

**BEFORE THE STATE DEPARTMENT OF EDUCATION
OF THE STATE OF ALABAMA**

J.C,

PETITIONER,

VS.

SPECIAL EDUCATION CASE NO.: 22-139

DCBOE,

RESPONDENT.

ORDER

I. PROCEDURAL HISTORY

This due process hearing was conducted under the authorization of the Individuals with Disabilities Education Improvement Act (IDEA), 2004 Reauthorization, 20 U.S.C. § 1400 *et seq.*, implementing federal regulations at 34 C.F.R. Part 300, and implementing State regulations, the Rules of the Alabama State Board of Education, Chapter 290-8-9, *et seq.*

On September 6, 2022, the Parent filed a *Request for a Due-Process Hearing* against the [REDACTED], [REDACTED] or “the District”) asserting that the District had violated the IDEA and various federal anti-discrimination laws and deprived [REDACTED], of a free and appropriate public education (“FAPE”) and damaged [REDACTED]. The undersigned Hearing Officer was assigned by the State Superintendent to hear this matter. Attorneys William T. “Bo” Johnson III and Caroline C. Pennington represented the Parent. Attorneys Stephen T.

Etheredge and Dustin J. Fowler represented the District. The District filed an Answer on September 13.

On or about October 26, 2022, the Parent filed an Amended Due Process Complaint incorporating its prior assertions of a breach of the terms of a Settlement Agreement and Impartial Hearing Officer Amanda Bradley's Order in case number 2022-7, and also asserting new allegations. The new allegations included the allegation that the school district had failed to conduct the students triennial reevaluation; the District had breached the Settlement Agreement by the District's failure to secure [REDACTED] attendance at the June 2022 IEP Meeting; the District's failure to provide specially-designed instruction in math; and the District's failure to produce education records related to math. The Amended Complaint also alleged that the School District had improperly attempted to schedule an MDR and/or change the students placement; had failed to give good faith consideration to a comprehensive language evaluation; and had failed to provide student's counsel with copies of the Student's educational records. The Amended Complaint also asserted a §504 claim for monetary damages.

[REDACTED] is a [REDACTED]-year old student with [REDACTED], [REDACTED] and a diagnosed math learning disability who is in [REDACTED] first year at [REDACTED]. In November 2022, the Student, [REDACTED], was disciplined for behavior that the District said violated the District's *Code of Conduct*. On November 15, the District gathered a manifestation determination review ("MDR") team. PX 117, District's *11.15.2022 Manifestation Determination Review* form. That day, the MDR team evaluated whether specific incidents in which [REDACTED] was involved were either [1] caused by or had a direct and substantial relationship to [REDACTED] disabilities or

[2] were the direct result of the District's failure to implement [REDACTED] IEP, which contained a BIP. PX 117, District's 11.15.2022 *Manifestation Determination Review* form. The District's MDR team found that [REDACTED] behaviors were not caused by and did not have a direct and substantial relationship to [REDACTED] disabilities. *Id.* Similarly, the MDR team found that [REDACTED]'s behaviors in the three incidents in question were not the result of the District's failure to implement [REDACTED] IEP. *Id.*

When [REDACTED], [REDACTED]'s mother, received Notice of the MDR team's decision, she filed a *Petitioner's Appeal of 11.15.2022 Adverse MDR Meeting Decision and Request for Expedited Due-Process Hearing* on November 18. The District filed a Response on November 29.

This Hearing Officer ruled that the Parent's complaint for an expedited due-process hearing would be set for a hearing and that all issues on which the Parent had filed a due-process complaint would be heard at the same time. The parties presented to this Hearing Officer their available dates for a hearing in this matter. The Hearing Officer entered a pre-hearing order, which, among other things, required the Parent to submit a list of hearing issues and provide to the District the names of her first five witnesses by a date specified in the pre-hearing order. The Parent complied with the pre-hearing order.

The due process hearing was conducted on January 18, 19, 23 and 24, 2023. The Petitioner requested that the hearing be "closed".

The parties waived opening statements. At the end of the taking of testimony, a briefing schedule was agreed to by the attorneys. Both parties agreed that they needed a

copy of the transcript prior to preparing proposed Orders. Both parties submitted proposed Orders to this Hearing Officer in a timely fashion.

No party has brought any procedural defect in any pre-hearing proceedings to my attention and I have determined that both parties timely complied with my Order to exchange witness and exhibit lists within the time allowed by applicable law.

II. EXHIBITS ADMITTED INTO EVIDENCE

There were numerous exhibits submitted by the parties and accepted into evidence by the Hearing Officer. These exhibits have been examined by the Hearing Officer subsequent to the Due Process Hearing in light of the testimony presented at said hearing. The Hearing Officer placed no weight on the fact that any particular matter was offered by any party since the purpose was to get all of the appropriate documents produced for consideration by the Hearing Officer so long as they were not prejudicial to any other party participating in the Due Process Hearing based upon objection. The documents were examined and the weight given to each was based upon the contents of the document which was submitted and not on which party introduced said document. The Hearing Officer has examined the exhibits based upon the substantive nature contained therein for the purpose of making a decision in this matter. A list of the Exhibits is attached hereto as Exhibit "A" to this Decision.

III. PETITIONER'S WITNESSES

1. [REDACTED], Special Education Director
2. [REDACTED], Superintendent of the District

3. [REDACTED], Principal, [REDACTED]
4. [REDACTED], Special Education Aide, [REDACTED].
5. [REDACTED], Assistant Principal, [REDACTED]
6. [REDACTED], Special Education Teacher, [REDACTED].
7. [REDACTED], Speech Language Pathologist
8. [REDACTED] Pediatric Neuropsychologist
9. [REDACTED] Board Certified Behavioral Analyst
10. [REDACTED], Petitioner

Respondent chose to call no witnesses

IV. BURDEN OF PROOF

“The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief.” *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 62 (2005). *See also M.A.M. ex rel. C.M. v. Sch. Bd. of Miami-Dade Cty.*, 437 F.3d 1085, 1096 n.8 (11th Cir. 2006). The standard of proof is by a preponderance of the evidence.

V. STATEMENT OF THE FACTS

A. The January 2022 Due-Process Complaint (2022-7) and the Settlement of That Case

[REDACTED], the Parent or Petitioner, filed this special education process case on behalf of her [REDACTED] who was a student at [REDACTED]. [REDACTED] is under the authority of the [REDACTED]. This is the second special education process case that [REDACTED], filed on [REDACTED] behalf in 2022. [REDACTED] filed the first case in January 2022 and it was assigned case number 2022-7. Impartial Hearing Officer Amanda Bradley presided over that case. During the pendency of the

January 2022 due-process case, [REDACTED] was able to have [REDACTED] evaluated by neuropsychologist Dr. [REDACTED] at [REDACTED] in [REDACTED], Alabama. Eventually, [REDACTED], and the District settled case number 2022-7. [REDACTED] was the District's Special Education Director when the case settled. (Tr. 42). The parties signed a Settlement Agreement, which Hearing Officer Amanda Bradley entered as a Final Order and Judgment. PX 6, *June 2022 Settlement Agreement*, [REDACTED] for [REDACTED] v. [REDACTED], Ala. Dept. of Educ., 2022-7.

The Director of Special Education, [REDACTED], read the Settlement Agreement (Tr. 44) and knew its contents (Tr. 43). [REDACTED] acknowledged and agreed that Hearing Officer Amanda Bradley's Order "made it a legal requirement for the [D]istrict" to follow the June 2022 Settlement Agreement. (Tr. 44). The District did not appeal Hearing Officer Amanda Bradley's Order.

B. Key Terms of the Settlement Agreement in case number 2022-7

1. Key Terms About Dr. [REDACTED] and [REDACTED] IEE

In the 2022-7 Settlement Agreement, the District committed that it would do certain things. Some terms of the Settlement Agreement relate to the District's obligations to the Parent and [REDACTED], regarding [REDACTED] neuropsychological IEE, and other terms set out the District's agreement regarding [REDACTED] future behavioral services. The District agreed that it would hold an IEP meeting within 14 days after receiving [REDACTED] written report of [REDACTED] IEE performed on [REDACTED] PX 6, ¶ III.A.2, p. 3. The District agreed that [REDACTED] would be allowed to attend the IEP meeting and explain the data, methods, and results of [REDACTED] IEE, give recommendations for [REDACTED] education, give recommendations

for further evaluations, and give recommendations for any other service items the Student needs or requires. *Id.* at 3. Next, the District committed to give good-faith consideration “to the [IEE] and therapeutic recommendations and amend [REDACTED] IEP where appropriate to the provision of a FAPE to [REDACTED].” *Id.* at ¶ III.A.3, p. 3. Third, the District agreed that “if [REDACTED] makes a recommendation that the District is already implementing, then the means, manner, and method of the implementation of the recommendations shall be documented in the IEP.” *Id.* at p. 4. Fourth, the District agreed to “give good-faith consideration to the recommendation made by [REDACTED] to address [REDACTED] math and Reading IEP goals, consider the need for further remediation, create a plan for further remediation if needed, consider the need for any further evaluations, and plan for any other service items needed by [REDACTED].” *Id.* at ¶ III.A.3, p. 4. Finally, the District agreed that if it implemented [REDACTED] recommendations, then it and [REDACTED] would “create and incorporate a data-collection process, collect data every 14 days, and within 3 school days of the date on which the data is collected provide data to Parent and the District, so that the District and Parent may monitor Student’s progress.” *Id.* at p. 4.

2. Key Terms Related to [REDACTED] Behavioral Services

The Settlement Agreement details a range of behavioral services the District agreed to provide to [REDACTED]. First, the Settlement Agreement specifies that the District “shall fully fund a new Functional Behavioral Assessment (FBA) by [REDACTED] BCBA. If Mr. [REDACTED] deems it appropriate, he will create a Behavior Intervention Plan (BIP) for [REDACTED] at his earliest convenience but no later than September 1, 2022.” PX 6, ¶III.B.1, p. 5. Second, the District agreed “to hold an IEP meeting within 14 days of receiving [REDACTED] FBA

and BIP to give good-faith consideration to FBA, BIP, [REDACTED] therapeutic recommendations, and to amend the IEP where appropriate for the provision of a FAPE to the [REDACTED].” PX 6, ¶III.B.2, p. 5. Third, the District agreed to invite [REDACTED] to the IEP meeting to explain the data, methods, and results of [REDACTED] FBA and BIP, give recommendations for [REDACTED] education, further evaluations, and any other service items that [REDACTED] needed. *Id.* Fourth, the District agreed that it would pay [REDACTED] to provide training within 14 days after he developed [REDACTED]’s BIP and the BIP was added to [REDACTED]’s IEP. PX 6, ¶III.B.4.a, p. 6. The Settlement Agreement clearly stated that certain types of training would occur, that “all pertinent school personnel” would receive the training, that the BIP would be implemented to fidelity, and that “all pertinent school personnel” would be trained on how to implement [REDACTED] BIP to fidelity:

- “The behavioral services will include . . . training all pertinent school personnel regarding the implementation of [REDACTED]’s BIP.” PX 6, ¶III.B.4.a, p. 6.
- The phrase “all pertinent school personnel” includes, at minimum, the Principal, Assistant Principal(s), counselor, the Student’s special-education teacher, the Student’s general education teacher(s).” *Id.*
- The District agreed to “invite the law enforcement personnel who serve as SROs at the Student’s school to attend the training. Regardless of whether the SROs attend the training, the District agrees to supply the SROs with a copy of the Student’s BIP.” *Id.*
- “The behavioral services will include . . . [i]mplementing the FBA and BIP to fidelity.” PX 6, ¶III.B.4.b, p. 6.
- “The behavioral services will include . . . training all pertinent school personnel to implement the FBA and BIP to fidelity.” PX 6, ¶III.B.4.b, p. 6-7.
- The phrase “all pertinent school personnel” includes, at minimum, the Principal, Assistant Principal(s), counselor, the Student’s special-education teacher,

the Student's general education teacher(s), and the law enforcement personnel who serve as SROs at [REDACTED] school." *Id.* at p. 7.

- "The behavioral services will include . . . [a]ssisting the Parent in understanding the Student's special needs and developing the skills that will help the Parent support the implementation of the Student's BIP in accordance with the parent training as a related service in 34 C.F.R. § 300.34(a)."

C. Dr. [REDACTED] Neuropsychological IEE and the June 2022 IEP Meeting

1. Dr. [REDACTED] Background, Training, Education, and Experience

[REDACTED] is the only neuropsychologist who evaluated [REDACTED] and testified in the hearing. [REDACTED] is a pediatric neuropsychologist. (Tr. 607). He obtained his doctorate of philosophy in the field of clinical child psychology from the [REDACTED] (Tr. 607). He interned at [REDACTED] and participated in a fellowship at [REDACTED] which included training at [REDACTED] (Tr. 607.) [REDACTED] was the [REDACTED] pediatric neuropsychologist [REDACTED] [REDACTED] [REDACTED] pediatric neuropsychology clinic at [REDACTED] [REDACTED], and eventually became the [REDACTED] (Tr. 607). [REDACTED] then transferred to the [REDACTED] where he served as the [REDACTED] (Tr. 607.) While at [REDACTED] in addition to his clinical responsibilities, [REDACTED] taught classes and performed research. (Tr. 607.) Since about 2012, [REDACTED] has been in private pediatric neuropsychology practice at [REDACTED] (Tr. 607.) He also chairs the [REDACTED] (Tr. 608).

2. [REDACTED] IEE

[REDACTED] IEE report consisted of his review of hundreds of pages of [REDACTED] records, clinical interviews of [REDACTED] and [REDACTED] parents, and the administration of a number of cognitive, personality, and behavioral tests. (Tr. 611). Those tests included the "Clinical Interview," *Wechsler Intelligence Scale for Children* (5th Ed.) ("WISC-V"), *Conner's Continuous Performance Test III* ("CPT-III"), *Test of Everyday Attention for Children* ("TEA-Ch"), *Delis-Kaplan Executive Functioning System* ("D-KEFS"), *Rey-Osterrieth Complex Figure* ("ROCF"), *Wide Range Assessment of Memory and Learning-2nd Ed.* ("WRAML-2"), *Wechsler Individual Achievement Test* (4th Ed.) ("WIAT-4"), *Personality Assessment Inventory* (Adolescent Version) ("PAI-A"), *Behavior Rating Inventory of Executive Function* (2nd Ed.) ("BRIEF 2"), *Behavioral Assessment System for Children* (3rd Ed.) ("BASC-3"). PX 4. [REDACTED] also obtained information directly from [REDACTED] teachers about their concerns for [REDACTED] as well as [REDACTED]'s strengths. (Tr. 612).

Based on the data [REDACTED] obtained, he noted that [REDACTED] verbal comprehension was in the below-average range, which indicated the possibility of potential language processing issues. (Tr. 612). [REDACTED]'s academic testing revealed "significant variability with low-average reading and borderline deficient written expression in math." (Tr. 612). Measures of [REDACTED]'s executive functioning showed "mild but clinically significant problems with focused sustained 'flex' attention" and extreme impulsivity. (Tr. 612).

[REDACTED] interviews with [REDACTED] and [REDACTED] parents along with [REDACTED] teacher's written reports indicated that [REDACTED] experiences clinically significant problems in impulse control, self-regulation, self-monitoring, emotional regulation, organizational planning,

and flexibility. (Tr. 612-613). According to ██████████ ██████████ self-report of ██████████ own personality “yielded indications of significant levels of self-prodding anxiety, irritability, egocentricity, at-risk concerns regarding paranoia, and a sense of persecution.” (Tr. 613). Based on ██████████ parents’ and teachers’ reports, ██████████ suffers from hyperactivity, aggression, depression, negative mood, irritability, attention deficits, and atypicality, which ██████████ ██████████ explained “is a psychological term meaning some odd and unusual obsessive behavior in terms of social behavior.” (Tr. 613-14). ██████████ academic testing showed a significant discrepancy between ██████████’s predicted achievement score, based on ██████████’s IQ test and the Alabama Department of Education Predictive Achievement Table, and ██████████’s actual mathematics score of 72 from the WIAT-4. (Tr. 619-620). On this point, ██████████ explained that when he compared ██████████ 2019 scores on the same tests with ██████████ 2022 scores, he found that the 2022 scores were significantly lower. PX 4, p. 4; Tr. 620. According to ██████████ the lower 2022 scores “[indicate] that the failure to adequately address ██████████ behavioral needs in school and the resulting suspensions [in 2021-2022 school year] have had a significant adverse impact on ██████████ academic functioning.” PX 4, p. 4; Tr. 620.

