 999, 197 L.Ed.2d 335 (2017). Where a child is not able to achieve at grade level, “his educational program must be appropriately ambitious in light of his circumstances.” *Id.* at 1000. A student making “‘merely more than *de minimis*’ progress from year to year can hardly be said to have been offered an education at all.” *Id.* at 1001.

The IDEA also protects the child’s right to receive a FAPE in the least restrictive environment (“LRE”). The IDEA requires:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(a)(5)(A). While the IDEA codifies a “preference for mainstream education,” it also “significantly qualifies the mainstreaming requirement by stating that it should be implemented ‘to the maximum extent appropriate’ and that it is inapplicable where education in a mainstream environment ‘cannot be achieved satisfactorily.’” *Pachl v. Seagren*, 453 F.3d 1064, 1067–68 (8th Cir. 2006). *Id.* at 1067–68 (internal citations omitted). “The LRE therefore cannot be determined without considering whether the child is receiving a FAPE: The availability of a FAPE—that is, the child’s ability to make meaningful progress in the environment—is part of what constitutes the LRE.” *J.P. by Ogden v. Belton Sch. Dist. No. 124*, 40 F.4th 887, 890 (8th Cir. 2022). As the Eighth Circuit has explained:

The IDEA implementing regulations therefore provide for a “continuum of alternative placements”—“instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions” to ensure a school district can “meet the needs of children with disabilities for special education and related services.” 34 C.F.R. § 300.115. The IDEA does not allow a school to place a child in a less restrictive environment in which he or she makes little or no progress towards appropriate educational goals.

*Id.*; see also 92 NAC § 008.01. “It is appropriate under the IDEA to place a student in a less integrated setting when ‘the handicapped child would not benefit from mainstreaming,’ when ‘any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting,’ and when ‘the handicapped child is a disruptive force in the non-segregated setting.’” *Id.* at 892 (quoting *Pachl*, 453 F.3d at 1068).

2. A less integrated/more restrictive setting is appropriate for [REDACTED] under the IDEA

Based on a preponderance of the evidence, all of these factors support ACP as [REDACTED] LRE. [REDACTED] receives minimal, if any, benefit from mainstreaming. The evidence demonstrated [REDACTED] did better in the resource room and other smaller settings in which she received more direct support and one-on-one instruction than she did in the general education classroom. [REDACTED] himself repeatedly asked [REDACTED] spend less time in the general education classroom and more time in resource, acknowledging she did better outside the general education classroom. In fact, [REDACTED] was self-selecting environments other than her general education classroom by acting out and disrupting the other students to the point where she was often removed. Even when she does spend time in the general education classroom, she struggles to stay on task and is not working on the same academic material as her general education peers. Moreover, she does not model or interact with her peers.

The evidence also demonstrated ACP offers [REDACTED] substantial benefits, which she can only get in ACP, that outweigh any benefits she may get from mainstreaming. ACP is its own classroom, so there will be fewer transitions for [REDACTED]-something she has and continues to struggle with. ACP offers a smaller student to teacher ratio, which would allow an adult to work more consistently with [REDACTED] on things like using her communication device. ACP classrooms are designed to provide more structure and are staffed with teachers and others who have received targeted training in behavior interventions and ABA principles, which both of Petitioners' experts advocated as part of [REDACTED] educational program. Martinelli explained the benefits most succinctly when she testified ACP would give [REDACTED] "that is difficult to replicate, even with all of the things that have been implemented right now, would be an environment that is structured better to meet her learning needs"; staff that "are trained and have experience with supporting those types of learning needs"; more "focus on adaptive skills, which [REDACTED] is struggling with, as well as functional academics"; and "the opportunity to be more independent." All of the OPS members of the Saddlebrook IEP team, most of whom have worked with [REDACTED] regularly for some time, agreed while she has made some progress at Saddlebrook, she could make more progress in ACP.

Finally, the evidence showed [REDACTED] can be disruptive in the general education classroom. Even Dr. Harris, Petitioners' expert witness who had never met [REDACTED] but based her opinions off of 11 documents she reviewed, recognized based on the information in those documents [REDACTED] challenging behaviors could be disruptive in a general education classroom.

Some of the evidence presented in the hearing indicated because [REDACTED] already spends such a minimal amount of time in the general education classroom, ACP would not be a more restrictive environment. But even if ACP were more restrictive, a preponderance of the evidence

supports OPS's conclusion the benefit of maintaining a more integrated placement for [REDACTED] at Saddlebrook is outweighed by the benefits available to her with ACP. *See J.P. by Ogden v. Belton Sch. Dist. No. 124*, 40 F.4th 887, 894 (8th Cir. 2022). In other words, even if [REDACTED] current placement at Saddlebrook were "a less restrictive environment on the placement continuum, the IDEA does not allow the school to sacrifice [her] access to a FAPE to have [her] in a more integrated setting." *Id.*

