

UTAH STATE BOARD OF EDUCATION BEFORE
THE DUE PROCESS HEARING OFFICER

█, on behalf of her minor child █,
Petitioner,

DECISION AND ORDER

v.

Case No. DP-2021-14

JORDAN SCHOOL DISTRICT,
Respondent.

(Hearing Officer Doug Larson)

A due-process hearing was held in the above referenced matter on April 29 and 30, 2021 (Hearing”). Petitioner, █, was present representing her minor child █ (“Student”) and Petitioners were represented by counsel, Dale Boam. Special Education Director █ was present on behalf of Respondent Jordan School Jordan District (“Jordan District”), which was represented by counsel, Joan Andrews and Elizabeth Stubbs. This matter was assigned to the undersigned Hearing Officer, Douglas R. Larson (“Hearing Officer”). The Hearing was held in accordance with the procedural requirements of the Individuals with Disabilities Education Act (“IDEA”) (20 USC §1415 et seq., and 34 CFR §§300.507-515, and the Utah State Board of Education (“USBE”) Special Education Rules (“State Rules”) IV.I-P, August 2020.

I. PROCEDURAL BACKGROUND

Ms. █ and her family moved from █ Utah to █ Utah and Student transferred from █ County School District (“█ District”) to Jordan District early in 2020. Student is an █-year-old boy with severe autism. Student was provided specialized instruction from a very early age. As a result of a mediated agreement, █

District provided a Registered Behavior Technician (“RBT”) to work with Student as part of his Individualized Education Plan (“IEP”). During his second-grade year, [REDACTED] District retained Dr. [REDACTED] to evaluate Student, create a behavior plan, and supervise RBTs working with Student. When Student moved with his family to [REDACTED], he was originally placed at Kauri Sue Hamilton School (“Kauri Sue”), a special school in Jordan District.

In August 2020, Petitioners filed a Request for Due Process Hearing stating that Student’s placement was inappropriate, and he was not receiving a free appropriate public education (“FAPE”) in violation of the IDEA. The parties entered into the early resolution process and agreed to mediate the matter. A settlement was reached, and the parties signed a settlement agreement on October 12, 2020 (“Settlement Agreement”), and an Order of Dismissal was entered on October 27, 2020.

As a result of the Settlement Agreement, Student’s placement was changed from Kauri Sue to a special classroom at Rose Creek Elementary (“Rose Creek”), and he began school there on October 15, 2020. A key provision of the Settlement Agreement stated that Student would be placed at a school where a Board Certified Behavior Analyst (“BCBA”) is assigned, and rather than require RBTs to work with Student, the parties agreed that the BCBA would supervise the classroom paraeducators at the same level that a BCBA would supervise an RBT.

No allegations were made that Jordan District violated the Settlement Agreement. Rather, based on the services provided under the Settlement Agreement and the IEP, Student was allegedly not performing at or near grade level and needed more services than Jordan District was offering to allow Student to access grade level instruction and make meaningful progress toward his IEP goals. As such, Petitioner renewed the Due Process Hearing Request on February 8, 2021 (“Due Process Hearing Request”). A hearing was originally scheduled for April 8 and 9, 2021.

Based on what can only be described as an alleged series of professional snafus by Petitioner’s counsel, Petitioner failed to produce documents and an expert report in a timely manner. Respondent filed a Motion in Limine to Prohibit Use of Untimely Prehearing Disclosures on April 4, 2021. The Hearing Officer convened a prehearing motion conference with the parties to rule on the motion. Based on a concession from Respondent’s counsel that Petitioners could request for an extension of time under State Rule IV.P. or possibly refile

complaint, the Hearing was rescheduled for April 29 and 30, 2021. During the Hearing, the following witnesses testified:

For Petitioner (in order of appearance)

██████████ (Student's Mother)

██████████ PhD (Petitioner's expert witness).

For Respondent (in order of appearance)

██████████ (Student's special education teacher)

██████████ (BCBA)

██████████ (BCBA)

██████████ (Respondent's expert witness)

██████████ (special education teacher specialist/trainer)

██████████ (speech language pathologist)

██████████ (BCBA)

██████████, (special education director)

During the Hearing, the following exhibits were admitted into evidence:

For Petitioner

Petitioner's Exhibit 1 - Copy of the Daily Notes Rose Creek Elementary

Petitioner's Exhibit 5 - ██████████, PhD, BCBA-D, LP, LBA Curriculum Vitae

Petitioner's Exhibit 11 - VB-MAPP Master Scoring Form

Petitioner's Exhibit 15 - Behavioral and Psychological Consultation and Supports, PLLC
Record Review Detailed Findings

For Respondent

Respondent's Exhibit 1 - Settlement Agreement and Release

Respondent's Exhibit 2 - Prior Notice for Student Change of Placement in Special Education

Respondent's Exhibit 3 - Email Exchange Between [REDACTED] and [REDACTED]

Respondent's Exhibit 4 - Individualized Education Program (IEP) for Student

Respondent's Exhibit 5 - Jordan School District Behavior Intervention Plan for Student 3/23/2020

Respondent's Exhibit 6 - Functional Behavior Assessment (FBA) and Behavior Intervention Plan (BIP)

Respondent's Exhibit 7 – Individualized Education Program (IEP) for [REDACTED] Meeting Date 12/14/2020

Respondent's Exhibit 8 - Jordan School District Behavior Intervention Plan for Student 12/14/2020

Respondent's Exhibit 10 - Email Exchange Re: November 2

Respondent's Exhibit 11 - Email Exchange Between [REDACTED] and [REDACTED]