Dr. ██████████ explained that some of ██████████ life experiences—physical and emotional—likely have negatively impacted ██████████ (Tr. 622). First, ██████████ history of concussion caused ██████████ to be “concerned about some of [██████████] mood dysregulation.” (Tr. 622). ██████████ concussion history is important because “it seems that while [██████████] has a history of difficulties which predated ██████████ concussion, ██████████ parents felt that the year after ██████████ concussion was ██████████ most difficult year yet.” (Tr. 623). Younger children

sometimes need “months” to recover from a concussion. (Tr. 623). During their recovery, “they may experience difficulties academically, emotionally, and socially.” (Tr. 623). If those symptoms “are not properly recognized and managed, then that could lead to longer-term complications.” (Tr. 623). [REDACTED] has reported chronic headaches since [REDACTED] concussion. PX 4, p. 5.

Although [REDACTED] does not meet the “full” criteria for post-traumatic stress disorder, [REDACTED] experienced an adverse event that influences [REDACTED] responses to authority figures. (Tr. 622-623). Dr. [REDACTED] testified that [REDACTED] and [REDACTED] parents told him that one day, police mistakenly burst into their home and roughly handled [REDACTED] father. PX 4; Tr. 622. The police handcuffed [REDACTED] dad but then realized they were in the wrong house. (Tr. 622). The family received an apology, but the event likely had a “significant impact” on [REDACTED] understanding of and “responses to authority figures.” (Tr. 622).

3. Dr. [REDACTED] Diagnoses

[REDACTED] diagnosed [REDACTED] with [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] (“[REDACTED]”), which carries an ICD-10 code of [REDACTED]. (Tr. 624). The ICD-10 code corresponds to and matches the diagnosis and description of [REDACTED] behaviors (combined type) in the *Diagnostic and Statistical Manual (Fifth Edition)* (“DSM V”). PX 122, p. 5; Tr. 625-26. [REDACTED] (combined type) is a neurological disorder resulting from altered brain development that causes cognitive, behavioral, and/or emotional difficulties. (Tr. 628-29). [REDACTED] (combined type) can be treated with medication, but medication is only “one component of the effective treatment of [REDACTED].” (Tr. 630). For kids who suffer from [REDACTED], treatment requires a “comprehensive approach,” which includes “an appropriate

educational support program,” behavior training, and an understanding about the appropriate response to the child’s behavior in light of the fact that “much of their acting out” is not within their direct control. (Tr. 630). [REDACTED] explained to [REDACTED]’s parents that even though “stimulant medications are proven to be highly effective for treating [REDACTED]” [REDACTED]’s “comorbid [REDACTED]” means that the medication would not achieve the same effects as they would see if [REDACTED] suffered only from [REDACTED]. (Tr. 633).

Dr. [REDACTED] also diagnosed [REDACTED] with [REDACTED] ([REDACTED]), which carries an ICD-10 code of [REDACTED], PX 122, p. 6; Tr. 627-28. The ICD-10 code corresponds to and matches the diagnosis and description of [REDACTED] behaviors in the *DSM V. Id.* [REDACTED] is a behavioral disorder “influenced by [REDACTED] that the child has been exposed to.” (Tr. 629). There are no medications for [REDACTED] and “there is no direct treatment for [REDACTED] in terms of pharmaceutical interventions.” (Tr. 631). According to [REDACTED] the method for treating [REDACTED] is to build the student’s skills to cope with [REDACTED] emotional deficits. (Tr. 632-633). When a student’s “underlying skill deficits” are identified, the next step is to train the student in “the requisite coping, prosocial skills that you want them to have.” (Tr. 633). A “punitive approach. . . just any kind of thing that’s primarily geared toward catching them being bad . . . is not effective for [REDACTED], and many times can make the situation worse.” (Tr. 633). [REDACTED] also has a [REDACTED]. (Tr. 623).

4. [REDACTED] Recommendations

First, [REDACTED] recommended that [REDACTED] have an IEP and that [REDACTED] classification should be [REDACTED]” so that the District could fully appreciate

significant behavioral needs. (Px 4, p. 6; Tr. 635.) recommended that the District use program called " " to treat . The program teaches "problem solving for both [] and treatment team." (Tr. 636). The schools that have accepted recommendation to use program "have been pretty pleased with the results" and have told that "they felt like they improved their ability [not only to work with specific kids] but to effectively work with children who have a variety of behavioral challenges." (Tr. 643-644). recommended compensatory education due to the loss caused by "ineffective homebound education" while was expelled. (Tr. 636). observed that "one of the responses of the [District] is to just get [] out of the school." (Tr. 636). "Most kids with and just about every kid with " will not do well studying on their own "because they are heavily dependent on their environment and organized instruction." (Tr. 637). does not possess the "self-monitoring capacity to wake up, get on the computer, decipher how to get on, maintain attention and focus throughout the lesson, and to be able to self-monitor." (Tr. 637). 's family cannot be expected to provide the same structure and supervision that the District could offer. (Tr. 637). Fourth and finally, recommended an IEE to rule out a language processing disorder. PX 4, p. 6, Tr. 637.

5. The June 2022 IEP

The District and , had both signed the Settlement Agreement by June 2. PX 6, pp. 14-15. The District received a copy of Dr. report for 's neuropsychological IEE on June 3. (Tr. 53). IEP team convened on June 15. *Id.*

██████████ could not attend, but the IEP discussed his report with ██████████, who attended the IEP team meeting. (PX 12, *June 2022 IEP*, p. 16.) During that June 15 meeting, ██████████ IEP team created an IEP for ██████████ for the 2022-2023 school year. (PX 12).

I. ██████████ 2022 Math Goals and Specially-Designed Instruction

Regarding math, ██████████ June 2022 IEP states that ██████████ overall 2021-2022 grade for geometry was a D and lists ██████████ mathematics scores from the WIAT-IV administered by ██████████ as “below average.” (PX 12, *June 2022 IEP*, p. 2.) However, the IEP omits any reference whatsoever to ██████████ diagnosis of ██████████ ██████████” (*Id.* at pp. 1-4; 10.) The IEP says, “██████████ report of the WIAT-IV also indicated that [██████████] was in the Below Average Range in the areas of Math Problem Solving and Numerical Operations.” (*Id.* at p. 3.) The June 2022 IEP says, further, that according to ██████████ special-education teacher ██████████, who taught ██████████ during the 2021-2022 school year, ██████████:

... is able to solve addition, subtraction, and multiplication problems, ██████████ often struggles to use these foundational skills to solve division problems with fluency and accuracy. Therefore, ██████████, would benefit from intensive small groups or one-one [sic] instruction both inside the general education and the special education resource room to address skills deficits in the area of computation.

According to ██████████, while ██████████ is able to read and solve word problems using basic operations, ██████████ often struggles to solve multi-step word problems using other types of operations. ██████████ added that ██████████ is often unable to organize the steps necessary to solve the word problem.

(PX 12, pp. 3; 10.) According to the June 2022 IEP, “[c]ompensatory education will be offered during the [s]ummer of 2022 to provide remediation in [m]ath.” *Id.* at p. 4. It summarized [REDACTED]’s present level of achievement as follows:

[REDACTED] report of the WIAT-IV also indicated that [REDACTED] was in the Below Average Range in the areas of Math Problem Solving and Numerical Operations. According to [REDACTED], while [REDACTED] is able to read and solve word problems using basic operations, [REDACTED] often struggles to solve multi-step word problems using other types of operations. [REDACTED] added that [REDACTED] is often unable to organize the steps necessary to solve the word problem.

(PX 12, p. 3; 10.) However, the June 2022 IEP’s present level of achievement omitted [REDACTED] deficits with solving division problems with fluency and accuracy and omitted that [REDACTED] would benefit from special education to address skills deficits in the areas of computation. (*Id.* at p. 10.)

Regarding [REDACTED]’s goals and specially designed instruction, the June 2022 IEP’s measurable annual goal for math says, “By the end of the 2022-2023 school year, when presented with a word problem that may include linear, quadratic, exponential, or rational function relationships in one variable, [REDACTED] will be able to write an equation that accurately models a contextual situation in 3 out of 4 trials with at least 80% accuracy.” (PX 12, *June 2022 IEP*, p. 10.) The IEP’s specially-designed instruction specified that from “8/9/2022 to 5/26/2023,” [REDACTED] would receive 60 minutes weekly “to focus on [m]ath computation and problem-solving skills outlined by the General Education Standards and IEP Goals. The special education teacher will also provide extra assistance in completing assignments and assessments.” (*Id.* at p. 10.)

ii. [REDACTED] Program

[REDACTED] June 2022 IEP makes no mention of [REDACTED] recommendation that the District use [REDACTED] program called '[REDACTED]' to treat [REDACTED]. (PX 12, *June 2022 IEP*.) Likewise, the District's June 21 *Notice of Proposal or Refusal to Take Action* does not mention [REDACTED] program. (PX 15.) In fact, [REDACTED] the District's Special Education Director, testified that she did not attempt to contact [REDACTED] until early October, which was four months after the June 2022 IEP in which the IEP team considered [REDACTED] recommendation that the District use [REDACTED] program. (Tr. 93-94; 96).

iii. IEE to Rule Out Language Processing Disorder

Regarding [REDACTED] recommendation that [REDACTED] receive an IEE to rule out a language processing disorder (PX 4, *March 2022 Neuropsychological Assessment by [REDACTED] Ph.D.*, p. 6, Tr. 637), the District's June 21 *Notice of Proposal or Refusal to Take Action* said, "The team discussed [REDACTED] recommendation for a language evaluation; parent agreed that this is not needed at this time; the team discussed that it can be revisited if needed." (PX 15, p. 1). However, there was no speech language pathologist at the IEP meeting to aid either [REDACTED] or the District in arriving at that conclusion or to advise [REDACTED]'s IEP team about whether a speech language evaluation would be beneficial. (Tr. 335-36).

D. The District Did Not Meet the September 1 Deadline for Completion of the FBA and BIP

The Special Education Director, [REDACTED], had 16.5 years' experience as a teacher prior

to earning a psychometry degree. After earning that additional degree, [REDACTED] was employed as a psychometrist for [REDACTED]. She later earned a degree in psychology and worked as a school psychologist before she became supervisor and finally Director of Special Education at [REDACTED]. (Tr. 29) She participated in the settlement of the prior due process action between [REDACTED] and [REDACTED] and participated in the review of the Settlement Agreement prior to its execution. (Tr.43)

The District's Special Education Director, [REDACTED], admitted during her testimony at the due process hearing that the District violated the Settlement Agreement because [REDACTED]'s FBA and BIP were not completed and in place by the September 1, 2022, deadline specified by the Settlement Agreement:

Q [by Mr. Johnson]: So September 1 was the deadline for [REDACTED] to have [REDACTED]—not only the FBA completed, but have the BIP done, right?

A [by [REDACTED]]: Uh-huh.

Q [by Mr. Johnson]: And the District did not meet that deadline, did they?

A [by [REDACTED]]: We did not meet that deadline.

(Tr. 98-99). In the Settlement Agreement, [REDACTED] and the District specified that Board-Certified Behavioral Analyst ("BCBA") [REDACTED] would undertake [REDACTED]'s FBA, write [REDACTED] BIP, and provide all training on the BIP prescribed by the Settlement Agreement. [REDACTED], [REDACTED] firm, [REDACTED], has a contract with the District to provide applied behavioral analysis services to the District. (Tr. 697-98). Basically, [REDACTED] and

his firm [complete FBAs], develop [BIPs], and [provide] training and monitoring on those plans.” (Tr. 698).

When the school year began on August 9, 2022, the attendance records indicate that during the first 10 days of school [REDACTED] was absent one full day and portions of three days, and was in in-school suspension for two days. (Tr. 139-141) With the exception of unexcused tardies [REDACTED] was in attendance the next two school weeks and received no disciplinary referrals. [REDACTED] actions almost immediately thereafter began to escalate with multiple unexcused absences, disciplinary referrals, out of school and in school suspensions.

According to [REDACTED] the District knew it might not meet the September 1 deadline. In the summer of 2022, the Director of Special Education, [REDACTED], told [REDACTED] that there was a Settlement Agreement “in place.” (Tr. 723). [REDACTED] told [REDACTED] that the June 2022 Settlement Agreement required [REDACTED]’s FBA and BIP had to be in place by September 1, 2022. (Tr. 724). [REDACTED] was [REDACTED] contact at the District for scheduling [REDACTED] observations of [REDACTED] for [REDACTED] FBA. (Tr. 729). [REDACTED] testified that he had also corresponded via email with [REDACTED], who was [REDACTED]’s case manager, about possibly observing [REDACTED] at school on August 18 or 19. (Tr. 729-730). The August 18 and 19 observations did not occur because, according to [REDACTED] “there was a situation where [REDACTED] was either absent or was serving suspension. [REDACTED] wasn’t on campus. And I remember [REDACTED] was having some difficulties just confirming if [REDACTED] was on campus, if [REDACTED] had returned, those types of things.” (Tr. 730).

██████ is a special education teacher with 18 years experience in that field. (Tr.518) Prior to teaching he was employed as a juvenile probation officer. (Tr.519) He began his employment with the ██████ in 2022. (Tr.520) He is ██████ case manager and has been ██████ case manager since August 9, 2022. (Tr.520)

██████ testified, that ██████ emailed him on August 22 “asking if there was anything that I needed from her or the district office.” (Tr. 730). Eventually, ██████ received an email from ██████. on August 31. (Tr. 734). It was that same day that ██████ decided he could observe ██████ at school on September 8 and 9 (Tr. 733-734), even though he and the District knew that ██████ FBA and BIP had to be completed by September 1, which was the next day. (Tr. 734). When asked, “[B]efore August 31, did you and ██████ ever discuss the possibility that you would not be able to get the FBA or BIP in place for ██████ by September 1st” ██████ answered, “I don’t recall having a conversation with ██████ about it. But I do know that ██████ and I spoke about the potential of needing to go into September for it.” (Tr. 734).

E. ██████ Data Collection for ██████. and His Observations of ██████

On August 31, the District and ██████ agreed that ██████ would come to ██████. on September 8 and 9 to observe ██████ for purposes of performing an FBA on ██████ (Tr. 733-734). ██████ observed ██████. on September 8. (Tr. 735). On September 9, the District sent to ██████ a copy of ██████ 2020 FBA and BIP written by BCBA ██████ at ██████ PX 44; Tr. 189-190. On September 15, ██████ sent to ██████, ██████ case manager, the BIP he wrote for ██████ for ██████ review and input. PX 52; Tr. 750-51. ██████ advised ██████ that he did not have any revisions

or changes to [REDACTED] BIP. (Tr. 751). In late September, probably the 29th or 30th, [REDACTED] received one of [REDACTED] disciplinary referrals from [REDACTED] that detailed [REDACTED] involvement in a fight and “school wide riot.” PX 68; Tr. 752; Tr. 781. On October 3, [REDACTED] attended an IEP team meeting for [REDACTED] during which [REDACTED] presented his report to [REDACTED]’s IEP team. (Tr. 755). On October 4 [REDACTED] presented [REDACTED]’s BIP to [REDACTED]’s IEP team. (Tr. 757; PX 73, *October 4 BIP from [REDACTED] at [REDACTED]*

F. The October 3 IEP Team Meeting With [REDACTED]

Less than a month after [REDACTED] filed her due process complaint on September 6, the District convened an IEP team meeting on October 3. [REDACTED] attended the IEP team meeting to discuss his IEE report and his recommendations for [REDACTED], so that the IEP team could give good-faith consideration to [REDACTED] report and recommendations. According to the District, “[REDACTED] reviewed his evaluation results with the IEP Team, Caroline Pennington, counsel for the Parent, and [REDACTED] the contracted BCBA. The IEP Team felt that the current IEP was appropriate, thus no changes were made to goals and services. It was decided by the IEP Team, based on recommendations from [REDACTED] that [REDACTED] would undergo an evaluation with a [speech language pathologist] in order to determine the need for Language Services.” (PX 80, p. 1, 10.18.2022 *Notice of Proposal or Refusal to Take Action.*)

G. The October 4 IEP Team Meeting With [REDACTED], the Need for a Revised BIP to be Completed by October 31, and the October 4 IEP

1. The October 4 IEP Meeting

[REDACTED] presented [REDACTED]'s BIP to [REDACTED]'s IEP team on October 4, 2022. (Tr. 738).

The October 4 IEP team meeting occurred more than a month after the September 1 deadline specified by the June 2022 Settlement Agreement. (PX 6, *June 2022 Settlement Agreement*). [REDACTED] testified that October 4 was the date that [REDACTED] IEP team discussed [REDACTED] BIP but that she was unsure when [REDACTED] finished it:

Q [by Mr. Johnson]: When did [REDACTED] eventually finish his Functional Behavior Assessment and provide the BIP to the IEP Team?

A [by [REDACTED]]: Okay. The first BIP was provided to the IEP Team on the 4th of October.

Q [by Mr. Johnson]: Okay.