Petitioners agreed with the decision to place [REDACTED] in ACP in April 2023 and were afforded a full opportunity to participate in the decision-making process. [REDACTED] later relayed he no longer wanted [REDACTED] in the ACP program. While Petitioners desire to return [REDACTED] to Saddlebrook—a school with which they are familiar and trust—is understandable, it does not outweigh the evidence supporting ACP as the appropriate placement for [REDACTED]. The "IDEA mandates individualized 'appropriate' education for disabled children, it does not require a school district to provide a child with the specific educational placement that [her] parents prefer." *T.F. v. Special Sch. Dist. of St. Louis Cnty.*, 449 F.3d 816, 821 (8th Cir. 2006) (quoting *Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648, 658 (8th Cir.1999)). Doing what Petitioners request: continue at Saddlebrook with more resource time and less and less general education time would violate IDEA's LRE requirement as the data does not support anything other than ACP.

3. Respondent has met its obligations under the IDEA in addressing [REDACTED] behaviors

Petitioners' primary argument Respondent erred in determining ACP was [REDACTED] least restrictive environment is OPS has failed to sufficiently address [REDACTED] behaviors, which, they say, is what has impeded her progress at Saddlebrook. (Amended Petition at ¶¶ 53 and 54) They criticize the form of the Behavioral Assessment and Intervention Plan in the IEPs. (Amended Petition at ¶ 53.a. and 53.b. ("Crucially, OPS left blank the section for 'Replacement Behavior(s)'"



... [and the] section for 'Behavioral Goal and Objectives...') During the hearing, Petitioners' experts advocated for the implementation of ABA into [REDACTED] school day, and Dr. Higgins testified [REDACTED] 2023 IEPs were not reasonably calculated to enable her to make progress on behavior that was impeding her learning.<sup>2</sup>

Under the IDEA, IEP teams are required to consider positive behavioral interventions where appropriate. 20 U.S.C. § 1414(d)(3)(B)(i)). However, "[i]t is 'largely irrelevant' if the school district could have employed 'more positive behavior interventions' as long as it made a 'good faith effort' to help the student achieve the educational goals outlined in [her] IEP." *M.M. v. Dist. 0001 Lancaster Cnty. Sch.*, 702 F.3d 479, 487 (8th Cir. 2012) (quoting *CJN v. Minneapolis Pub. Sch.*, 323 F.3d 630, 639 (8th Cir. 2003)). A preponderance of the evidence demonstrates Respondent did that here.

Dr. Higgins criticized Respondent's efforts to address [REDACTED] behaviors based only on the IEPs themselves, with no information about how they were implemented or how [REDACTED] has responded to Respondent's various efforts. However, "[a]n IEP is a snapshot, not a retrospective," and we must 'take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was promulgated.'" *K.E. ex rel. K.E. v. Indep. Sch. Dist. No. 15*, 647 F.3d 795, 808 (8th Cir. 2011) (quoting *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir.1990), *cert. denied*, 499 U.S. 912, 111 S.Ct. 1122, 113 L.Ed.2d 230 (1991)). The witnesses who regularly work with and observe [REDACTED] testified about all of the actions they have

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<sup>2</sup> Dr. Higgins also testified [REDACTED] 2023 IEPs did not "set forth appropriate plans for [REDACTED] to pursue academic and functional advancement" because the goals and assessments were insufficient and [REDACTED] 2023 IEPs were not "based on peer-reviewed research or evidence-based practices." (Tr. Vol. I, 246:12-247:1) These issues were not raised in the original, amended, or supplemental petition and therefore will not be decided in this matter. 92 NAC § 55-007.01B; *see also* Tr. Vol. II, 15:6-8.

taken to help curb [REDACTED] behaviors and why they felt those behaviors had been addressed as well as they could at Saddlebrook and could be better addressed in ACP. Gunderson explained why [REDACTED] increasing behaviors despite the Saddlebrook team's efforts to address them actually supported the decision to place her in ACP.

The evidence at the hearing did not present a situation in which "no cohesive plan was in place to meet [REDACTED] behavioral needs," like in *Steckelberg v. Chamberlain School District*, 77 F.4th 1167, 1170 (8th Cir. 2023), where the IEP team did not consider a behavior support plan and set near-perfect compliance expectations for the student. Nor were the facts similar to *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1028 (8th Cir. 2003), where the IEP team never adopted a cohesive behavior management plan "in spite of the fact that [the student's] behavior problem was the major concern at every IEP meeting."

In contrast, for [REDACTED] a behavior coach was brought in almost immediately after she began [REDACTED] to work with the Saddlebrook staff on how to address [REDACTED] behaviors. The IEP team gathered mid-way through [REDACTED] year, two months before her annual IEP was due, to add an FBA and BIP to her IEP. [REDACTED] OPS team has worked with her to teach her replacement behaviors, to "minimize[e] triggers [or antecedents] for her," and to teach her to communicate her needs." They have gathered and relied on data of her behavior and have documented antecedents to her behaviors in an attempt to better understand the antecedents and functions so they can redirect her to desired behaviors. A preponderance of the evidence showed OPS adequately considered behavioral interventions and strategies and implemented an appropriate behavior intervention plan for [REDACTED] "The District's strategies, while they might have been imperfect, complied with the IDEA." *Parrish v. Bentonville Sch. Dist.*, 896 F.3d 889, 895 (8th Cir. 2018)

With respect to Petitioners' experts' advocacy for the implementation of ABA into [REDACTED] IEPs, courts have consistently rejected the proposition that an ABA program is the only effective method of instruction for autistic students. *R. E. B. v. Dep't of Educ.*, 770 F. App'x 796, 801 (9th Cir. 2019) (holding that specifying ABA in the IEP was not necessary, crediting the teachers' belief that "it was best to use multiple teaching methodologies" so they could "select the methodology that best fit [the student's] needs as they arose"); *Deal ex rel. Deal v. Hamilton Cnty. Dep't of Educ.*, No. 1:01-CV-295, 2006 WL 5667836, at \*16–18 (E.D. Tenn. Apr. 3, 2006), *aff'd sub nom. Deal v. Hamilton Cnty. Dep't of Educ.*, 258 F. App'x 863 (6th Cir. 2008)(providing comprehensive summary of decisions discussing ABA). "Although an IEP team must 'consider' the results of outside evaluations," such as those conducted by Tejral, "not all such recommendations need be adopted." *M.M.*, 702 F.3d at 487.

Moreover, [REDACTED] February 2023 and April 2023 IEPs committed to using behavioral interventions consistent with ABA principles, and witnesses testified such behavioral interventions were in fact used with [REDACTED]. For example, Tejral testified she observed OPS staff using behavior interventions with [REDACTED]—she just recommended it could be done more consistently. Such testimony does not support a finding Respondent violated the IDEA. *See Elizabeth B. by & through Donald B. v. El Paso Cnty. Sch. Dist. 11*, 841 F. App'x 40, 43 (10th Cir. 2020) (finding ABA was not required but the IEP nonetheless "committed to one-on-one ABA-guided instruction 'using other terms,'" which was sufficient to be "reasonably calculated to deliver [the student] a FAPE."); *Renee J. as Next Friend of C.J. v. Houston Indep. Sch. Dist.*, 913 F.3d 523, 530 (5th Cir. 2019) ("Both sides agree that although [the school district] does not expressly provide Applied Behavioral Analysis, it incorporates techniques from ABA and other methods into its approach.")

Petitioners' suggestions for addressing [REDACTED] behaviors—made in hindsight, only after they filed their due process petition—do not establish [REDACTED] was denied FAPE and the decision to place her in ACP violated the IDEA. “A FAPE does not necessarily fit precise parental preferences, maximize a student’s potential, or provide the best possible education at public expense.” *D. L. by Landon v. St. Louis City Sch. Dist.*, 950 F.3d 1057, 1064 (8th Cir. 2020). “The school is not required to provide an optimal experience for a student with a disability, but instead must simply provide the student with a FAPE consistent with the IEP.” *Kass v. W. Dubuque Cmty. Sch. Dist.*, 101 F.4th 562, 570 (8th Cir. 2024). Respondent did that here and appropriately determined [REDACTED] needed more than she could receive in her educational program at Saddlebrook—that she needed ACP.

N. [REDACTED] “then-current placement” in January 2024 was ACP

The “stay-put” or “pendency” provision of the IDEA requires the student remain in the “then-current educational placement” pending the resolution of the dispute at issue. 42 U.S.C. §1415(k). In December 2023, Petitioners filed a motion for stay-put placement, arguing [REDACTED] then-current educational placement was Saddlebrook. (*See* Petitioners’ Motion for Enforcement of Stay-Put Placement, filed with the Nebraska Department of Education on December 27, 2023) Respondent opposed, disputing [REDACTED] then-current educational placement, for purposes of the pendency requirement, was Saddlebrook. (*See* Respondents’ Opposition to Petitioners’ Motion for Enforcement of Stay-Put Placement, filed with the Nebraska Department of Education on January 4, 2024) Submitted as evidence related to this motion were [REDACTED] October 2023 IEP (Ex. 18); an October 12–23, 2023 email exchange between [REDACTED] and Saldierna (Ex. 19); an October 22, 2023 email from Pereira (Ex. 121); an affidavit signed by Saldierna; and [REDACTED] attendance record for the 2023 fall semester reflecting she had attended Prairie Wind from approximately

August 16, 2023, to September 4, 2023. (See exhibits to Petitioners' Motion for Enforcement of Stay-Put Placement and exhibits to Respondents' Opposition to Petitioners' Motion for Enforcement of Stay-Put Placement) Based on this limited evidentiary record, this Hearing Officer determined the last agreed-upon educational placement for [REDACTED] was "alternative curriculum instruction at her home school, Saddlebrook Elementary." (See Order for Stay-Put Placement, filed with the Nebraska Department of Education on January 10, 2024)

Based on the more complete record presented at the hearing, a preponderance of the evidence demonstrates [REDACTED] then-current educational placement, as of the date the initial petition was filed on November 30, 2023, was, in fact, OPS's ACP, which is not offered at Saddlebrook. In general, under the IDEA, a student's "educational placement" is distinct from the "location" at which the student will receive educational services.