A [by [REDACTED]]: I don't know exactly the date that he finished it.

Q [by Mr. Johnson]: It was not—in other words, it was present to [REDACTED] mother, and the complete IEP Team on October 4th, which is over a month after the due date of September 1st—

A [by [REDACTED]]: Right.

However, [REDACTED] clarified that he had actually completed [REDACTED] BIP on September 15, which was three weeks before the October 4 IEP team meeting. (Tr.750-751). It was on September 15 that [REDACTED] emailed the BIP to [REDACTED], [REDACTED]'s case manager, to ask [REDACTED] to review the BIP and “offer up and thoughts or feedback.” (Tr. 750). [REDACTED]

█████ related that █████. “felt comfortable with the interventions that were listed and didn’t have any additional thoughts.” (Tr. 751).

2. The Need for a Revised BIP to be Completed by October 31

During the October 4 IEP team meeting, █████ explained that the District had advised him that █████ had begun to exhibit some “new target behaviors,” which were “elopement,” “disruptive behaviors,” and “aggression.” (Tr. 766). However, both █████ and the District possessed information that these behaviors were not new. (PX 44; Tr. 189-190; Tr. 756.) On September 9, █████ sent █████’s 2020 FBA and BIP from █████ Center written by BCBA █████ (PX 44; Tr. 189-190; Tr. 756.) According to █████ March 2020 FBA and BIP, which was completed 31 months before █████ undertook █████’s FBA in September 2022, █████ had displayed “behaviors of concern,” which included “aggression toward others” that resulted in minor injury to peers and staff. (Tr. 76-77). █████ 2020 FBA noted, too, that █████ past behaviors also included “aggression towards property” when █████ █████ (Tr. 77). The 2020 FBA described that █████ engaged in “disruptive” behaviors that included █████ (Tr. 78). The 2020 FBA listed that █████ eloped by “█████ that █████ “[failed] to follow school or classroom rules,” and engaged in “█████ █████ (Tr 79-80). █████ plan was to incorporate these “new” behaviors - which were not actually new behaviors and had been documented more than

two years before - into [REDACTED] BIP by "direct observation," "record review," and staff interviews. (Tr. 766-67). At the October 4 IEP meeting, [REDACTED] IEP team determined:

based on recommendations from [REDACTED] in that [REDACTED] would benefit from one-to-one support from a trained staff member while on school campus in order to ensure [REDACTED] safety and accountability. Furthermore, based on recent new aggressive behaviors, [REDACTED] stated he would like to incorporate new behaviors into the BIP and should have the additional part of the FBA completed and targeted in a BIP by the end of October 2022.

(PX 81, *10.18.2022 Notice of Proposal or Refusal to Take Action*; Tr. 242; PX 74, *10.4.2022 IEP*, p. 5.)

According to the District's *10.18.2022 Notice of Proposal or Refusal to Take Action*, [REDACTED] was supposed to supply [REDACTED]'s revised BIP to the District by October 31. (PX 81; Tr. 241-242.) However, [REDACTED] did not revise [REDACTED] BIP until November 21. (PX 100; Tr. 768.) Between October 4 and November 21, [REDACTED] collected additional data for [REDACTED] behaviors and met with the District's manifestation determination review team ("MDR team") convened to assess [REDACTED] conduct. [REDACTED] observed [REDACTED] on November 1. (Tr. 769). [REDACTED] also obtained [REDACTED] data sheets on [REDACTED] behaviors. (PX 100; Tr. 771; Tr. 781.) [REDACTED] received from [REDACTED] the FAST forms [REDACTED] completed for [REDACTED] elopement (PX 98; Tr. 772), aggression (PX 98; Tr. 772), and disruptive behaviors (PX 99; Tr. 774). [REDACTED] did not recall receiving any of [REDACTED] disciplinary reports from either October or November 2022. (Tr. 781). [REDACTED] attended the MDR team meeting on November 15. (Tr. 776-77).

One week after the November 15 MDR meeting, [REDACTED] [REDACTED] October BIP, based on the information he obtained between October 4 and November 21. The

changes that [REDACTED] made to [REDACTED] November BIP were that it incorporated data and information on the “new target behaviors.” (Tr. 778). [REDACTED] also identified the “hypothesized functions” for the new target behaviors. (Tr. 779). Finally, [REDACTED] incorporated “a new antecedent based strategy, which is the increased monitoring and supervision.” (Tr. 779.) [REDACTED] trained some District personnel on “an updated data sheet to incorporate some of the new procedures and some of the new target behaviors” on November 16. (Tr. 705; Tr. 706). [REDACTED] presented [REDACTED] revised November BIP to [REDACTED] IEP team on December 6. (Tr. 768).

3. [REDACTED] October 4 IEP

At the end of the October 4 IEP team meeting, the District created another IEP dated 10.4.2022. (PX 74). [REDACTED] October 2022 IEP carried with it the exact requirements for [REDACTED] specially-designed instruction in mathematics from [REDACTED] June 2022 IEP. (*Id.*) With regards to [REDACTED] math abilities, deficits, and scores, the October 2022 IEP repeats verbatim the language from the June 2022 IEP. (PX 74, 10.4.2022 IEP, p. 3-5.) Like the June 2022, the October 2022 IEP omits any reference to [REDACTED]’s math learning disability, despite the fact that [REDACTED] IEP team had met with [REDACTED] just one day before, on October 3, which was the day it wrote the October IEP. (*Id.*) Next, like the June 2022 IEP, the October 2022 IEP also says that “[c]ompensatory education will be offered during the [s]ummer of 2022 to provide remediation in [m]ath.” (PX 74, p. 5.) Although four months had passed since [REDACTED] had attended summer math remediation, the October 2022 IEP omits any information whatsoever to [REDACTED] participation in the summer 2022 math remediation, the results or grades from the remediations, work samples, and/or whether the remediation was effective

or ineffective. (*Id.*) Additionally, in the “annual goals” section for math, at the space for “present levels,” the October 2022 IEP says nothing about [REDACTED] previously documented deficits in solving division problems with fluency and accuracy and omitted that [REDACTED] would benefit from special education to address skills deficits in the areas of computation. (PX 74, p. 12.) Like the June 2022 IEP, the October 2022 IEP’s specially-designed instruction provides [REDACTED] with small group instruction 60 minutes weekly “to focus on [m]ath computation and problem-solving skills outlined by the General Education Standards and IEP Goals. The special education teacher will also provide extra assistance in completing assignments and assessments.” (PX 74, p. 16.)

According to both IEPs, [REDACTED] was to provide 30 minutes two times per week of additional education in math and language. (Tr. 524) He addressed the math disability in the fall of 2022. However, he did not utilize a specific, peer reviewed program, nor did he utilize a research based program for the math instruction, but instead utilized common day to day activities and the math involved with those activities. (Tr. 527-528) Under the block program utilized by [REDACTED], [REDACTED] was not enrolled in a math course in the fall of 2022 and did not receive “graded instruction” in math that semester. (Tr.529) [REDACTED] is enrolled in a math course for the current semester even while expelled.

II. Training on [REDACTED] BIP

1. Components of Training and Implementation to Fidelity

The June 2022 Settlement Agreement states that the District will pay for behavioral services that include “[i]mplementing the FBA and BIP to fidelity and training all pertinent school personnel to implement the FBA and BIP to fidelity.” (PX 6, p. 6, “III. Substantive

Obligations,” “B. BCBA Behavioral Services,” ¶4.b.). ██████ testified that “implementation to fidelity” means “doing it with the highest degree of accuracy, following the treatment plan, whatever those particular recommendations or interventions are . . . with the highest level of accuracy.” (Tr. 700). The main reason that a student’s BIP should be implemented to fidelity is “to ensure that whatever interventions have been recommended as part of the plan, that they are actually having the effect on the client’s behavior to the degree that . . . was sought out.” (Tr. 700-701). ██████ warned that if a student’s BIP “isn’t implemented with a high degree of fidelity, then there is a possibility that the interventions may or may not be working. But there is no way to determine that if the plan wasn’t implemented with fidelity.” (Tr. 701).

Implementation to fidelity of a BIP involves “trainings with whomever the individuals are that are going to be implementing the behavior plan” plus data collection and analysis. (Tr. 701-02). The most common form of training is “behavior skills training,” which is comprised of verbal instruction of the interventions of the BIP, some “practicing, role playing on what it looks like to actually implement [the] interventions,” “coaching and feedback while the plan is being implemented directly with the client,” and then “additional follow-up that’s needed as part of that.” (Tr. 701-02). ██████ documents the BIP training. (Tr. 703). The “data collection and analysis” component of implementation to fidelity involves “actual data collection on the student’s target behaviors.” (Tr. 702). The data collection allows the BCBA to “simultaneously [look] at how well the individuals who are responsible for implementing the plan, how well they are doing that, how well they are

following the steps. In addition to what sort of behavior change effect is occurring with the client that the plan is designed for.” (Tr. 702).

Finally, implementation to fidelity requires “fidelity checks.” A fidelity check is a “monitoring session,” which is used to “monitor how well individuals that have been trained with [redacted]’s BIP] are carrying out [redacted] interventions.” (Tr. 708). With [redacted]’s BIP, a fidelity check would have occurred whenever [redacted] [redacted] was on [redacted]’s campus, in light of the fact that the BIP “was so new, you know, just given the circumstances and the nature of those behaviors.” (Tr. 708).

[redacted] explained that if the teachers and the administrators who were supposed to be trained on [redacted] BIP and who were supposed to implement it to fidelity are not actually trained, then the risks to [redacted] are that [redacted] target behaviors will continue to occur or that the teachers and administrators “may attempt to use interventions that are not part of [redacted] BIP.” (Tr. 714). The behaviors that were targeted by [redacted] BIP are the behaviors that interfere with [redacted] ability to receive or benefit from [redacted] education. (Tr. 714-15.)

The Special Education Director, [redacted], acknowledged that training is important for several reasons. She stated, “so the purpose of training for a BIP would include understanding the operation behavior definition of each behavior. So, what they are looking for. Proper data collection methods, and what each person’s responsibility toward the IEP is—I mean, toward the BIP is, and to understand everything that’s in the BIP and what’s expected.” (Tr. 264). [redacted] agreed that without training, [redacted]’s BIP could not have been fully implemented:

Q [by Mr. Johnson]: Without that—without the training that you just discussed, is it fair to say the BIP can't be fully implemented?

A [by ■■■.]: I feel it can be fully implemented by anyone who was trained in it.

Q [by Mr. Johnson]: But without the training, you and I agree they can't fully implement it?

A [by ■■■.]: I agree with that. Because they don't know what's in it.

The District agreed that ■■■ BIP would be implemented “to fidelity,” which ■■■ described as “actually understand[ing] everything that's going on in it and to be actually implementing those interventions.” (Tr. 265.) She agreed that for school personnel to abide by that term of the Settlement Agreement, they would have to be trained on the BIP. (Tr. 265).

2. The BIP Training Did Not Occur

Although ■■■ BIP was completed by September 15 and presented to ■■■ IEP team on October 4, the only training ■■■ provided on ■■■ initial BIP was “partial” training to ■■■, case manager, and ■■■, ■■■ one-to-one aide, which occurred on November 1. Tr. 704; PX 97. ■■■ did not train any District employees, teachers, administrators, or SROs other than ■■■ and ■■■. (Tr. 706), although, according to ■■■, ■■■, “it was pretty well known . . . that all of the general [education] teachers that worked with [■■■] and any related service providers would also need to receive training.” (Tr. 707). Additionally, ■■■ assumed that ■■■'s Principal, ■■■ and vice Principal, ■■■, would be trained on ■■■'s BIP because “they were so heavily involved

with [REDACTED]" (Tr. 707). Additionally, the "partial" training that [REDACTED] undertook did not occur within the 14-day deadline specified by the Settlement Agreement. Fourteen days after October 4 was October 18, and the training did not happen until November 1. (Tr. 706). [REDACTED] did not provide any training to the District for [REDACTED] revised November IEP. (Tr. 796). [REDACTED]'s parents never received any training. [REDACTED] did not invite any of the [REDACTED] SROs to [REDACTED]'s BIP training and is not aware that anyone at the school invited the SROs to the training. (Tr. 254-55).

I. [REDACTED] Behavior Escalates

Dr. [REDACTED] [REDACTED] [REDACTED] psychiatrist, diagnosed [REDACTED] with [REDACTED] in August 2019. (Tr. 801-802). [REDACTED] [REDACTED] prescribed medication for [REDACTED] at that time. (Tr. 801). [REDACTED] started [REDACTED] on the medication when [REDACTED] prescribed it. (Tr. 802). Whenever [REDACTED] prescribed medications for [REDACTED], [REDACTED] filled the prescription. (Tr. 802). [REDACTED] gave the medication to [REDACTED] and [REDACTED] took it. (Tr. 803). The testimony showed that [REDACTED] was on [REDACTED] medication as prescribed when [REDACTED] BIP was revised in 2020.¹

I. [REDACTED] 2020 BIP

The Special Education Director, [REDACTED], testified that the 2020 BIP written by BCBA [REDACTED] at [REDACTED] was part of [REDACTED] IEP for the 2020-2021 and 2021-2022 school years. (Tr. 61). The 2020 BIP listed [REDACTED] diagnoses as "[REDACTED] and [REDACTED]" (Tr. 64). The 2020 BIP noted that [REDACTED] "has a history of aggression toward others . . . property misuse; disruptive behaviors; noncompliance to

¹ A.C. testified that there were times when [REDACTED] did not take [REDACTED] medicine and does not deny that

class; classroom rules, and instructions from teachers or school tasks and not staying on task.” (Tr. 75). The 2020 BIP listed a series of behaviors that interrupted or interfered with [REDACTED] ability to learn or interfered with others. (Tr. 80). [REDACTED] listed “aggression toward others” as a maladaptive behavior which [REDACTED] exhibited that included pushing other students. (Tr. 76). It further states that [REDACTED] aggression “had resulted in [REDACTED] [REDACTED] [REDACTED] (Tr. 77). The 2020 BIP also listed “aggression toward property” as another maladaptive behavior which [REDACTED] exhibited that included “[REDACTED] [REDACTED] [REDACTED] (Tr. 77). “Disruptive behaviors or problem behaviors” were also listed as a maladaptive behavior that included “[REDACTED] [REDACTED] [REDACTED] (Tr. 78). [REDACTED] was also identified in the [REDACTED] [REDACTED] BIP as a maladaptive behavior that [REDACTED] exhibited, along with “failure to follow school or classroom rules.” (Tr. 78; Tr. 79). [REDACTED] was also observed to have “major episodes” of elopement, or “leaving [REDACTED] assigned area without permission.” (Tr. 79). [REDACTED] observed [REDACTED] exhibiting other problematic behavior including “[REDACTED] [REDACTED] [REDACTED] which occurred three to six times per each of her observations of [REDACTED] (Tr. 79-80).

2. [REDACTED] Behavior in Summer School

In June 2022, the Special Education Director, [REDACTED], sent emails to the administrators and staff at [REDACTED] and [REDACTED] about the Settlement Agreement and [REDACTED]'s behaviors:

Good Evening!

This email is to make you aware of a student returning to [REDACTED] campus from [REDACTED] one year expulsion to summer school at [REDACTED]. [REDACTED] is a [REDACTED] who will be in [REDACTED] grade next year. [REDACTED] will be on campus to attend summer school until 7/21. It was determined at [REDACTED] IEP meeting 6/15 that [REDACTED] would start tomorrow 6/21 and would be receiving "compensatory education" for remedial math and written expression as well as the opportunity via summer school to recover two credits.

...

[REDACTED] BIP is still within process due to the Settlement Agreement stating that we will await school to start to get the assessment completed. If needed, the team can create a temporary BIP with [REDACTED]. Overall, [REDACTED] just doesn't like to be "singled out, yelled at, or backed into a corner." Other than that, [REDACTED] doesn't present much in the way of challenges than just staying on task.

(PX 14, p. 3 (6.20.2022 6:34 p.m. email from [REDACTED] to District staff and administrators)).

Later that evening, [REDACTED] also emailed [REDACTED] about [REDACTED] behaviors:

Hey [REDACTED]!

This is just an FYI regarding the student we spoke to you about for a recent settlement. [REDACTED] name is [REDACTED] [REDACTED] will be on campus at [REDACTED] until 7/21/22 if you can possibly make it to observe [REDACTED] among peers and provide any consultation so that [REDACTED] will have some idea how to begin the year with [REDACTED] until you can do [REDACTED] FBA/BIP. This is the student who has three weeks once school starts to have a BIP in place.