A placement is not a place, but a program of educational services offered to a student with a disability. A placement also refers to a point along the child's continuum of placement options, while a location is the physical location where the child receives services, such as a classroom.

Anchorage School District, 72 IDELR 106, 118 LRP 21106 (ASEA March 22, 2018) (quoting Letter to Fisher, 21 IDELR 992 (OSEP July 6, 1994)). Simply put, "[t]he term 'placement' ... is not synonymous with 'place....'" *Michael C. ex rel Stephen C. v. Radnor Twp. Sch. Dist., No. C.A. 98-4690*, 1999 WL 89675, at \*3 (E.D. Pa. Feb. 4, 1999), *aff'd sub nom. Michael C. ex rel. Stephen C. v. Radnor Twp. Sch. Dist.*, 202 F.3d 642 (3d Cir. 2000).

It is not surprising, therefore, most courts have interpreted the term "educational placement" in the stay-put context to mean the type of program the student is receiving as opposed to a specific school or classroom. For example, in *AW ex rel. Wilson v. Fairfax Cnty. Sch. Bd.*, 372 F.3d 674, 682 (4th Cir. 2004), the Fourth Circuit Court of Appeals found the school district had not violated the student's stay-put placement by transferring him to another school. The court

found because the program at the new school was “materially identical in its educational offerings,” the specific location where the student was being educated was “not controlling in a determination of educational placement in this context.” *Id.* at 683, 685–86. The court explained:

Consideration of the structure and the goals of the IDEA as a whole, in addition to its implementing regulations, reinforces our conclusion that the touchstone of the term “educational placement” is not the location to which the student is assigned but rather the environment in which educational services are provided.

*Id.* at 682. The Second Circuit has similarly held that the “IDEA’s pendency provision does not entitle a disabled child to keep receiving services from the exact same service providers while his proceedings are pending; instead, it only entitles the child to receive the same general type of educational program.” *T.M. ex rel. A.M. v. Cornwall Cent. Sch. Dist.*, 752 F.3d 145, 171 (2d Cir. 2014).

Other courts have analyzed the stay-put provision have come to similar conclusions. *See Ventura de Paulino v. New York City Dep’t of Educ.*, 959 F.3d 519, 532 (2d Cir. 2020) (“The stay-put provision does not guarantee a child with a disability “the right to remain in the exact same school with the exact same service providers while his administrative and judicial proceedings are pending. Instead, it guarantees only the same general level and type of services that the ... child was receiving.”); *Sherri A.D. v. Kirby*, 975 F.2d 193, 206 (5th Cir. 1992) (school transfer did not violate the stay-put provision because “it did not alter [the student’s individualized educational program (‘IEP’); merely the location in which her IEP is to be implemented”); *Z.B. by & through Sanchez v. D.C.*, 292 F. Supp. 3d 300, 306 (D.D.C. 2018) (denying parent’s request for stay-put because transfer of student from one school to another did not constitute a fundamental change to the student’s then-current educational placement).

Outside of the stay-put context, even more cases confirm location is typically not part-and-parcel of a student’s educational placement. *See, e.g., T.Y. v. New York City Dep’t of Educ.*, 584

F.3d 412, 419 (2d Cir. 2009) (“[T]he term ‘educational placement’ in the regulations ‘refers only to the general type of educational program in which the child is placed.’”) (quoting *Concerned Parents v. N.Y. City Bd. of Educ.*, 629 F.2d 751, 756 (2d Cir.1980)); *Veazey v. Ascension Par. Sch. Bd.*, 121 F. App’x 552, 553 (5th Cir. 2005) (“[A] change in the particular school site at which a disabled student’s [IEP] is implemented does not constitute a change in ‘educational placement.’”); *J.M. v. Miller Creek Sch. Dist.*, No. 22-CV-06105-DMR, 2023 WL 8125286, at \*8 (N.D. Cal. Nov. 22, 2023) (finding no change in educational placement occurred because the student “stay[ed] in the same classification, same school district, and same educational program.”); *J.S. by & through v. Eugene Sch. Dist. 4J*, No. 6:21-CV-01430-MK, 2023 WL 4628182, at \*6 (D. Or. May 19, 2023), *report and recommendation adopted sub nom. J.S. by & through S.S. v. Eugene Sch. Dist. 4J*, No. 6:21-CV-01430-MK, 2023 WL 4626610 (D. Or. July 19, 2023) (“While a change in educational location or program management is allowed under the IDEA, an impermissible change in placement occurs when the components of a student’s previous IEP services are altered significantly.”). Indeed, “[c]ourts addressing the question have overwhelmingly determined that a change in location of services, on its own, is not a fundamental change in the educational program and therefore, not a change in education placement under the IDEA.” *Gore v. D.C.*, 67 F. Supp. 3d 147, 153 (D.D.C. 2014).