(PX 14, p. 3 (6.20.2022 7:32 p.m. email from [REDACTED] to [REDACTED]))

As the summer progressed, [REDACTED] maladaptive behaviors increased. A week after [REDACTED] began summer school, [REDACTED] contacted [REDACTED] [REDACTED] to ask for help: "Hey [REDACTED] Please look over the attached anecdotal notes for [REDACTED]". Any advice for interventions you can

provide in the way of a temporary BIP for summer school would be greatly appreciated. I don't mind you billing for this. The teachers are just having a time with [REDACTED] . . . [REDACTED], [REDACTED]." (PX 18, 6.28.2022 email from [REDACTED] to [REDACTED] p. 1.).

The next day, June 29, [REDACTED] and others began communicating with [REDACTED] about [REDACTED]'s behaviors. [REDACTED], one of [REDACTED] special education teachers, emailed [REDACTED] to say, "Good morning. I will be adding a behavior plan to [REDACTED] June 2022] IEP. What is a good day and time for you to meet so that we can get this added?" PX 19A, p.1. [REDACTED]. replied, "Good morning . . . From my understanding we were waiting to add behavior plan until [REDACTED] [REDACTED] could come and observe [REDACTED]. Is that not correct?" PX 19A, p.1. [REDACTED]. immediately responded to [REDACTED] and explained:

Yes ma'am. That is correct. I've sent the documentation of behaviors to the BCBA for consultation for a temporary behavior plan to take us through summer school. [REDACTED] is having some issues with [REDACTED] cell phone, walking out of class, profanity, and such. They just need to put into place a plan they can follow right now until [REDACTED] [REDACTED] is able to observe [REDACTED]

PX 19A, p. 2. [REDACTED] replied, "Ok. Thank you. This is the first I am hearing of issues. I will discuss with [REDACTED] tonight as well. I am not sure what my schedule looks like yet for next week. I should receive it this afternoon and will let you know." PX 19A, p. 2. [REDACTED] answered, "Thank you so much! I think the school has just wanted to see what they could do proactive wise first without the behavior plan before alerting you. We can start sending you weekly updates though if you'd like. We just don't want it to seem as though they are complaining." (PX 19A, p.3.) [REDACTED] concluded the conversation by saying, "No problem. I understand completely. I just want to ensure I am reinforcing at the house. If [REDACTED] is not

behaving, I want to make sure I am not rewarding [REDACTED] for not behaving. :).” (PX 19A, p. 3.).

The Special Education Director, [REDACTED], testified that [REDACTED] would often [REDACTED] [REDACTED] and refuse to comply with direction. (Tr. 110). [REDACTED] also [REDACTED] to [REDACTED] [REDACTED] (Tr. 110). [REDACTED] was not violent over the summer and did not threaten anyone at summer school. (Tr. 111). [REDACTED] behaviors were severe enough that the District determined a behavior goal was necessary for [REDACTED] to benefit from the SDI provided during summer 2022. (Tr. 103). The District was also aware from [REDACTED] IEE, based in part on [REDACTED]’s teacher survey results, that [REDACTED]’s behaviors were clinically significant for [REDACTED] inability to regulate [REDACTED] emotion, [REDACTED] inability to stay on task, and [REDACTED] inability to follow instructions from superiors like adults and teachers. (Tr. 104-105).

3. 2022 Incident Reports and Related Documents

When school started in early August 2022, [REDACTED] behaviors worsened and increased substantially between August and November:

- August 16: [REDACTED] received 2 days of in-school suspension for [REDACTED] (PX 27, 8.16.2022 [REDACTED] *Discipline Referral Form*, p. 1)
- August 22: [REDACTED] was written up for [REDACTED] (PX 32, 8.22.2022 [REDACTED] *Discipline Referral Form*, p.1)
- August 29: [REDACTED] was written up for using [REDACTED] in class and [REDACTED] refusal to [REDACTED] to [REDACTED] teacher (PX 34, 8.29.2022 [REDACTED] *Discipline Referral Form*, p.1)
- September 1: [REDACTED] was written up for [REDACTED] work (PX 38, 9.1.2022 [REDACTED] *Discipline Referral Form*, p.1)

■ September 6: [REDACTED] was written up for using [REDACTED]
[REDACTED]
(PX 39, 9.6.2022 [REDACTED] *Discipline Referral Form*, p.1)

■ September 7: [REDACTED] was written up for [REDACTED]
[REDACTED]
(PX 41, 9.7.2022 [REDACTED] *Discipline Referral Form*, p. 1)

■ September 8: [REDACTED] was written up for [REDACTED]
(PX 42, 9.8.2022 [REDACTED] *Discipline Referral Form*, p. 1)

■ September 8: [REDACTED] was written up for the second time in the same day for being
[REDACTED]
(PX 43, 9.8.2022 [REDACTED] *Discipline Referral Form*, p. 1)

■ September 13: [REDACTED] was written up for [REDACTED]
(PX 48, 9.13.2022 [REDACTED] *Discipline Referral Form*, p. 1)

■ September 13: [REDACTED] was written up for the second time in the same day for [REDACTED]
[REDACTED] for which [REDACTED] received two
days out of school suspension and three days of in school suspension
(PX 49, 9.13.2022 [REDACTED] *Discipline Referral Form*, p. 1).]

■ September 21: [REDACTED] was written up for [REDACTED] without permission
and [REDACTED] for which [REDACTED] received an unspecified number of days of in
school suspension
(PX 55, 9.21.2022 [REDACTED] *Discipline Referral Form*, p. 1)

■ September 23: [REDACTED] written up for [REDACTED] for which [REDACTED]
received an unspecified number of days of in school suspension
(PX 57, 9.23.2022 [REDACTED] *Discipline Referral Form*, p.1-2)

■ September 23: [REDACTED]. was written up for the second time in the same day for [REDACTED]
[REDACTED] and being
disruptive in the hallway for which [REDACTED] received an unspecified number of days of in
school suspension
(PX 58, 9.23.2022 [REDACTED] *Discipline Referral Form*, p.1-3)

■ September 26: [REDACTED] was written up for [REDACTED]
[REDACTED] [REDACTED] [REDACTED] as [REDACTED]

[REDACTED]
[REDACTED]
(PX 52, 9.26.2022 [REDACTED] *Discipline Referral Form*, p.1-3)

▪ September 28: [REDACTED] was written up for shouting, using profanity, and making obscene hand gestures for which [REDACTED] received out of school suspension
(PX 65, 9.28.2022 [REDACTED] *Discipline Referral Form*, p.1-2)

▪ September 28: [REDACTED] was written up for the second time in the same day for what a teacher described as “a constant problem with skipping different classes,” leaving class without permission, disrupting class by repeatedly requesting permission to leave class, and using profanity for which [REDACTED] received three days of in school suspension
(PX 66, 9.28.2022 [REDACTED] *Discipline Referral Form*, p.1-2)

▪ September 29: [REDACTED] was written up for being involved in a “fight/riot” for which [REDACTED] received eight days of out of school suspension
(PX 68, 9.29.2022 [REDACTED] *Discipline Referral Form*, p. 1).

▪ October 19: [REDACTED] was written up for supposedly using threatening language toward another student and discussing fighting
(PX 82, 10.19.2022 *DCS Discipline Referral Form*, pp. 1-3)

▪ November 7: [REDACTED] was written up for shouting obscenities at another student and was subdued by an SRO
(PX 93, 11.7.2022 [REDACTED] *Discipline Referral Form*, pp. 1)

▪ November 7: [REDACTED] was written up for the second time in the same day for threatening a teacher by saying, “I’m at [REDACTED]”
[REDACTED]
(PX 93, 11.7.2022 [REDACTED] *Discipline Referral Form*, pp. 2-7)

² During both November 7 incidents, [REDACTED] was not in [REDACTED] assigned classroom. PX 93. [REDACTED] was supposed to be accompanied by a one-to-one aide, as provided by [REDACTED] October 2022 IEP, Tr. 308; PX 64. [REDACTED] special education teacher testified that [REDACTED] was with [REDACTED] when the incident at PX 93, p. 1, occurred, but that [REDACTED] was unaccompanied and out of [REDACTED] assigned classroom during the second incident at PX 93, p. 4-7. The second incident was the subject of the November 15 MDR proceeding.

J. The November 15 MDR Meeting and Decision

The District began attempts to schedule a MDR meeting to remove [REDACTED] from [REDACTED] in early October 2022. (Tr. 271). At that time, [REDACTED] BIP had been in place for thirteen days but no one had been trained on the BIP. (Tr. 272). The District held an MDR meeting on November 15, 2022. PX 117, *11.25.2022 Manifestation Determination Review form*; Tr. 318. The purpose of the MDR meeting was to assess whether three incidents involving [REDACTED] were conduct that was either [1] caused by, or had a direct and substantial relationship to, [REDACTED] disabilities or [2] was the direct result of the District's failure to implement [REDACTED] IEP, which contained a BIP. 20 U.S.C. § 1415(k)(1)(E)(i)(I) and (II). The District's *11.15.2022 Manifestation Determination Review form*. PX 117. The form lists [REDACTED] behaviors from September 26 (threatening behavior), October 19 (intimidation of students), and November 7 (threat) as the subjects of the MDR meeting. (PX 117; *see also* PX 62, *9.26.2022 DCS Discipline Referral Form*; PX 82, *10.19.2022 DCS Discipline Referral Form*; and PX 93, *11.7.2022 Discipline Referral Form*).

The MDR team consisted of one of [REDACTED] general education teachers, [REDACTED]; special education teacher [REDACTED]; Assistant Principal, [REDACTED]; Principal [REDACTED] special education lead teacher [REDACTED]; psychometrist [REDACTED] and BCBA [REDACTED] (PX 117; Tr. 319.) According to the records provided, [REDACTED] did not perform any psychometric testing on [REDACTED] for [REDACTED] 2022-2023 IEP. (Tr. 316.) Based on the records and testimony at the hearing, there is no mention that [REDACTED] ever had any interaction with [REDACTED] whatsoever. [REDACTED] did not participate in the MDR meeting.

█████ counsel contacted ██████ to ask whether ██████ would be able to participate in the November 15 MDR proceeding. (Tr. 649-650). ██████ advised that ██████ required, at a minimum, the report of the specific incidents in which ██████ had been involved that were the subject of the MDR meeting. (Tr. 650). ██████ explained that ██████ could not make a decision about whether ██████ behaviors were or were not manifestations of ██████ disabilities based solely on ██████ March 2022 IEE. (Tr. 650). ██████ schedule also prevented ██████ from participating on November 15. (Tr. 650). However, between October 3 and November 15 no one from the District contacted ██████ ██████ by email or phone to discuss ██████ behaviors. (Tr. 651). Likewise, no one from the District contacted ██████ to ask ██████ if ██████ would be able to participate in an MDR meeting. (Tr. 651). Finally, no one from the District ever contacted ██████ to ask ██████ whether ██████ behaviors were or were not manifestations of ██████ disabilities. (Tr. 652).

The *Notice of Proposal or Refusal to Take Action*, which the School District supplied to the Petitioner on November 15, lists ██████ disability as ██████ but does include ██████ diagnosis. (PX 124; Tr. 324.) The *Notice of Proposal or Refusal to Take Action* states:

A Manifestation Determination Review meeting was held today to determine if recent behaviors involving threats made toward students and staff are considered manifestations of ██████ disability areas. Specifically, ██████ is found eligible under IDEA due to the impact ██████ diagnosis of ██████ has on ██████ school performance. The outcome of this meeting was that the behaviors are not considered manifestations of ██████ disability.

(PX 117, 11.25.2022 *Manifestation Determination Review form*, p. 1.) The *Notice of Proposal or Refusal to Take Action* also says:

... the consensus was that [REDACTED] behavior does not have a direct and substantial relationship to [REDACTED] disability [sic] and also was not the direct result of the school's failure to implement [REDACTED] IEP/BIP. The team expressed concern of [REDACTED] escalating aggression toward others and potential for violent acts due to the credible nature of [REDACTED] threats.

(PX 124). Following the MDR decision, [REDACTED] was expelled from the District.

VI. ISSUES PRESENTED

A. Violations of the June 2022 Settlement Agreement

1. Did the District's violation of the June 2022 Settlement Agreement's provisions concerning behavioral services, which was embodied in the Impartial Hearing Officer's Order, violate the IDEA, and deny [REDACTED] a FAPE when it failed to ensure that its Board-Certified Behavioral Analyst [REDACTED] [REDACTED] undertook a behavioral assessment (FBA) on [REDACTED] and, if needed, a behavior intervention plan (BIP) no later than September 1, Settlement Agreement, ¶¶ III B.1 to B.6. (*Issue 8*).

2. Did the District's violation of the June 2022 Settlement Agreement's provisions concerning the neuropsychological evaluation undertaken by [REDACTED] [REDACTED] of [REDACTED] which was embodied in the Impartial Hearing Officer's Order, violate the IDEA, and deny [REDACTED] a FAPE when it failed to document "the means, manner, and method of the implementation of the recommendations" for any instances in which the District was already implementing [REDACTED] [REDACTED] recommendations. (*Issue 7B*).

3. Did the District's violation of the June 2022 Settlement Agreement's provisions concerning the neuropsychological evaluation undertaken by [REDACTED] [REDACTED] which was embodied in the Impartial Hearing

Officer's Order, violate the IDEA, and deny [REDACTED], a FAPE when it failed to "[create and incorporate a data-collection process, collect data every 14 days, and within 3 school days of the date on which the data is collected provide data to Parent and the District, so that the District and Parent may monitor Student's progress." Settlement Agreement, ¶3, p. 4. (*Issue 7C*).

4. Did the District's violation of the June 2022 Settlement Agreement's provisions concerning the neuropsychological evaluation undertaken by [REDACTED] [REDACTED] which was embodied in the Impartial Hearing Officer's Order, violate the IDEA, and deny [REDACTED] a FAPE when it failed to give good-faith consideration to [REDACTED] recommendation that [REDACTED] undergo an independent education evaluation to rule out a language processing disorder. Settlement Agreement, III.A. Or, stated differently, did the District deprive [REDACTED] of a timely language evaluation which was recommended by [REDACTED] and, if so, violate the IDEA? (*Issue 7D*). Furthermore, did the District give good-faith consideration to the language evaluation results and report authored by [REDACTED] after she undertook a language assessment of [REDACTED], and, if not, did the District's failure violate the IDEA? (*Issue 13*).

5. Did the District's violation of the June 2022 Settlement Agreement's provisions concerning documentation of IEP services, which was embodied in the Impartial Hearing Officer's Order, violate the IDEA, and deny [REDACTED] a FAPE when it failed to provide to [REDACTED] parents and counsel documentation of the services identified in the Settlement Agreement after they were incorporated into the Student's IEP. Settlement Agreement, ¶ III.C. (*Issue 9*).

B. Issues Related to the 11.15.22 Manifestation Determination Review and J.C.'s Subsequent Expulsion

1. Did the District violate the IDEA when it decided that the Student's behaviors, which were the subject of the District's November 15, 2022, MDR meeting, were not manifestations of the Student's disabilities? (*Issue 4B*).

2. Did the District violate the IDEA when it decided that the Student's behaviors, which were the subject of the District's November 15, 2022, MDR meeting, were not the result of the District's failure to implement the Student's behavior intervention plan? (*Issue 4C*).

3. Did the District violate the IDEA by finding that the Student's behaviors compelled it to expel the Student? (*Issue 6*).

C. Issues Related to a lack of Specially Designed Instruction and Related Services

1. Did the District violate the IDEA when it failed to provide [REDACTED] with adequate specially-designed instruction in mathematics during the 2021-2022 and 2022-2023 school years? (*Issue 10*).

2. Did the District violate the IDEA when it failed to update the Student's functional behavioral assessment and [REDACTED] behavior intervention plan to account for [REDACTED] allegedly aggressive or violent behaviors? (*Issue 4A*).

D. Procedural Violations

1. [REDACTED] filed an Amended Request for a Due-Process Hearing on October 26, 2022, and the parties scheduled a resolution meeting for November 7. Did the District

violate the IDEA when it failed to produce all of the Student's education records before the November 7, 2022, resolution meeting? (*Issue 2*).

2. The District notified [REDACTED] that it intended to hold an MDR meeting on November 15. Did the District violate the IDEA when it failed to partner with [REDACTED] the Student's mother, to select the members of the Student's MDR team and choose a mutually-agreable date on which the MDR meeting could occur? (*Issue 1*) and when it chose to produce 635 pages of the Student's records on November 14, which was the day before the November 15 MDR meeting? (*Issue 3*).