Of course, location *can* be a component of a student’s educational placement, but only when the location substantially or materially affects the composition of the educational program and services provided to the child, which is not the case for [REDACTED] with Saddlebrook. For example, in *AW ex rel. Wilson*, the Fourth Circuit explained:

To the extent that a new setting replicates the educational program contemplated by the student’s original assignment and is consistent with the principles of “mainstreaming” and affording access to a FAPE, the goal of protecting the student’s “educational placement” served by the “stay-put” provision appears to be

met. Likewise, where a change in location results in a dilution of the quality of a student's education or a departure from the student's LRE-compliant setting, a change in "educational placement" occurs.

372 F.3d at 682. This makes sense given that the term "educational placement" is "related to the adequacy of a child's education program as defined by his IEP." *Chavez ex rel. M.C. v. New Mexico Pub. Educ. Dep't*, 621 F.3d 1275, 1282 (10th Cir. 2010). "The touchstone in interpreting section 1415 has to be whether the decision is likely to affect in some significant way the child's learning experience." *DeLeon v. Susquehanna Cmty. Sch. Dist.*, 747 F.2d 149, 153 (3d Cir. 1984).

This was the case in *Hale v. Poplar Bluff R-I Sch. Distr.*, 280 F.3d 831 (8th Cir. 2002). There, the school district sought to change the instructional setting from home schooling back to a traditional school. It is axiomatic that such dramatic changes in the setting in which the student is to receive her educational services would substantially affect the services themselves. Moreover, *Hale* is further distinguishable because it involved a change in location based on an expulsion. Most courts treat expulsion and other disciplinary cases differently in terms of identifying the student's "educational placement." "In contexts where children are moved from a school because of external factors, rather than their own behavioral problems," courts have interpreted "the term 'placement' to refer to general education programs .... In instances where a child has been expelled, courts have construed 'educational placement' much more narrowly by looking to the specific institution." *Bd. of Educ. of Cmty. High Sch. Dist. No. 218, Cook Cnty., Ill. v. Illinois State Bd. of Educ.*, 103 F.3d 545, 548 (7th Cir. 1996). "This narrow reading of placement [in the expulsion context] is in keeping with original purpose of the Education of the Handicapped Act: Congress passed the act to prohibit schools from excluding from the classroom difficult disabled students." *Id.* at 549. In contrast, in most cases that do not involve disciplinary decisions, "choosing which school the student will attend is an administrative decision" to be made by the school



district—not part of the student’s “educational placement.” *Deer Valley Unified Sch. Dist. v. L.P. ex rel. Schripsema*, 942 F. Supp. 2d 880, 887 (D. Ariz. 2013).

With respect to [REDACTED] there was no evidence presented at the hearing a location other than Saddlebrook would have diluted or even affected [REDACTED] educational program and services. For example, in *R.B. ex rel. Parent v. Mastery Charter Sch.*, 762 F. Supp. 2d 745 (E.D. Pa. 2010), *aff’d sub nom. R.B. v. Mastery Charter Sch.*, 532 F. App’x 136 (3d Cir. 2013), the parents provided evidence the particular school the student had been attending was part of her educational placement because: 1) its proximity to her house mitigated her difficulty getting to school, 2) it provided needed access to her doctor’s office in the case of a medical emergency, 3) it was smaller and easier for her to navigate because of her familiarity with the location, and 4) it had very small classes, providing her with “lots of individual attention.” *Id.* at 763.

In contrast, the evidence presented at the hearing demonstrated just the opposite—that because Saddlebrook does not have ACP, which is the appropriate placement for [REDACTED] keeping her at Saddlebrook is what has diluted [REDACTED] educational program and services. Moreover, the IEP in place at the time Petitioners filed their original petition—i.e., the October 2023 IEP—concluded the “academic, developmental, and functional needs” of [REDACTED] required “[t]he **alternative curriculum program**,” which it described as “a modified instructional program [that] will include a structured setting, visual and verbal cues, repeated instruction and directions, extended time, choice making activities and manipulatives.” Pereira testified this meant the current program she was in at Prairie Wind, i.e. ACP. Moreover, it makes sense the Prairie Wind IEP team did not reverse the Saddlebrook IEP team’s decision [REDACTED] educational placement should be ACP, given that the Prairie Wind team did not have sufficient data to do so, with [REDACTED] attending school at Prairie Wind for only 17 days. Similar to the situation in *J.S. v. D.C.*, No. CV

21-0293 (CKK), 2021 WL 1428998, at \*7 (D.D.C. Apr. 15, 2021), Saddlebrook, “a school that cannot implement the IEP” in place at the time Petitioners filed their original petition in the fall of 2023, could not be [REDACTED] “then-current placement.”