3. Did the District violate the IDEA's "stay put" provision when it expelled the Student? (*Issue 5*).

VII. DISCUSSION OF THE ISSUES

A. Breaches of the 2022 Settlement Agreement and Hearing Officer Dr. Amanda Bradley's June 2022 Order

The Petitioner brought the underlying September 2022 due process case because the District committed a series of violations of the June 2022 Settlement Agreement and subsequent Order of Hearing Officer Amanda Bradley incorporating the Settlement Agreement into her final judgment. (PX 6; PX 133, Exhibit A, *Order of Dr. Amanda Bradley* at p. 39-40). The First Circuit, considering whether a parent is entitled to relief under the IDEA for breach of a Settlement Agreement, determined that:

Congress could not have intended to leave plaintiffs without an IDEA statutory remedy when . . . the school system does not appeal [an] administrative decision but simply fails to fulfill a continuing obligation to provide services Congress could not have intended for a school system to be in a *better* position under IDEA when it refuses to comply with a final administrative order and its continuing obligations than when it exercises its

statutory right to appeal from the order It cannot be that a court is powerless under IDEA to issue injunctive relief when the school system neither appeals from nor complies with a valid administrative order and its continuing obligations. . . . It would create incentives for school systems to drag out the administrative process, not to appeal administrative orders, not to announce their intentions to refuse to comply with those orders, and generally not to comply.

(*Joshua Nieves-Marquez et al. v. The Commonwealth of Puerto Rico et al.*, 353 F.3d 108, 115-16 (1st Cir. 2003)). In the Eleventh Circuit, to prevail on a claim for breach of a settlement provision, the Petitioner must show that the alleged violation resulted in a denial of a FAPE to ■■■ (E.D. ex rel. *Dukes v. Enterprise City Bd. of Educ.*, 273 F.Supp.2d 1252, 1259-60 (11th Cir. 2003)). Denial of a FAPE may result from a procedural violation, or breach of a settlement provision, where it “impeded the child’s right to a free appropriate public education; 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 caused a deprivation of educational benefits.” (20 U.S.C. § 1415(f)(3)(E)(ii); *J.Y. v. Dothan City Bd. of Educ.*, No. 1:12CV347-SRW, 2014 WL 1320187, at *9 (M.D. Ala. Mar. 31, 2014)). The Petitioner has satisfied the burden of showing by a preponderance of the evidence that all alleged breaches of the Settlement Agreement and the Order resulted in a denial of a FAPE to ■■■.

1. The District denied [REDACTED] a FAPE when it breached the Settlement Agreement's provisions and failed to ensure that its Board Certified Behavioral Analyst (BCBA) [REDACTED] completed [REDACTED]'s BIP by September 1, 2022, and failed to see that [REDACTED] provided training in accordance with the Settlement Agreement within 14 days of completing the BIP.

The evidence and the testimony show that the District's failure to provide a series of behavioral intervention services per the Settlement Agreement resulted in a multitude of denials of a FAPE to [REDACTED]. First, the Hearing Officer finds that the District failed to see that [REDACTED] BCBA, undertook a behavioral assessment (FBA) on [REDACTED], and, if needed, a behavior intervention plan (BIP) no later than September 1. (PX 6, *Settlement Agreement*, ¶¶ III.B.1 to B.6; *Issue 8, Petitioner's 12.30.22 Ltr to Hearing Officer*.) The District's lack of communication and understanding of the Settlement Agreement ultimately deprived [REDACTED] of a FAPE. The Superintendent, [REDACTED], testified that he "didn't recall the details" of the Settlement Agreement and delegated the task of complying with the behavioral services portion of the Settlement Agreement and the Order to the Special Education Director. (Tr. 480; 484). The Special Education Director, [REDACTED], testified that she charged the [REDACTED] Principal, [REDACTED], and [REDACTED] special education teacher [REDACTED] with compliance of some portions of the Order, including ensuring that the BCBA hired to complete [REDACTED] Functional Behavior Assessment and Behavior Intervention Plan performed the observations necessary to complete the BIP by September 1. (Tr. 122-123).

The Principal, [REDACTED], is an administrator at [REDACTED] with more than thirty-one years' experience in education (Tr. 399). He has had prior experience in implementing Behavioral Intervention Plans. (Tr. 399) He was aware of the training on the BIP for [REDACTED] but had not

been individually trained prior to the expulsion of [REDACTED] although his availability for each training has been requested. (Tr. 402). [REDACTED] testified that he had never seen the Settlement Agreement and was unaware that there was a deadline by which [REDACTED] BIP should have been completed. (Tr. 400; 521).

The Assistant Principal, [REDACTED], earned a bachelors degree in education from [REDACTED] and a Masters in administration from [REDACTED] (Tr. 446) He is an administrator at [REDACTED]. (Tr.446-447) He has never served as a special education teacher but has experience in teaching students with disabilities. (Tr. 447) He was aware of the existence of a Settlement Agreement relating to a prior due process complaint presented on behalf of [REDACTED], but had never read the Settlement Agreement. (Tr. 447-448) He was aware that the Settlement Agreement was supposed to be in place no later than September 1, 2022. He was also aware that [REDACTED] (BCBA) had been engaged and was arranging for observations of [REDACTED] for the purposes of completing a BIP. (Tr.450) Administration was using [REDACTED] behavioral class as a structure to assist [REDACTED] (Tr.459-460)

The District's Special Education Director, [REDACTED], agreed that the District breached its duty to have [REDACTED] BIP completed by September 1, 2022. (Tr. 98-99 ("We did not meet that deadline.")).

[REDACTED] is a special education teacher with 18 years' experience in that field. (Tr.518) He is [REDACTED] case manager and has been since August 9, 2022. (Tr.520) He had first learned in August 2022, that [REDACTED] was to prepare a BIP for [REDACTED]. and as [REDACTED] case manager it was his responsibility to schedule any and all meetings between [REDACTED] and [REDACTED] (Tr. 521) His first contact was an email from [REDACTED] or about August 12

of 2022. (Tr. 538). In the latter part of August he was advised that [REDACTED] would need two consecutive days to observe [REDACTED] in the classroom environment and finish up the BIP. (Tr. 539-540, 544) He was not aware of the terms of the prior Settlement Agreement, however, as case manager he is familiar with both the June 15, 2022, IEP and the October 22, 2022, IEP. According to both IEPs he was to provide 30 minutes two times per week of additional education in math and language. (Tr. 524) He addressed the math disability in the fall of 2022, however, he did not utilize a specific, peer reviewed program, nor did he utilize a research based program for the math instruction, but instead utilized common day to day activities and the math involved with those activities. (Tr. 527-528) Under the block program utilized by [REDACTED], [REDACTED] was not enrolled in a math course in the fall of 2022 and did not receive "graded instruction" in math that semester. (Tr. 529) [REDACTED] is enrolled in a math course for the current semester even while expelled. [REDACTED] testified that he had never seen the Settlement Agreement and unaware that there was a deadline by which [REDACTED] BIP should have been completed. (Tr. 400; 521).

[REDACTED] testified that she was employed as an aide at [REDACTED] in mid-August 2022. (Tr. 423) She had previously been employed as a special education aide eight years ago with [REDACTED] (Tr. 423). [REDACTED] was assigned as [REDACTED] one-on-one aide in mid-October 2022, and continued in that role until mid-November 2022. (Tr. 424) She started keeping a log on [REDACTED] actions on or about October 19, 2022 at the direction of [REDACTED] (the Board Certified Behavioral Analyst). (Tr. 424)

In fact, [REDACTED] first draft of [REDACTED] BIP was not completed until October 4, 2022. (Tr. 184; PX 73, *October 4 BIP from [REDACTED] BCBA at [REDACTED]* [REDACTED]).

The Hearing Officer further finds that the District failed to ensure that “at minimum, the Principal, [REDACTED], Assistant Principal(s), counselor, the Student’s special education teacher, [and]the Student’s general education teacher(s)” received training to implement [REDACTED] behavior plan to fidelity no later than 14 days after the BIP was developed, which deprived [REDACTED] of a FAPE. *Id.*

Q [by Mr. Johnson]: Did the district’s personnel listed in the Settlement Agreement, the Principal, the Assistant Principal, the special education teacher, the general education teacher, and the other persons, did any of them receive any training on the BIP that [REDACTED] presented to the team on October 4th, and it was made a part of [REDACTED] IEP going forward

A [by [REDACTED]]: It is my understanding that they didn’t.

(Tr. 252). [REDACTED] the BCBA who wrote [REDACTED] BIP testified that, although [REDACTED] BIP was completed by September 15, 2022 and presented to [REDACTED] IEP Team on October 4, the only training [REDACTED] provided on [REDACTED] initial BIP was “partial” training to [REDACTED] and [REDACTED], [REDACTED] one-to-one aide, which occurred on November 1, 2022, past the 14-day deadline specified by the Settlement Agreement. (Tr. 704; PX 97, [REDACTED] *November 2022 BIP Training*). The Principal, [REDACTED] confirmed that he never received training on [REDACTED] BIP. (Tr. 402.)

[REDACTED] also did not provide any training to the District for [REDACTED] revised November BIP. (Tr. 796).

Despite the District's failure to ensure that the appropriate parties received training on [REDACTED] BIP, the Special Education Director, [REDACTED], acknowledged that such training is important for several reasons. [REDACTED] stated, "so the purpose of training for a BIP would include understanding the operation behavior definition of each behavior. So, what they are looking for. Proper data collection methods, and what each person's responsibility toward the IEP is – I mean, toward the BIP is, and to understand everything that's in the BIP and what's expected." (Tr. 264.) [REDACTED] agreed that for school personnel to implement the BIP to fidelity, they would have to be trained on the BIP. (Tr. 256).

[REDACTED] further explained that if the teachers and administrators who were supposed to be trained on [REDACTED] BIP and who were supposed to implement it to fidelity are not actually trained, then the risks to [REDACTED] are that [REDACTED] target behaviors will continue to occur or that the teachers and administrators "may attempt to use interventions that are not part of [REDACTED] BIP." (Tr. 715). He testified that [REDACTED] "target behaviors" are the maladaptive behaviors which interfere with [REDACTED] ability to receive or benefit from [REDACTED] education, which included elopement, off-task behavior, disruptive behaviors, and aggression. (Tr. 714-15; 758).

The question, is whether the District's failure to timely provide [REDACTED] with a BIP and see that [REDACTED] provided adequate training to District personnel actually deprived [REDACTED] of a FAPE. The Hearing Officers finds that it did. "[A] material failure to address the Child's behavior needs. . . result in a denial of a FAPE." (*L.J. by N.N.J. v. Sch. Bd. of Broward Cnty., Fla.*, No. 11-60772-CIV, 2017 WL 6597516, at *15, n. 23 (S.D. Fla. Sept.

28, 2017), *aff'd sub nom. L.J. by N.N.J. v. Sch. Bd. of Broward Cnty.*, 927 F.3d 1203 (11th Cir. 2019)).

The District does not dispute that ■ needed a BIP. (Tr. 70) The Special Education Director, ■, stated that she knew during the Summer of 2022 that ■ needed a BIP to benefit from ■ summer education; (Tr. 103) (Stating the District was aware from ■ behavior during summer school that ■ displayed the maladaptive behaviors of inappropriate usage of ■ cell phone, elopement, and use of profanity were severe enough that the District determined a behavior goal was necessary for ■ to benefit from the SDI provided during summer 2022)). However, when school began and ■ still did not have a BIP in place, ■ behaviors escalated. (Tr. 173). For example, at some point during the semester, ■ was “kicked out” of Psychology class after multiple negative interactions with the Psychology teacher. Although the IEP Team never met to discuss changing ■ LRE for that class period, ■ was sent to the special education classroom to complete Psychology work but did not receive instruction in Psychology because ■ was not allowed back in the general education classroom at that time. (Tr. 533-34.) ■ continuing propensity for elopement quite literally prevented ■ from participating in the educational environment. ■ received eleven disciplinary referrals for skipping class or eloping from ■ assigned area between the beginning of school on August 9 and the time ■ BIP was finally presented to the IEP team on October 4. (PX 22; PX 27; PX 39; PX 41; PX 42; PX 43; PX 48; PX 49; PX 55; PX 58; PX 66). ■ Assistant Principal ■, testified that he didn't implement any type of intervention because “[j]ust not knowing the situation, not knowing ■ and ■ history, being new to the district, I just felt that I would have more

comfort in assigning disciplinary action once we had time to sit down and meet and discuss a behavioral plan.” (Tr. 456). The Special Education Director, [REDACTED], agreed that [REDACTED] suspension-related absences from school could have been avoided.

Q [by Mr. Johnson]: Okay. So, Mr. Etheredge was asking you about, you know, the student being absent because of disciplinary problems because of suspensions, but can't we agree that some of those might have been avoided if the people making the decision to discipline [REDACTED] had received a copy of [REDACTED] BIP and actually had been trained to fidelity on it?

[objection made by Mr. Etheredge, which the Hearing Officer overruled.]

A [by [REDACTED]]: I do agree.

(Tr. 376).

When [REDACTED] who performed [REDACTED] neuropsychological IEE and made therapeutic recommendations for [REDACTED] behaviors, reviewed [REDACTED] disciplinary records leading to [REDACTED] expulsion, [REDACTED] felt that it was “disheartening . . . that [REDACTED] received no services addressing [REDACTED]. And it was very predictable that [REDACTED] behavior escalated over time due to the lack of services.” (Tr. 656).

The District's failure to provide [REDACTED] with a BIP by the September 1 deadline and its subsequent failure to provide training in accordance with the Settlement Agreement and the Order clearly resulted in a denial of a FAPE.

2. **The District denied [REDACTED] a FAPE when it breached the Settlement Agreement's provisions and failed to document the means, manner, and method of the implementations of the recommendations made by [REDACTED].**

The Hearing Officer finds that the District also failed to abide by portions of the Settlement Agreement and Hearing Officer Amanda Bradley's Order related to [REDACTED] [REDACTED] neuropsychological independent education evaluation ("IEE") of [REDACTED]. Specifically, the District first failed to document "the means, manner, and method of the implementation of the recommendations" in [REDACTED] IEP for any instances in which the District was already implementing [REDACTED] recommendations. (PX 6, Settlement Agreement, ¶3, p. 4; *Issue 7B, Petitioner's 12.30.22 Ltr to Hearing Officer.*) The Notice of Proposal or Refusal to Take Action ("NOPRA") issued after [REDACTED]'s 6.15.22 IEP Meeting pursuant to the Settlement Agreement and during which [REDACTED] [REDACTED] IEE Report was discussed states only:

A Language evaluation was rejected based on team discussion that it is not needed at this time and that the target in [REDACTED] report was more for socially appropriate language which is being addressed in an Adaptive Goal. Assistive Technology, specifically a LiveScribe pen, was rejected based on team discussion that it is not needed and might cause a distraction to [REDACTED].

(PX 15, *June 21 Notice of Proposal or Refusal to Take Action*).

In his March 2022 IEE Report, [REDACTED] made well over fifteen educational recommendations for [REDACTED] (PX 4 at p. 6-8). Because none of the other recommendations - such as whether [REDACTED] mental health needs were being addressed by the school or whether [REDACTED] was being taught the study skill methodologies recommended by [REDACTED] - were mentioned in either [REDACTED] June 15 IEP or the June 22 NOPRA, the District "significantly

impeded [REDACTED] opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child." (*Id.*; 20 U.S.C. § 1415(f)(3)(E)(ii); PX 15, 6.21.2022 *Notice of Proposal or Refusal to Take Action*; PX 12, *June 2022 IEP*.) [REDACTED] simply had no way of knowing what the District was and was not doing with respect to [REDACTED] education.

- 3. The District denied [REDACTED] a FAPE when it breached the Settlement Agreement's provisions and failed to collaborate with [REDACTED] to create and incorporate a data-collection process to be shared with [REDACTED] every 14 days.**

The Hearing Officer finds that the District failed to collaborate with [REDACTED] to "[create and incorporate a data-collection process, collect data every 14 days, and within 3 school days of the date on which the data is collected provide data to Parent and the District, so that the District and Parent may monitor Student's progress." (PX 6, *Settlement Agreement*, ¶III, p. 4; *Issue 7C, Petitioner's 12.30.22 Ltr to Hearing Officer*; Tr. 54-55 ("Did we collaborate with [REDACTED] to create, no.")). The District did not have any contact with [REDACTED] to determine what kind of data he wanted the district to collect. (Tr. 55). The Special Education Director, [REDACTED], admitted that was a violation of the Settlement Agreement. (*Id.*)

The Hearing Officer finds this breach deprived [REDACTED] of a FAPE and [REDACTED] of meaningful participation in the education process. One purpose of this particular provision of the Settlement Agreement was so that [REDACTED] "could participate in the decision-making process regarding the provision of a free appropriate public education to [REDACTED]." 20 U.S.C. § 1415(f)(3)(E)(ii). The District agreed that [REDACTED] is an active and involved parent when

given the opportunity. (Tr. 534-35) [REDACTED] special education teacher, [REDACTED], testified that he had an “excellent” relationship with [REDACTED], and that she “absolutely” had “an interest in [REDACTED] education and an interest in [REDACTED] success.” [REDACTED] testified that when she became aware that [REDACTED] was skipping class or eloping from [REDACTED] assigned area, she used an app on [REDACTED] cell phone to track [REDACTED] movements during the school day. (Tr. 813-814). However, [REDACTED] testified that during summer school 2022, the District not only was not collecting and providing data to [REDACTED] but it was also deliberately withholding information about instances of [REDACTED] behaviors impeding [REDACTED] ability to benefit from summer instruction because “we just [didn’t] want it to seem like we were complaining.” (Tr. 115). Without this information, the Hearing Officer finds [REDACTED] could not meaningfully participate in the process of determining what services and supports, [REDACTED] required to access [REDACTED] education, or could she engage in actively parenting [REDACTED], and helping correct the behaviors which were impeding [REDACTED] ability to benefit from and participate in [REDACTED] education.