That Saddlebrook is [REDACTED] home school does not affect the analysis. “[F]or provision of services to an IDEA student, a school system may designate a school other than a neighborhood school.” *White ex rel. White v. Ascension Par. Sch. Bd.*, 343 F.3d 373, 381–82 (5th Cir. 2003) (“no federal appellate court has recognized a right to a neighborhood school assignment under the IDEA”); *see also, McLaughlin v. Holt Public Sch. Bd. of Educ.*, 320 F.3d 663, 672 (6th Cir.2003) (LRE provisions and regulations do not mandate placement in neighborhood school); *Kevin G. by Robert G. v. Cranston Sch. Comm.*, 130 F.3d 481, 482 (1st Cir.1997) (“[W]hile it may be preferable for [student] to attend a school located minutes from his home,” the school district was “not required to change the district’s placement of nurses when, as in this case, care is readily available at another easily accessible school”.); *Hudson v. Bloomfield Hills Public Sch.*, 108 F.3d 112 (6th Cir.1997) (IDEA does not require placement in neighborhood school); *Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 727 (10th Cir.1996) (IDEA does not give student a right to placement at a neighborhood school); *Schuldt ex rel. Schuldt v. Mankato Indep. Sch. Dist. No. 77*, 937 F.2d 1357, 1361–63 (8th Cir.1991) (school may place student in non-neighborhood school rather than require physical modification of the neighborhood school to accommodate the child’s disability); *Wilson v. Marana Unified Sch. Dist. No. 6 of Pima County*, 735 F.2d 1178 (9th Cir.1984) (school district may assign child to school 30 minutes away because teacher certified in child’s disability was assigned there, rather than move the service to the neighborhood school). Respondent has significant authority to select the school site, as long as it is educationally appropriate. The Office

of Special Education Programs (OSEP), the Department of Education branch charged with monitoring and enforcing the IDEA and its implementing regulations, has explained:

[I]f a public agency ... has two or more equally appropriate locations that meet the child's special education and related services needs, the assignment of a particular school ... may be an administrative determination, provided that the determination is consistent with the placement team's decision.

*Letter from Office of Special Education Programs to Paul Veazey* (26 Nov. 2001); *see also, e.g., Letter to Anonymous*, 21 IDELR 674 (OSEP 1994) (it is permissible for a student with a disability to be transferred to a school other than the school closest to home if the transfer school continues to be appropriate to meet the individual needs of the student); *Letter to Fisher*, 21 IDELR 992 (OSEP 1994) (citing policy letter indicating that assignment of a particular location is an administrative decision). For all of these reasons, based on a preponderance of the evidence, this Hearing Officer finds [REDACTED] then-current educational placement as of November 30, 2024, was ACP, which is not offered at Saddlebrook.

**O. Respondent did not deny [REDACTED] FAPE in the fall of 2023**

Not only did Respondent not deny [REDACTED] FAPE because of its decision in April 2023 to place her in ACP, it also did not deny her FAPE, as Petitioners claim, by “fail[ing] to respond to Petitioners’ numerous requests for assistance in finding a safe, appropriate placement” for her and its subsequent “refusal to effectuate the educational placement [REDACTED] IEP team decided upon on October 9, 2023.” First, Respondent did respond promptly to Petitioners’ requests. Petitioners first emailed about their concerns for [REDACTED] safety at Prairie Wind on a Friday evening; Respondent responded to that email and also had a call with Petitioners the next business day. Respondent immediately offered Petitioners instructions on how to request a transfer to a different ACP classroom. That Respondent did not immediately offer the outcome Petitioners wanted—for [REDACTED] to return to Saddlebrook—does not mean it violated the IDEA.

Respondent has conceded [REDACTED] IEP team erred in October 2023 when it indicated to Petitioners [REDACTED] could return to Saddlebrook. Pereira testified the team was primarily focused on getting [REDACTED] back into school and was swayed by the parents' strong emotional desire for [REDACTED] to return to Saddlebrook. However, "[t]he IDEA does not require that parental preferences guide educational decisions, ... only that parental preferences are considered and addressed." *Kass v. W. Dubuque Cmty. Sch. Dist.*, 101 F.4th 562, 570 (8th Cir. 2024) (internal quotations and citations omitted). As already indicated, the "educational placement" identified for [REDACTED] by the October 2023 IEP was ACP. Respondent's error, then, was in communicating to [REDACTED] [REDACTED] could receive "an alternate curriculum" at Saddlebrook. Nonetheless, Respondent quickly remedied this error four days later when it offered to place [REDACTED] in the ACP classroom at Oak Valley, a school that was very similar to Saddlebrook and in which [REDACTED] could have been placed within a day or two. Respondent continued to engage with [REDACTED] about [REDACTED] placement, scheduling an IEP meeting for December 1, 2023. Nonetheless, [REDACTED] refused any offer by Respondent to place [REDACTED] in an ACP classroom and chose to keep [REDACTED] at home. A school district does not violate the IDEA if it offers FAPE but the parents decline. *See, e.g., J.B. v. Kyrene Elementary Sch. Dist. No. 28*, 112 F.4th 1156, 1164–1166 (9th Cir. 2024) (petitioners' "rejection of [the final] FAPE offer ... relieved the District of any IDEA obligations," particularly where the record indicated it was unlikely petitioners would have considered another FAPE offer as an alternative to what they wanted). Here, any deprivation of educational benefits to [REDACTED] in the fall of 2023 was not due to Respondent's actions but Petitioners' choice to refuse any option other than Saddlebrook. Respondent met its obligations under the IDEA by offering FAPE.

**P. Respondent did not violate the IDEA with respect to Petitioners' request for an IEE**

In their supplemental petition, Petitioners argue Respondent violated the IDEA with

respect to their request for an IEE. First, they argue they “repeatedly asked OPS for its ‘criteria applicable for independent educational evaluations’ as required by 34 C.F.R. § 300.502(a)(2)” but OPS “refused to provide any criteria at all.” (Supplemental Petition at ¶13) They also allege Respondents refused an evaluator based on criteria that had been repeatedly requested but never provided and provided the name of one provider who had a conflict of interest. *Id.* Finally, they allege Respondent denied ██████ FAPE when it refused to consider the behavioral evaluation conducted by CAS. (Supplemental Petition at ¶14) These allegations were not supported by a preponderance of the evidence and/or do not amount to an IDEA violation.

1. Respondent did not violate the IDEA by refusing to provide its criteria for the IEE

Under the interpreting regulations for the IDEA, “[e]ach public agency must provide to parents, upon request for an [IEE], information about where an [IEE] may be obtained, and the agency criteria applicable for [IEEs] ....” 34 C.F.R. § 300.502(a)(2). The reason for this requirement is because “[i]f an independent educational evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent’s right to an independent educational evaluation.” 34 C.F.R. § 300.502(c)(1).

██████ did ask, in his initial request for an IEE, for “official documentation of the school district’s criteria for IEEs”, but there was no evidence OPS refused to provide its criteria. Rather, Saldierna responded with two lists of approved providers ██████ could contact to schedule the IEE: one that identified “approved providers for psychological evaluations” and the other, a list of BCBAs in case ██████ “prefer[ed] a BCBA [to do] the FBA over a psychologist.” In doing so, OPS communicated to ██████ the “criteria” a psychologist would need to perform any

“psychological evaluations” and a BCBA could conduct the FBA. [REDACTED] contacted a couple of providers on that list and appears to have had trouble scheduling an IEE with those providers, but there was no evidence the trouble was caused by OPS at all, let alone any issue with respect to its criteria for IEEs.

In addition, Saldierna told [REDACTED] in response to his request for the IEE, if “there [was] a provider not on” the lists she sent him, to let her know and she would “check to see if they are appropriately certified/licensed.” Respondent did, in accordance with 34 CFR § 300.502(e)(1) and 92 NAC § 51-006.071, refuse to authorize [REDACTED] request in late April 2023 to have Dr. Higgins conduct some parts of the IEE because, as indicated in Saldierna’s response to [REDACTED] request for an IEE, OPS does not have BCBA’s conduct assessments other than the FBA. [REDACTED] never asked Saldierna to identify any other providers who may be able to provide the IEE. For all of these reasons, there was no procedural violation in Respondent’s response to Petitioners’ request for an IEE.

Even if arguendo Respondent had violated the procedures laid out in 34 C.F.R. § 300.502(a)(2), a hearing officer may find a violation of the IDEA only if a procedural 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). Petitioners presented no evidence any potential procedural violation in Respondent’s communications about its criteria for an IEE resulted in a denial of FAPE for [REDACTED] impeded Petitioners’ opportunity to participate in the decision-making process regarding FAPE for [REDACTED] or caused a deprivation of benefits.

Saldierna testified she followed the same process with [REDACTED] she follows in response to every request for IEEs submitted to OPS and has never before had similar issues in getting an IEE scheduled. In fact, other OPS students were able to schedule an IEE during this same time period. Moreover, despite it being a deviation from OPS's typical process, Saldierna provided authorization letters for [REDACTED] to provide directly to providers containing the specific language he requested, and still Petitioners had not scheduled [REDACTED] for any part of the IEE other than the FBA and BIP prepared by CAS. Thus, any procedural violation is not actionable under the IDEA. *See, e.g., H.L. b/n/f R.L. v. Allen Indep. Sch. Dist.*, No. 4:21-CV-749-SDJ, 2023 WL 8700535, at \*15 (E.D. Tex. Dec. 15, 2023), *aff'd sub nom. H. L. v. Allen Indep. Sch. Dist.*, No. 24-40029, 2024 WL 4457459 (5th Cir. Oct. 10, 2024) (school district's procedural error in unnecessarily delaying its response to parents' request for an IEE was "not actionable" where "plaintiffs failed to show that a delayed FBA IEE caused a deprivation of educational benefit" to the student).