- 4. The District denied [REDACTED], a FAPE when it breached the Settlement Agreement’s provisions and failed to give good-faith consideration to [REDACTED] [REDACTED] recommendation that [REDACTED] undergo a language processing evaluation and when it misled [REDACTED] as to the nature of such an evaluation.**

[REDACTED] has a degree in psychology from [REDACTED] and a masters degree in communication disorders from the [REDACTED] (TR.573-574) She is employed with an independent group operating as [REDACTED] Psychology. (Tr. 574) She was engaged by the [REDACTED] to evaluate [REDACTED] for a potential language disorder. (Tr. 574) She is not qualified to diagnose an auditory processing disorder. (Tr.594) While she determined that [REDACTED] performed at a level of average or below on some of the sub tests, she utilized the sub

test to form the basis for the core evaluations. (Tr.596) The core evaluations are the most important in determining whether or not any type of language disorder is present. (Tr.596-597) [REDACTED]. tested average or above on each of the core evaluations. (Tr.598) The Alabama administrative code requires specific test scores of 70 or below on two or more of the Core evaluations in order to be qualified or termed a language disorder. Using that criteria, in the Alabama education system, [REDACTED] is not recognized and cannot be classified as having a language disorder. (Tr.598-599)

The Hearing Officer finds that the District failed to give good-faith consideration to [REDACTED]. [REDACTED]'s recommendation that [REDACTED] undergo an independent education evaluation to rule out a language processing disorder and otherwise deprived [REDACTED] of a timely language evaluation. (PX 6, *Settlement Agreement*, ¶III.A.; *Issue 7D, Petitioner's 12.30.22 Ltr to Hearing Officer.*) The District simply determined that a language processing evaluation was not necessary without consulting a neuropsychologist or psychologist. (Tr. 57-58). There was also no acting speech language pathologist at the IEP Meeting to aid the District in arriving at that conclusion or to advise the team about whether a speech language evaluation would be beneficial. (Tr. 335-36). The District stated in the NOPRA issued after the June 15 IEP Meeting that the IEP Team made the decision that a speech language evaluation was not needed because Dr. [REDACTED] recommendation "was more for socially appropriate language which is being addressed in an Adaptive Goal," and that [REDACTED] agreed. (PX 15, *June 21 Notice of Proposal or Refusal to Take Action*). [REDACTED] is not a speech language pathologist, a neuropsychologist, or a psychologist. (Tr. 799). The District described [REDACTED] recommendation to [REDACTED] as a concern that [REDACTED] was not using

“socially appropriate language.” Contrarily, [REDACTED] was very clear that his recommendation had nothing to do with inappropriate use of language. In his report, Dr.

[REDACTED] stated the reason for his recommendation as follows:

[REDACTED] performance on a measure of general cognitive functioning yielded intellectual index scores that ranged from below average (Verbal Comprehension) to low average (Visual Spatial and Fluid Reasoning) to average (Working Memory and Processing Speed) for an overall composite or Full Scale IQ of [REDACTED] percentile, below average range). Prior IQ testing with the Naglieri Nonverbal Ability test in 2019 yielded a composite IQ of [REDACTED]. Considering the current test pattern as well as comparing current findings to prior testing suggests the presence of a possible language processing problem adversely impacting [REDACTED] performance on traditional measures of intelligence.

(PX 4 at p.4).

The record shows that the District never discussed the results of Dr. [REDACTED] IEE with him and clearly didn't understand his recommendations at the time of the June 15 IEP meeting. (When asked, “Did you have any contact with [REDACTED] about the contents of the IEE?” [REDACTED] answered, “We did not.”) As such, the Hearing Officer finds [REDACTED] was deprived of a FAPE both because [REDACTED] was denied the opportunity to meaningfully participate in [REDACTED] education and because the District failed to timely evaluate [REDACTED] when “faced with evidence that [REDACTED] suffered from a suspected [language impairment.]” *Phyllene W. v. Huntsville City Bd. of Educ.*, 630 F. App'x 917, 928 (11th Cir. 2015) (“We conclude that the Board violated the procedural requirements of the IDEA by failing to evaluate [REDACTED] when faced with evidence that she suffered from a suspected hearing impairment. . . . As a result of its failure to obtain necessary medical information regarding [REDACTED] hearing, the Board further failed to provide her with a FAPE.”)

The Hearing Officer finds that, had the District timely evaluated [REDACTED] for a language processing disorder, it would have been aware that [REDACTED] requires “in-class accommodation[s] to help bridge the gap between [REDACTED] understanding of oral language and [REDACTED] expression of oral language” and that “[REDACTED] difficulties with receptive language might be secondary to another disorder, such as Auditory Processing Disorder . . . further evaluation might help narrow down which accommodation would help [REDACTED] be the most successful in the classroom.” (PX 118, *Milestones Psychology Speech Language Evaluation*, p. 4-5).

5. **The District denied [REDACTED] a FAPE when it breached the Settlement Agreement’s provisions and failed to provide to [REDACTED] counsel documentation of the services added to [REDACTED] IEP as a result of the Settlement Agreement.**

The Hearing Officer finds that the District deprived [REDACTED] of a FAPE and [REDACTED] of meaningful participation in the FAPE process when it failed to provide to [REDACTED]’s parents and counsel with documentation of the services identified in the Settlement Agreement after they were incorporated into the Student’s IEP. (PX 6, *Settlement Agreement*, ¶III.C.; *Issue 9, Petitioner’s 12.30.22*.) In its Answer to the Petitioner’s 9.6.22 Request for a Due Process Hearing, the District “admits that the IEP was not provided to Student’s counsel.” (PX 134, *Respondent’s 9.13.22 Answer to Petitioner’s Request for a Due Process Hearing*). The Hearing Officer reasons that, had [REDACTED] counsel been provided with a copy of the 6.15.22 IEP, [REDACTED] would have been able to intervene at an earlier date because her counsel could have identified the District’s violations of the IDEA which occurred at the 6.15.22 IEP meeting.

B. Issues Related to the 11.15.22 Manifestation Determination Review and [REDACTED] Subsequent Expulsion

[REDACTED] MDR team met on November 15, 2022, to assess whether three incidents involving [REDACTED] were conduct that was either [1] caused by, or had a direct and substantial relationship to, [REDACTED] disabilities or [2] was the direct result of the District's failure to implement [REDACTED] IEP, which contained a BIP. 20 U.S.C. § 1415(k)(1)(E)(i)(I) and (II). The Hearing Officer reviewed the evidence for both elements and finds that the District violated the IDEA and that it deprived [REDACTED] of a FAPE.

- 1. The District violated the IDEA when it decided that [REDACTED] behaviors were neither caused by nor had a direct and substantial relationship to [REDACTED] disabilities.**

According to the testimony and the evidence, [REDACTED] did not participate in [REDACTED]'s MDR proceeding. Likewise, the District did not consult with any psychologist or neuropsychologist about whether [REDACTED] behaviors were either caused by or had a direct and substantial relationship to [REDACTED] disabilities. There is no evidence that the District was prevented, in any way, from speaking with [REDACTED] to obtain his opinions before it proceeded with the MDR meeting. Between October 3 and November 15, no one from the District [REDACTED] by email or phone to discuss [REDACTED] behaviors. (Tr. 651.) Likewise, no one from the District contacted [REDACTED] to ask him if he would be able to participate in an MDR meeting. (Tr. 651). Finally, no one from the District ever contacted [REDACTED] to ask him whether [REDACTED] behaviors were or were not manifestations of [REDACTED] disabilities. (Tr. 652).

The June 2022 Settlement Agreement recites the fact that during pendency of [REDACTED] first due-process case, [REDACTED] counsel funded [REDACTED] neuropsychological IEE. (PX 6, ¶ III.A.1, p. 2.) The District then paid [REDACTED] counsel for the costs of [REDACTED] IEE. (Id.) Practically speaking, the District paid for the IEE and could have spoken with [REDACTED] any time it wanted. If, before the MDR meeting, [REDACTED] had seen the forms containing the information for each of [REDACTED] incident, if he had been asked to participate in the MDR meeting, and if he had been asked to give an opinion about whether [REDACTED] behaviors were a manifestation of [REDACTED] disabilities, [REDACTED] would have been able to do so. (Tr. 653).

Next, the District's documentation from the MDR meeting omits any reference to [REDACTED] diagnosis. According to [REDACTED] [REDACTED]'s behaviors that were the subject of the MDR proceeding were caused by and appeared "very consistent with [the] diagnosis of [REDACTED]" (Tr. 653; Tr. 655). [REDACTED] opined further that [REDACTED]'s behaviors were manifestations not only of [REDACTED] but also "a manifestation of the lack of services for [REDACTED] [REDACTED] and [REDACTED] up to that point." (Tr. 655-56). When [REDACTED] read the 11.15.2022 *Manifestation Determination Review* form and [REDACTED] IEP, one of the "concerns" he had was that "nowhere was the diagnosis of [REDACTED] indicated. It was all based upon review [sic] of [REDACTED]. And yet [REDACTED] was clearly part of my diagnostic formulation." (Tr. 655-56). [REDACTED] expressed that it was "disheartening to [me] that [REDACTED] received no services addressing that. And it was very predictable that [REDACTED] behavior escalated over time due to the lack of services." (Tr. 656). [REDACTED] summarized the increase in [REDACTED] behaviors in this way:

So it's not surprising to me that [REDACTED] escalated. It's not surprising to me that the behaviors became increasingly antisocial. That [REDACTED] began showing more of the irritability, the crankiness as part of the [REDACTED]. That if [REDACTED] perceived somebody was doing [REDACTED] wrong, that [REDACTED] would feel a need for retribution, vengeance. That's part of the diagnosis of [REDACTED]. [REDACTED] would have difficulty accepting responsibility for [REDACTED] behavior when confronted. And that's clearly indicated by the fact that [REDACTED] thinks that other people are responsible for [REDACTED] misbehavior and for [REDACTED] acting out.

(Tr. 655). [REDACTED] behaviors were a manifestation "of all the things that you see under [REDACTED] (PX 111, p. 6; Tr. 655). Neither [REDACTED] the BCBA, nor any other mental-health professional disputed [REDACTED] opinion. The Hearing Officer finds that [REDACTED] s behaviors that were the subject of the MDR proceeding were either caused by or had a direct and substantial relationship to [REDACTED] disabilities.

- 2. The District violated the IDEA because [REDACTED] behaviors were the direct result of the District's failure to implement [REDACTED] IEP, which contained a BIP.**

The Hearing Officer finds that [REDACTED] proved by a preponderance of the evidence that [REDACTED] behaviors that were the subject of the MDR proceeding were the direct result of the District's failure to implement [REDACTED] IEP, which contained a BIP. The June 2022 Settlement Agreement and Hearing Officer Bradley's Order stated in clear terms when [REDACTED] s BIP was supposed to be in place, that the BIP must be implemented to fidelity, when training was to occur, who was to receive training, and the types of training that everyone was to receive. The District and [REDACTED] admitted several times that [REDACTED] FBA had not even begun as of September 1, even though it was supposed to be completed by September 1. Additionally, the District and [REDACTED] admitted several times that [REDACTED] BIP had not been written as of September 1, which, again, was the deadline. The District had known

about the September 1 deadline for months, and [REDACTED] testified that he and [REDACTED] had discussed "the potential of needing to go into September for it." (Tr. 734).

The Special Education Director, [REDACTED], testified that, while she and [REDACTED] were jointly responsible for ensuring that [REDACTED] undertook [REDACTED] FBA and created a BIP for [REDACTED] by September 1, [REDACTED] delegated the planning of [REDACTED] [REDACTED] visits to campus to the Principal and [REDACTED] (Tr. 122-123). The Principal, [REDACTED] testified that he had never read the Settlement Agreement. (Tr. 400). [REDACTED] was unaware there was a deadline for [REDACTED] to complete a FBA and a new BIP:

Q [by Ms. Pennington]: Okay. Have you read a copy of that Settlement Agreement?

A [by [REDACTED]]: No, I have not.

Q [by Ms. Pennington]: Do you currently have any understanding that the district agreed in the Settlement Agreement to contract with an individual named [REDACTED] [REDACTED] to provide [REDACTED] with a Functional Behavior Assessment and a new Behavior Intervention Plan?

A [by [REDACTED]]: I have that assumption by attending meetings.

Q [by Ms. Pennington]: Were you aware that there was a deadline for that to occur?

A [by [REDACTED]]: Not to my knowledge. And, like I said, this is the first time I've read this.

(Tr. 400). The Assistant Principal, [REDACTED] testified that, as of the due process hearing, he, like the Principal, [REDACTED], had never read a copy of the Settlement Agreement. (Tr. 448). [REDACTED] also testified that he was unaware that a deadline existed for [REDACTED] to have a BIP in place:

Q [by Mr. Johnson]: Before you came in here today, did you know anything about a September 1, 2022, deadline for [REDACTED] to have a [BIP] in place?

A [by [REDACTED]]: No, sir, not that specific date.

(Tr. 449-50).

The Special Education Director, [REDACTED], did not have any contact with [REDACTED] from August 9, 2022, when school started, until August 31, 2022, the day before the Settlement Agreement deadline for an FBA/BIP. (Tr. 125). Instead, that task was delegated to [REDACTED] special education teacher, [REDACTED], who became employed by the District on August 9, 2022, the first day of school. (Tr. 520). [REDACTED] testified that no one informed him that [REDACTED] parents brought a previous due process case on [REDACTED] behalf or that a Settlement Agreement existed. (Tr. 520). [REDACTED] was neither told what the terms of the Settlement Agreement were nor shown a copy of the Settlement Agreement. (Tr. 521). As of the date of the due process hearing, [REDACTED] was wholly unaware of the District's obligations in the Settlement Agreement:

Q [by Mr. Johnson]: Last question about this, [REDACTED] [REDACTED] Do you have any knowledge whatsoever about what's in the Settlement Agreement?

A [by [REDACTED]]: No.

(Tr. 522).

Importantly, the Settlement Agreement required the IEP team to meet within 14 days after [REDACTED] completed the FBA and BIP to give good faith consideration to the documents. (PX 6, p. 5.) If the District had followed the Settlement Agreement, then [REDACTED]

IEP team would have met on September 15. This was a date that preceded the September 26 incident, which was the first of three incidents that the MDR team considered at its November 15 meeting.

In this vein, the Hearing Officer notes that [REDACTED] was written up 20 times between August 16 and November 7. Most likely, if [REDACTED] BIP had been finished by September 1 and if [REDACTED] IEP team had met on September 15, then the BIP would probably have been put in place that same day, considering what occurred at the October 4 IEP team, which is the BIP was agreed to by [REDACTED] IEP team. If the BIP had been put in place on September 15, it would have been in force at the point where [REDACTED] behaviors were limited to skipping class, wandering the halls, using [REDACTED] phone in class, leaving class without permission, using profanity, and being out of dress code. (See PX 27, PX 32, PX 34, PX 38, PX 39, PX 41, PX 42, PX 43, PX 48, and PX 49.) The first incident that the MDR team considered occurred on September 26. Again, if [REDACTED] BIP had been in place on September 15, that would have been 11 days before the September 26 incident. Because the BIP was not in place, [REDACTED] behaviors were not impacted by it and, consequently, continued to escalate.

The Hearing Officer finds, that the District violated the Settlement Agreement and Hearing Officer Bradley's Order, violated the IDEA, and deprived [REDACTED] of a FAPE because it did not complete the FBA or the BIP by September 1. The evidence is undisputed that [REDACTED] actually had the BIP written on September 15, shared it with [REDACTED] case manager that day, and that the case manager, [REDACTED], did not have any changes or revisions to it. For whatever reason, the [REDACTED] BIP was not presented to [REDACTED] IEP team until October

4. By that time, though, the September 26 incident had already occurred. The BIP was not implemented.

The Hearing Officer finds by a preponderance of the evidence that [REDACTED], attended school a sufficient number of days that would have permitted reasonable observation for the FBA and a revised BIP. In order to create [REDACTED] FBA and [REDACTED] BIP, [REDACTED] observed [REDACTED] on only one day, which was September 8. [REDACTED] sent [REDACTED] the draft BIP a week later on September 15. [REDACTED] testified that while [REDACTED] had been placed in in-school suspension ("ISS") some of the time in early August, there would have been no restriction on [REDACTED] observing [REDACTED] while [REDACTED] was in ISS. (Tr. 147). The testimony presented indicated that [REDACTED] was absent or skipping class on August 10, August 11 (absent from second period class, present the remainder of the day), August 15 (absent second period class, present the remainder of the day), August 16 (tardy for second period class, present the remainder of the day), August 17 (ISS for skipping class), August 18 (ISS for skipping class), and August 19 (absent third period class, present the remainder of the day). (Tr. 391; Tr. 466-67). [REDACTED] was at school at school between August 22 and September 1, 2022. (Tr. 391). At no point did the Special Education Director, [REDACTED], contact [REDACTED] to inform her of the days that it was imperative for [REDACTED] to be on campus for observation by [REDACTED] although [REDACTED]. testified that she could have called [REDACTED] (Tr. 391-92).

Additionally, the Hearing Officer finds that the District violated the Settlement Agreement and Hearing Officer Bradley's Order, violated the IDEA, and deprived [REDACTED] of a FAPE because it did not complete [REDACTED] revised BIP by October 31, which the District agreed it would do in [REDACTED] October 4 IEP team meeting and reconfirmed in 2022 IEP. (PX

74, *October 2022 IEP*, p. 5 (“Amendment 10/4/2022: The IEP Team, the FBA/BIP will be completed by the end of October by ██████ BCBA.”); PX 81, 10.18.2022 *Notice of Proposal or Refusal to Take Action*, p. 1 (“Furthermore, based on new, recent aggressive behaviors, ██████ stated he would like to incorporate the new behaviors into the BIP, and should have the additional part of the FBA completed and targeted [sic] in a BIP by the end of October 2022.”)). The BIP was not revised by the end of October 2022. The undisputed evidence was that the revised BIP was not completed until November 21 and not presented to ██████ IEP team until December 6. By that time, all of the incidents in which ██████ had been involved had occurred, the MDR proceeding focusing on those three incidents had happened, and the outcome of the MDR proceeding was adverse to ██████ and ██████ parents. It appears to this Hearing Officer that the District’s substantial delay in procuring ██████ FBA and BIP in compliance with the terms of the Settlement Agreement caused even more delays in the creation of a valid BIP for ██████. These delays, in turn, blunted the potential impact of any BIP on ██████ behaviors. The consequence is that ██████ was disciplined as if ██████ had no disabilities. The disciplinary actions taken against ██████ deprived ██████ of a FAPE.

Even assuming ██████ FBA and BIP had been created by the September 1 deadline, there is no guarantee that they would have had any positive impact on ██████ behavior. This is because only two people were trained on ██████ BIP and those two people were trained on November 1, which was after the September 26 and October 19 incidents occurred that were the subject of the MDR proceeding. According to the Settlement Agreement and Hearing Officer Bradley’s Order, “all pertinent school personnel” were required to

implement [REDACTED] BIP to fidelity and were required to receive training on how to do that. The phrase "all pertinent school personnel" meant "at minimum" the Principal, [REDACTED] the Assistant Principal, [REDACTED], [REDACTED] counselor, [REDACTED] special-education teacher, and all of [REDACTED] general education teachers. (PX, p. 6.) Even the school's SROs had to implement [REDACTED] BIP to fidelity and receive training on how to carry out that task. (PX 6, p. 6.) Additionally, pursuant to the Settlement Agreement and Hearing Officer Bradley's Order, [REDACTED] parents were to receive training as a related service consistent with 34 C.F.R. § 300.34(a). With the exception of the training [REDACTED] gave to [REDACTED] and [REDACTED] on November 1, no one else received any training on how to implement [REDACTED] BIP to fidelity.

According to the Special Education Director, [REDACTED] between October 4 and the date in November on which [REDACTED] was suspended, only [REDACTED] and [REDACTED] received any training on [REDACTED] BIP:

Q [by Mr. Johnson]: So between October 4th and the time in which [REDACTED] had been suspending sometime in November, the only people who have been trained on the BIP, based on the evidence that we have, is special education teacher [REDACTED] and the one-to-one aide [REDACTED] right?

A [by [REDACTED]]: Correct.

Q [by Mr. Johnson]: None of the people making the decisions about how to discipline [REDACTED] have been trained on the BIP yet, have they?

A [by [REDACTED]]: This is my understanding.

(Tr. 375). The Principal, [REDACTED], confirmed that he never received training on [REDACTED] BIP.

(Tr. 402). The Assistant Principal, [REDACTED], also confirmed that he did not receive any training

from anyone on [REDACTED]'s BIP. (Tr. 452-53). In fact, the Assistant Principal [REDACTED], voiced concerns that he was unsure how to handle [REDACTED] discipline because [REDACTED] did not have a BIP in place for the 2022-2023 school year. PX 45. The Assistant Principal, [REDACTED], explained, "Just not knowing the situation, not knowing [REDACTED] and [REDACTED] history, being new to the district, I just felt that I would have more comfort in assigning disciplinary action once we had time to sit down and meet and discuss a behavioral plan." (Tr. 456). The Assistant Principal, [REDACTED] testified that he knew a behavior plan would have been used to try and reduce, or possibly eliminate, the behaviors that were causing [REDACTED] disciplinary problems. (Tr. 456-57). The Assistant Principal, [REDACTED], testified that he had a good relationship with [REDACTED] (Tr. 458). [REDACTED] observed during the time [REDACTED] was not receiving behavioral interventions from [REDACTED] BIP —because a BIP did not yet exist— [REDACTED] began growing increasingly frustrated and would become "upset with [REDACTED]" and was not "responding in the best manner." (Tr. 458). The Special Education Director, [REDACTED], agreed that some of the disciplinary issues that led to [REDACTED] suspensions might have been avoided if the people making the decisions to discipline [REDACTED] had received a copy of [REDACTED] BIP and had been trained to fidelity on it:

Q [by Mr. Johnson]: Okay. So, Mr. Etheredge was asking you about, you know, the student being absent because of disciplinary problems because of suspensions, but can't we agree that some of those might have been avoided if the people making the decision to discipline [REDACTED] had received a copy of [REDACTED] BIP and actually had been trained to fidelity on it?

[Objection overruled.]

A [by [REDACTED]]: I do agree.

Hales T. 375-76.

The lack of training is apparent from a review of [REDACTED] [REDACTED] *Behavior Flow Charts* and [REDACTED] *Manifestation Determination Review Flow Charts*. None of [REDACTED]'s [REDACTED] *Behavior Flow Charts* for behavioral incidents that occurred on September 26 (PX 63), October 4 (PX 72), or November 7 (PX 94) show that [REDACTED] is one of [REDACTED]'s diagnoses and disabilities. Similarly, none of [REDACTED]'s *Manifestation Determination Review Flow Charts* for incidents that occurred on September 26 (PX 64), October 7 (PX 76), or November 7 (PX 95) reflect that [REDACTED] is one of [REDACTED]'s diagnoses and disabilities.

The Special Education Director, [REDACTED], and [REDACTED] discussed the consequences and risks of a failure to train to fidelity on [REDACTED]'s BIP. The evidence shows that [REDACTED]'s general education teachers were never trained on [REDACTED] BIP and that neither the Principal, [REDACTED], nor the vice-Principal, [REDACTED], who was in charge of [REDACTED]'s discipline, were ever trained on [REDACTED]'s BIP. The teachers were interacting with and attempting to discipline [REDACTED] without the benefit of training on [REDACTED] BIP. Additionally, [REDACTED] and [REDACTED] were disciplining [REDACTED] without ever being trained on the BIP or understanding what it meant for [REDACTED]'s BIP to be implemented to fidelity. The training log that [REDACTED] maintained shows only that [REDACTED] and [REDACTED] were trained. (PX 97, [REDACTED] *November 2022 BIP Training*.) The SROs and [REDACTED] parents were never trained. (*Id.*)

The Alabama Administrative Code specifies that a school district may file a due-process case. *Ala. Admin. Code* § 290-9-90.08(9)(c). At least one Alabama special education due process hearing decision holds that if a school district cannot comply with a

Settlement Agreement, the school district should file a due process action to seek relief from the terms of the Settlement Agreement. (*A.W. v. Elmore County Board of Educ.*, Ala. Dept. of Educ., 2019-05 (Cole), pp. 16-17 (“If the circumstances became such that the District believed that this Hearing Officer’s Order needed to be amended or modified, then, in the view of this Hearing Officer, the proper procedure would have been for the District to petition for a due process hearing pursuant to *Ala. Admin. Code* § 290-9-90.08(9)(c)).”

If the District in this case believed it could not comply with any specific term or terms of the Settlement Agreement, it could have filed a due process case to seek relief from the Settlement Agreement or it could have reached out to the Petitioner’s attorneys to inquire as to whether or not the parties could agree to certain modifications of the Settlement Agreement because of time restraints regarding [REDACTED] schedule. Unfortunately, the District did not seek either one of these options but instead the District chose to simply violate the terms of the Settlement Agreement and Hearing Officer Amanda Bradley’s Order.

The Hearing Officer finds by a preponderance of the evidence that [REDACTED] behaviors were the direct result of the District’s failure to implement [REDACTED] IEP, which contained a BIP. More specifically, the Hearing Officer finds that [REDACTED] behaviors were the direct result of the District’s failures to have completed [REDACTED] FBA and BIP by September 1, the District’s failure to have a revised BIP in place by October 31, the District’s failure to train the persons listed in the Settlement Agreement on the contents of [REDACTED] BIP, and the District’s failure to train those persons in the Settlement Agreement how to implement [REDACTED] BIP to

fideliy. These failures violated the Settlement Agreement and Hearing Officer Bradley's Order, violated the IDEA, and deprived [REDACTED] of a FAPE.

The Hearing Officer finds by a preponderance of the evidence that [REDACTED] failure to either be on [REDACTED] medication or [REDACTED] failure to take [REDACTED] medication as prescribed does not dilute the District's errors. [REDACTED] testified that [REDACTED] first got on [REDACTED] medicine in 2019 and that [REDACTED] took it until November 2021. (Tr. 804). [REDACTED] 2020 BIP was in place while [REDACTED] was on [REDACTED] medication from 2019 to 2021 and during the 2020-2021 and 2021-2022 school years. (Tr. 61). The 2020 BIP from BCBA [REDACTED] catalogs [REDACTED] behaviors that were occurring while [REDACTED] was on [REDACTED] medication. Those behaviors were the same the behaviors that [REDACTED] exhibited when [REDACTED] was not on medication for part of the fall 2022 semester. The District did not present any medical evidence and did not elicit any testimony from [REDACTED] about how [REDACTED] behaviors would have been different if [REDACTED] had been on [REDACTED] medication during the times when it argues [REDACTED] should have been taking it. Relatedly, Dr. [REDACTED] testified that [REDACTED] behaviors that were the subject of the MDR proceeding were caused by [REDACTED] [REDACTED] and by the District's failure to implement [REDACTED] BIP. The District did not counter [REDACTED] testimony in any meaningful way.

- 3. The District violated the IDEA when it expelled [REDACTED] based on [REDACTED] behaviors that were the subject of the MDR proceeding and, subsequently, the MDR decision.**

For the reasons discussed above, the Hearing Officer finds that the District violated the IDEA and deprived [REDACTED] of a FAPE when it expelled [REDACTED]. The [REDACTED] Policy Manual, § 6.20, "Student Expulsion (including Students with Disabilities), states, "Expulsion of students with disabilities will be subject to applicable limitations and

requirements imposed by the Individuals with Disabilities Education Act (“IDEA”) and its implementing regulations.” (PX 121, p. 91). This Hearing Officer finds that, pursuant to 20 U.S.C. § 1415(k)(1)(E)(i)(I) and (II), the November MDR team’s decision was incorrect and that it violated the IDEA. [REDACTED] discipline and, ultimately, [REDACTED] expulsion were based on the incidents made the subject of the MDR proceeding. Because this Hearing Officer finds that [REDACTED] behaviors in those the incidents had a direct and substantial relationship to [REDACTED] disabilities and that [REDACTED] behaviors in those incidents were a direct result of the District’s failure to implement [REDACTED] IEP, which contained a BIP that was not implemented, the Hearing Officer reverses the decision MDR decision. Because the Hearing Officer reverses the MDR decision, the Hearing Officer is compelled to reverse [REDACTED]’s expulsion. [REDACTED] will be reinstated as a full-time student in the District with all of the same rights and privileges any other student who is in good standing.

C. Issues Related to a lack of Specially Designed Instruction and Related Services

- 1. The District denied [REDACTED] a FAPE when it failed to provide [REDACTED] the specially-designed instruction designated in [REDACTED] IEP.**

The Hearing Officer finds by a preponderance of the evidence that the Petitioner demonstrated that “the school has materially failed to implement a child’s IEP. . . .And prove[d]more than a minor or technical gap between the plan and reality; *de minimis* shortfalls are not enough. A material implementation failure occurs only when a school has failed to implement substantial or significant provisions of a child’s IEP.” (*L.J. by N.N.J. v. Sch. Bd. of Broward Cnty.*, 927 F.3d 1203, 1211 (11th Cir. 2019)). In fact, the evidence

and the testimony shows District did not provide any “research-based instruction” under 20 U.S.C.A. § 1414(d)(1)(a)(iv) in the areas of math or Collaborative Services.

According to [REDACTED] 2022-2023 IEP (PX 12, *June 15 IEP*), [REDACTED] was supposed to receive the following specially designed instruction: 30 minutes of English and Language Arts instruction, two times weekly; thirty minutes of math instruction, two times weekly; 20 minutes of weekly Study Skills instruction; and 320 minutes of collaborative services. [REDACTED], [REDACTED]’s special education case manager testified that, “Typically, collaborative is going into the classrooms.” (Tr. 524.)

The testimony and the evidence show that [REDACTED] did not even meet [REDACTED] special education teacher, [REDACTED], until [REDACTED] was assigned ISS during what [REDACTED] believed to have been in the second week of school. (Tr. 526.) He recalled going to the in-school suspension room to meet [REDACTED] (*Id.*) Assistant Principal, [REDACTED], testified that, according to the handwritten attendance ledger from [REDACTED], [REDACTED] was first assigned to in-school suspension on August 17. (*Id.*) [REDACTED] explained that [REDACTED] didn’t “see [REDACTED] unless [REDACTED] [came] to [REDACTED] room” (PX 28, *August 17 2:14 p.m. email from [REDACTED]*) He testified that was because [REDACTED] class schedule did not allow time for [REDACTED] to be in [REDACTED]’ room for instruction. (Tr. 540.) Instead, [REDACTED] stated that, “I told [REDACTED] where my room is. I said that we obviously needed to make contact, and come with a plan in order to meet and get these goals met.” (Tr. 543.)

When [REDACTED] did meet with [REDACTED], he testified that his system of instructing [REDACTED] in mathematics “wouldn’t be like a worksheet, per se, or pre-algebra. But, you know, just in conversations, doing hands-on activities.” (Tr. 528).

Q [by Mr. Johnson]:

Here's my question: Did you – with [REDACTED], were you provided any specific program, written by any, you know, education materials manufacturer, or any education company, that said, this is a peer-reviewed research-based program to address a learning disability in mathematics? Were you given anything like that for [REDACTED]?

A [by [REDACTED]]: No, sir.

[REDACTED] testified that [REDACTED] was not enrolled in any math class during the fall of 2022 and did not receive "graded instruction" in math that semester. (Tr. 89-90). [REDACTED] is enrolled in a math course for the current semester even while expelled; and [REDACTED] testified that he did not employ any "specific written programs, peer-reviewed, research-based programs for [REDACTED]." (Tr. 529). He did not assess [REDACTED] math skills with written tests at any point during the first semester of the 2022-2023 school year. (*Id.*) [REDACTED] one-to-one aide, [REDACTED], also did not provide any specially designed instruction [REDACTED] in the areas of English Language Arts or math. (Tr. 532).