2. Respondent did not violate the IDEA by refusing to consider the FBA and BIP prepared by CAS

Petitioners also criticize OPS for refusing to meet with Tejrall from CAS to consider the FBA and BIP she prepared when [REDACTED] requested it in July 2024. Respondent did not refuse to meet with CAS but rather indicated it wished for the entire IEE to be completed *before* it met with CAS. Saldierna testified, based on her experience with other IEEs, she assumed the IEE would be complete by August.

Petitioners argue they never agreed to an IEE that would include more than the FBA, saying that Respondent's assertion the parties' agreement was for a complete IEE is "without evidence." (Supplemental Petition at ¶ 9) On the contrary, a preponderance of the evidence, demonstrates Respondent was reasonable in believing the agreement between the parties, upon which the hearing in this matter was delayed, was for an IEE that would be comprehensive—not one limited

to an FBA.

While [REDACTED] formal request for an IEE specified he wanted an FBA, the motion to continue the hearing, filed jointly by the parties prior to [REDACTED] submitting his formal request, stated the parties had agreed to the continuance “to allow time” for the parties “to pursue an independent educational evaluation (“IEE”) of [REDACTED]” It said nothing of an FBA. In addition, [REDACTED] formal request indicated the IEE was “*to include* a functional behavioral assessment (FBA) and an assistive technology evaluation”—not be limited to those assessments. (emphasis added) The formal request also said the reason for the request was that [REDACTED] “disagree[d] with the district’s most recent evaluation of [REDACTED] because it was *not comprehensive...*” (emphasis in original) *Cf.* 34 CFR § 300.502(b)(1) (“A parent has the right to an independent educational evaluation at public expense *if the parent disagrees with an evaluation obtained by the public agency...*”) (emphasis added); 92 NAC § 51-006.07 (. Finally, an “evaluation,” in the context of an IEE, “means a comprehensive assessment of the child” that assesses “the child in all areas of their disability,” whereas an FBA is an “assessment tool”—not an “evaluation.” *D.S. v. Trumbull Bd. of Ed.*, 975 F.3d 152 (2d Cir. 2020). Petitioners’ own expert, Dr. Higgins, agreed. Respondent therefore did not violate the IDEA by not immediately convening an IEP team meeting to consider CAS’s FBA and BIP.

Even if Petitioners had proved Respondent should have immediately scheduled an IEP team meeting to review the FBA and BIP from CAS rather than waiting for a comprehensive IEE to be completed, there is no evidence Respondent’s failure to do so resulted in a denial of FAPE to [REDACTED] Her IEP team met on November 4, 2024, and offered Petitioners three days later a new IEP incorporating much of CAS’s recommended BIP. Petitioners never agreed (or even responded) to that new IEP. Accordingly, there is no evidence they would have agreed to such an IEP,



including a BIP that adopted CAS's recommendations, had it been presented to them at an earlier date. This is evidenced by Petitioner's second stay put request overruled by this hearing officer pertaining to Respondent's desire to hold an IEP meeting for [REDACTED]. Accordingly, even if Respondent had committed a procedural violation of the IDEA in refusing to consider the BIP from CAS earlier, there would be no violation of the IDEA because its actions caused no deprivation of benefits.

**IT IS THEREFORE ORDERED AS FOLLOWS:**

1. Petitioners failed to meet their burden of proving Respondent violated the Least Restrictive Environment requirements of the IDEA and Rule 51 or failed to provide a free appropriate public education to [REDACTED] in accordance with federal and state law and applicable regulations.

2. The Hearing Officer's January 10, 2024, Order for Stay-Put Placement is vacated. [REDACTED] last agreed-upon educational placement at the time Petitioners filed their original Petition on November 30, 2023, was ACP, which is not offered at Saddlebrook. Selection of the particular school at which [REDACTED] is offered this educational placement is an administrative decision to be made by Respondent.

3. 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.

4. 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.

5. Petitioners shall pay their own costs; Respondent is not responsible for any attorney fees or costs incurred by Petitioners.

6. 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 this 3rd day of April 2025,

/s/ Mona L. Burton

By: Mona L. Burton, #21696,  
Hearing Officer  
ANDERSON, CREAGER &  
WITTSTRUCK, P.C., L.L.O.  
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Lincoln, NE 68512  
(402) 477-8800

#### **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the forgoing was emailed to each of the following this 3rd day of April 2025. The undersigned does hereby certify a true and correct copy of the above and foregoing was duly served via certified mail, return receipt requested, on the 3rd day of April, 2025, upon the following:

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