[REDACTED] also stated that he had not provided any collaborative services to [REDACTED] during the 2022-2023 school year, which according to [REDACTED] IEP were supposed to "provide [REDACTED] with support . . . in accessing the general education curriculum across all content areas," and that [REDACTED] would have only received those services if [REDACTED] was assigned to a collaborative class. (PX 12; p. 14; Tr. 525-26.) [REDACTED] class schedule for the first semester of the 2022-2023 school year does not indicate that [REDACTED] was assigned to a collaborative class, so [REDACTED] did not receive the collaborative specially designed instruction as provided in [REDACTED] 2022-2023 IEP. (*See* PX 106, *Attendance Log* (showing that [REDACTED] four class blocks were filled with Visual Arts, History, Theatre, and Psychology classes.) Upon [REDACTED] expulsion, the record

shows that [REDACTED] final grades were as follows: Visual Arts: F(58); Theatre: D(65); Psychology: D(62); U.S. History: F(42). (PX 109; PX 110; PX 111; PX 112). [REDACTED] clearly did not benefit from [REDACTED] general education curriculum without proper collaborative support, as called for in [REDACTED] IEP. In fact, [REDACTED] class schedule did not provide any time for [REDACTED] to receive specially designed instruction. (*Id.*; Test. 540 (stating that [REDACTED] did not come to the special education room for regular intervention because “[REDACTED] had a schedule”)).

The Hearing Officer finds that the District materially failed to implement substantial or significant provisions of a [REDACTED] IEP and, as such, deprived [REDACTED] of a FAPE.

2. **The District denied [REDACTED], a FAPE when it failed to update his functional behavioral assessment and behavior intervention plan to account for [REDACTED] allegedly aggressive or violent behaviors.**

34 C.F.R. § 300.324(a)(2)(i) is clear that, “In the case of a child whose behavior impedes the child’s learning or that of others, positive behavioral interventions and supports, and other strategies to address that behavior should be developed and implemented.”

During the October 4 IEP team meeting, [REDACTED] explained that the District had advised him that [REDACTED] had begun to exhibit some “new target behaviors,” which were “elopement,” “disruptive behaviors,” and “aggression.” (Tr. 766). However, the testimony and the evidence show that the District was aware that [REDACTED] had exhibited those behaviors in the past. (PX 44; Tr. 76-78; Tr. 189-190; Tr. 756.) [REDACTED] 2020 FBA, which was provided to [REDACTED] listed that [REDACTED] eloped by “leaving assigned area without permission,” that [REDACTED] “[failed] to follow school or classroom rules,” and engaged in “verbal aggression, minor threats, and inappropriate language.” (Tr 79-80). The District, however,

did not inform [REDACTED] of the extent of [REDACTED]'s aggressive behaviors during the 2022-2023 school year. [REDACTED] testified that she knew [REDACTED] asked for copies of [REDACTED] disciplinary referrals but she "did not know" if anyone from the District ever provided [REDACTED] with those records. (Tr. 187-88). According to the records provided by the District, the only disciplinary referral ever sent [REDACTED] was from an incident on 9.28.22 when [REDACTED] was caught skipping class and responded in a defiant manner to the teacher who caught [REDACTED]. (See PX 69, *September 30 emails (and attachments) between [REDACTED] and [REDACTED]* at p. 6.) [REDACTED] was, thus, unaware that [REDACTED] on 9.29.22, before the 10.4.22 IEP Meeting to review [REDACTED] BIP, received a disciplinary referral for being involved in a fight, which [REDACTED] characterized as a "schoolwide threat" after which [REDACTED] was suspended from school for 8 days. (PX 68).

At the time [REDACTED] [REDACTED] presented [REDACTED] initial BIP to the IEP Team, [REDACTED] had been suspended from [REDACTED] for a total of 10 calendar days and had received numerous days of in-school suspension. (See *id.* (9.28.22 disciplinary referral resulting in 8 days of out of school suspension); PX 49, 9.13.2022 [REDACTED] *Discipline Referral Form*, p. 1 (resulting in 2 days of out of school suspension and multiple days of in-school suspension); PX 27 (8.16.22 disciplinary referral resulting in 2 days of in-school suspension); PX 55 (9.21.22 disciplinary referral resulting in an unspecified number of days of in-school suspension); PX 57 (9.23.22 disciplinary referral resulting in an unspecified number of days of in-school suspension); PX 66 (9.28.22 disciplinary referral resulting in 3 days of in-school suspension)).

The *Alabama Administrative Code* §290-8-9-.09(1)(c) instructs that “[a]fter a child with a disability has been removed from his or her current placement for ten (10) school days in the same school year . . . The child must receive, as appropriate, a functional behavioral assessment and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.”

According to the District’s *10.18.2022 Notice of Proposal or Refusal to Take Action*, [REDACTED] was to supply [REDACTED]’s revised BIP to the District by October 31. (PX 81; Tr. 241-242). That did not occur by October 31. One week after the November 15 MDR meeting, [REDACTED] revised [REDACTED] October BIP, based on the information he obtained between October 4 and November 21. [REDACTED] presented [REDACTED] revised November BIP to [REDACTED] IEP team on December 6. (Tr. 768). By that time, the MDR team had already decided that [REDACTED] behaviors were not manifestations of [REDACTED] disability and Principal, [REDACTED], had already recommended that [REDACTED] be expelled from the District. (PX 123, *11.15.2022 email from* [REDACTED]).

The Hearing Officer finds that the District’s violations of the Alabama Admin. Code and the Code of Federal Regulations deprived [REDACTED] of a FAPE because [REDACTED] did not receive behavioral interventions focused on the allegedly aggressive or violent behaviors that negatively impacted [REDACTED] ability to receive an education due to suspensions and [REDACTED] ultimate expulsion.

D. Other Procedural Violations

- 1. The District denied [REDACTED], a FAPE and denied [REDACTED], the ability to make meaningful decisions about [REDACTED] education when it failed to provide the Petitioner with [REDACTED] educational records before the 11.7.22 resolution meeting.**

[REDACTED] filed an Amended Request for a Due-Process Hearing on October 26, 2022, and the parties scheduled a resolution meeting for November 7. Under C.F.R. § 300.613, “Each participating agency must permit parents to inspect and review any education records relating to their children . . . before any . . . resolution session pursuant to §300.510” The parent’s right to inspect includes “[t]he right to have a representative of the parent inspect and review the records.” (*Id.*)

The Hearing Officer finds that the District violated this code provision. The Special Education Director, [REDACTED], testified that [REDACTED]’s updated records were not provided before the November 7th resolution, and that she did not know that the records should have been provided to [REDACTED] before that time. (Tr. 291.) She stated that the records were provided either the afternoon following the resolution meeting or in the following days. (Tr. 291.)

Q [by Mr. Johnson]: And so when we had the resolution meeting on . . . November 7th, the district had not yet provided [the records] to us, had they?

A [by [REDACTED].]: No.

Q [by Mr. Johnson]: And the district didn’t provide them to us until several hours later after the resolution meeting, right?

A [by [REDACTED].]: It’s my understanding that it was that day. But I don’t know.

Under *J.Y. v. Dothan City Bd. of Educ.*, [REDACTED], must show that [REDACTED] was denied a FAPE because the resolution session was conducted improperly. (2014 WL 1320187, at *9) (M.D. Ala. 2014).

The District argues that the District had previously produced records in response to the September 6, 2022, Request for Due-Process Hearing. With school in session additional records were being made a part of the student's records on a daily basis. The District does not deny that it failed to supplement its prior production of records prior to the second Resolution Hearing. However, Petitioner must go further than merely establishing a procedural error on the part of the District. However, Petitioner failed to produce evidence that the failure to supplement the records prior to the second resolution meeting resulted in a denial of FAPE. The parents have not identified anything they would have done differently, any evidence they would have introduced, or any contribution they might have made, had all the required records and notice been provided to them a reasonable time before any of the team meetings. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies— (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. 20 U.S.C.A. § 1415.

This Hearing Officer finds that [REDACTED] did not meet the burden by a preponderance of the evidence to show that the District's failure to provide [REDACTED] records "significantly

impeded [REDACTED]'s] opportunity to participate in the FAPE decision-making process.” 20 U.S.C. § 1415(f)(3)(E)(ii). The testimony shows that [REDACTED] counsel decided to stop the resolution meeting and reschedule it for a later date in order for [REDACTED] and her counsel to make an informed decision about [REDACTED]'s education. (Tr. 293-94).

- 2. The District violated the IDEA's "stay put" provision when it expelled the Student on 12. after the Petitioner filed her 11.18.22 Appeal of 11.15.22 Adverse MDR Meeting Decision and Request for Expedited Due-Process Hearing.**

20 U.S.C. § 1415(k)(4)(A) instructs that when a parent appeals an adverse MDR decision, “the child shall remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period provided for in paragraph (1)(C), whichever occurs first, unless the parent and the State or local educational agency agree otherwise.” 20 U.S.C. § 1415(k)(2) states that the “interim alternative setting . . . shall be determined by the IEP Team.” The evidence shows that despite [REDACTED] 11.18.22 notice of appeal, the District expelled [REDACTED] from [REDACTED] for one calendar year, effective 12.14.22. (PX 119, 12.20.2022 DCS Tribunal Decision Letter). The IEP never met to discuss [REDACTED] “interim alternative setting”. The Hearing Officer finds that this violation denied [REDACTED] a FAPE because [REDACTED] has been removed from [REDACTED] without an IEP Team decision to determine the proper interim alternative setting.

VIII. SPECIFIC FINDINGS

The Hearing Officer finds that the Petitioner has established the following:

1. The District denied [REDACTED] a FAPE when it breached the Settlement Agreement and Hearing Officer Bradley's Order by failing to ensure that its Board Certified

Behavioral Analyst (BCBA) [REDACTED] completed [REDACTED] BIP by September 1, 2022, and failing to see that [REDACTED] [REDACTED] provided training in accordance with the Settlement Agreement within 14 days of completing the BIP.

2. The District denied [REDACTED], a FAPE when it breached the Settlement Agreement and Hearing Officer Bradley's Order by failing to document the means, manner, and method of the implementations of the recommendations made by [REDACTED]

3. The District denied [REDACTED] a FAPE when it breached the Settlement Agreement and Hearing Officer Bradley's Order by failing to collaborate with [REDACTED] to create and incorporate a data-collection process to be shared with [REDACTED] every 14 days.

4. The District denied [REDACTED] a FAPE when it breached the Settlement Agreement and Hearing Officer Bradley's Order by failing to give good-faith consideration to [REDACTED] [REDACTED] recommendation that [REDACTED] undergo a language processing evaluation.

5. The District denied [REDACTED] a FAPE when it breached the Settlement Agreement and Hearing Officer Bradley's Order by failing to provide to [REDACTED]'s counsel documentation of the services added to [REDACTED]'s IEP as a result of the Settlement Agreement.

6. The District violated the IDEA when it decided that [REDACTED]'s behaviors were neither caused by nor had a direct and substantial relationship to [REDACTED] disabilities.

7. The District violated the IDEA because [REDACTED]'s behaviors were the direct result of the District's failure to implement [REDACTED] IEP, which contained a BIP.

8. The District violated the IDEA when it expelled [REDACTED] based on [REDACTED] behaviors that were the subject of the MDR proceeding and, subsequently, the MDR decision.

9. The District denied [REDACTED] a FAPE when it failed to provide [REDACTED] the specially-designed instruction designated in [REDACTED] IEP.

10. The District denied [REDACTED] a FAPE when it failed to update [REDACTED] functional behavioral assessment and behavior intervention plan to account for [REDACTED] allegedly aggressive or violent behaviors.

11. Any and all other issues raised by the Petitioner are denied because the Petitioner did not meet its burden of proof as to said issues.

12. The Section 504 claims were not addressed in this Hearing because this Hearing Officer is an IDEA Hearing Officer and does have authority or jurisdiction to rule on Section 504 claims.

IX. ORDER

The Hearing Officer finds in favor of [REDACTED] the Student, and [REDACTED], [REDACTED] mother, and against the District, and hereby grants the Petitioner the following relief:

- A. The District shall place a copy of this Order and a copy of Hearing Officer Bradley's Order and the previous Settlement Agreement in this Child's special education file. The Order shall be available for review by the Child's IEP team in order to ensure that any future IEPs are compliant.
- B. The Hearing Officer reverses the November 15, 2022, decision made by the District's MDR team.
- C. The Hearing Officer reverses the District's decision to expel [REDACTED] from the District.

- D. The Hearing Officer reinstates [REDACTED] as a full-time student. The Hearing Officer orders that [REDACTED] may immediately return to school.
- E. The Hearing Officer orders the District to provide 30 hours of compensatory education in math to make up for the specially-designed instruction in math that [REDACTED] missed between August 9, 2022, and the present. A plan created by the District to supply these hours to [REDACTED] will be provided to [REDACTED] within 14 calendar days of this decision.
- F. The Hearing Officer orders the District to provide 160 hours of compensatory education in collaborative services by the special education teacher to make up for the collaborative services/instruction that [REDACTED] missed between August 9, 2022, and the present. A plan created by the District to supply these hours to [REDACTED] will be provided to [REDACTED] within 14 calendar days of this decision.
- G. Within 21 days of this decision, the District will make contact with Dr. [REDACTED], the specialist recommended by [REDACTED] and will, within the parameters of [REDACTED] schedule, arrange for and fully fund the training, instruction, and other items of the curriculum [REDACTED] recommends for [REDACTED] and [REDACTED]. [REDACTED] parents will attend [REDACTED] training. The Parents will be copied on and kept apprised of the District's efforts to contact [REDACTED]. The following persons will attend [REDACTED] training: the Special Education Director, [REDACTED] Principal, [REDACTED], [REDACTED] Assistant Principals, [REDACTED] guidance counselor, [REDACTED] general education teachers,

████ special education teachers, █████ paraprofessional(s), the SROs, and █████ parents.

H. Within 30 days of this decision, the District will fully fund an auditory processing independent education evaluation by an audiologist. The Parent shall submit the names of three audiologists to the IEP Team and the IEP Team shall select one of the three audiologists. In the event the audiologist selected by the IEP Team is not located in █████, Alabama the Parent shall be reimbursed for mileage at the 2023 IRS rate. The District will reimburse said expense within 30 calendar days of the date on which the Parent submits the reimbursement request to the District.

I. The Hearing Officer orders the District to immediately implement the educational recommendations, including recommended accommodations, of █████ SLP. The District will amend █████ IEP to reflect the addition of such accommodations.

J. The Hearing Officer orders the District to fund training on █████ BIP and training on how to implement █████ BIP to fidelity within 21 days of the date of this Order to the following District personnel: the Special Education Director, █████, █████ Principal, █████, █████ Assistant Principal, █████ guidance counselor, █████ general education teachers, █████ special education teachers, █████ paraprofessional(s), and the SROs. The training shall be provided by █████ of █████ who drafted █████ BIP. A list of the dates of the training, the content of the

training, and those who attend the training will be maintained by the District.

The persons who attend the training will sign an attendance ledger and note the date they attended training, the time they arrived, and the time they departed.

- K. Within 21 days of the date of this decision, the District will fully fund a separate in-person training session [REDACTED] FBA and BIP for [REDACTED], her husband, and [REDACTED], which will be performed by [REDACTED]. The training will occur in [REDACTED] at location chosen by the Parents and [REDACTED]. The training does not have to occur at a District facility or building.
- L. The District will fully fund a monthly fidelity check with [REDACTED] on [REDACTED] BIP each month for the next 12 months.
- M. The District will offer [REDACTED] a minimum of 40 hours of one-to-one ESY services to be delivered by a special education teacher in a setting where [REDACTED] is the only student. The ESY services will be delivered at the District. A plan created by the District to supply these hours to [REDACTED] will be provided to [REDACTED] within 14 calendar days of this decision. All ESY services will be based on and will employ research-based, peer-reviewed programs.
- N. The District shall immediately comply with this Order, as well as the Order of Hearing Officer Dr. Amanda Bradley dated June 3, 2022.
- O. The District shall convene any IEP team meeting needed to comply with this Order within fourteen (14) days.
- P. Petitioner is the prevailing party.

X. NOTICE OF APPEAL RIGHTS

Any party aggrieved by the findings and decision made herein has the right to bring a civil action in the appropriate Court under 20 U.S.C. Section 1415. The *Alabama Administrative Code* § 290-8-9.08 (9)(c)16 provides an aggrieved party shall file a notice of intent to file a civil action with all parties to the Impartial Due Process Hearing **within thirty (30) calendar days** upon receipt of the decision of the Impartial Due Process Hearing Officer. The Code further provides that a civil action in a court of competent jurisdiction must be filed **within thirty (30) days** of the filing of the notice of intent to file a civil action.

DONE and ORDERED this the 23rd day of March, 2023.

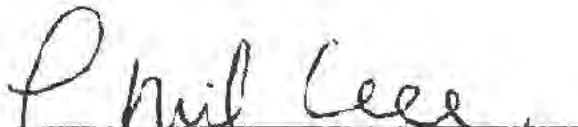
XI. CERTIFICATE OF SERVICE

I hereby certify that a copy of this Decision has been forwarded to the following individuals by U.S. Certified Mail/return receipt requested with postage prepaid as well as by electronic mail on this the 20th day of March, 2023.

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Due Process Hearing Officer