Respondent's Exhibit 14 - Email Exchange Re: Preserve Bus Camera Footage

Respondent's Exhibit 18 - Email Exchange Re: Violation

Respondent's Exhibit 19 - Email Exchange Re: Transportation

Respondent's Exhibit 20 - Email Exchange

Respondent's Exhibit 22 - Email Exchange Between [REDACTED] and [REDACTED]
Re: December 14

Respondent's Exhibit 25 - Email from [REDACTED] to [REDACTED] Re: January 5

Respondent's Exhibit 26 - Email Exchange Between [REDACTED] and [REDACTED]
Re: February 2

Respondent's Exhibit 31 - Email from [REDACTED] to [REDACTED] Re: March 22

Respondent's Exhibit 32 - Jordan District IEP Progress Report for Student 12/14/2020

Respondent's Exhibit 33 - Individual Supervision Meeting Form and Agenda

Respondent's Exhibit 34 - Email Exchange Re: Para Aide Training

Respondent's Exhibit 35 - Speech and Language Data Logs for Student

Respondent's Exhibit 36 - [REDACTED]'s Supervision Spreadsheets

Respondent's Exhibit 38 - Remind Message History Between [REDACTED] and [REDACTED]
[REDACTED]

Respondent's Exhibit 40 - Oversight Documentation for [REDACTED] by [REDACTED]

Respondent's Exhibit 41 - Behavior Spreadsheets

Respondent's Exhibit 42 - Student BIP at a Glance 2020-2021 School Year

Respondent's Exhibit 44 - Copy of the Daily Notes

Respondent's Exhibit 47 - Board Certified Behavior Analyst® Handbook

Respondent's Exhibit 48 - BCBA Task List (5th ed.)

Respondent's Exhibit 49 – Registered Behavior Technician® Handbook

Respondent's Exhibit 50 - RBT® Task List (2nd ed.)

Respondent's Exhibit 51 - RBT® 40-Hour Training Packet: Requirements

Respondent's Exhibit 52 - Utah Code Part 7·Behavior Analyst Licensing Act

Respondent's Exhibit 53 - Behavior Analyst Licensing Act Rule

Respondent's Exhibit 54 - State Board of Education Paraeducator Manual – September 2019

Respondent's Exhibit 55 – Paraeducator Overview and Instructional Strategies

Respondent's Exhibit 56 - Educator Licensing for [REDACTED]

Respondent's Exhibit 57 - Educator Licensing Lookup for [REDACTED]

Respondent's Exhibit 58 - Educator Licensing Lookup for [REDACTED]

Respondent's Exhibit 59 - Educator Licensing Lookup for [REDACTED]

Respondent's Exhibit 60 - Educator Licensing Lookup for [REDACTED]

Respondent's Exhibit 62 - [REDACTED], PhD, BCBA-D, NCSP Curriculum Vitae

Respondent's Exhibit 63 - Functional Communication Training

Respondent's Exhibit 64 - Expert Disclosure and Report of Dr. [REDACTED]

At the Hearing, Petitioners insisted that Student should receive his education in a general education environment and that he would be successful in that environment if Jordan District would only provide a one-to-one RBT certified by the Behavior Analyst Certification Board and supervised by a BCBA. Petitioners maintained that Student was successful with these interventions in the past in [REDACTED] District, and there was no reason for Jordan District not to provide the same services and supports. Further, Petitioners insisted that a one-to-one RBT was necessary for Student's safety as he had exhibited regression with respect to risky behaviors such as elopement and head banging. Petitioners argued the one-to-one RBT should remain with Student throughout the day, including on the bus to and from school. By refusing to provide those services and supports, Petitioners allege that Jordan District denied a FAPE to Student.

Conversely, Respondent argued that a general education environment would not provide a FAPE to Student based on his acute academic, functional, and behavioral needs and his present level of academic performance. Respondent also argued that the autism support classroom at Rose Creek is adequately staffed with trained professionals and paraprofessionals, and Student does not require a one-to-one RBT to receive a FAPE. Further, Respondent argued that any regression in Student's progress is likely a function of several disruptions in Student's life including moving to a new home, attending two new schools, and missing several weeks of instruction. Jordan District posited that Student is making progress in his academic, functional, and behavioral performance taking the disruptions and other circumstances into consideration, and his current IEP and BIP are reasonably calculated to provide Student with a FAPE in the least restrictive environment ("LRE") appropriate under the circumstances.

At the close of the hearing, based on the extensive record developed over two days and pursuant to State Rule IV.P., the parties requested an extension of the 45-day time window to

allow the court reporter to publish the transcript, allow the parties sufficient time to review the transcript and submit post-hearing briefs, and allow the Hearing Officer sufficient time to submit this Decision and Order. (See Post Hearing Deadlines Order and Modified Post Hearing Deadlines Order.)

II. BURDEN OF PROOF

Petitioner, as the party requesting a due process determination, is the party carrying the burden of proof by a preponderance of the evidence in this matter. *Schaffer v. Weast*, 546 US 49, 52 (2005) (“The burden of proof in an administrative hearing [in the IDEA context] is properly placed upon the party seeking relief.”). The Hearing Officer informed Petitioners at the pre-Hearing conference that Petitioners would have the burden of proof and the duty to present evidence first at the Hearing.

III. ISSUES

Petitioners articulated the central issue of this matter as follows: Does Student’s current placement, including the services provided by Jordan District, afford Student a FAPE in a manner that is individualized to the needs of Student? (*See* Due Process Hearing Request). Petitioners argue the services are not sufficient to afford a FAPE to Student, and Petitioners urge the Hearing Officer to rule: (1) Student requires a one-to-one aide; (2) the one-to-one aid must be an RBT; and (3) with a one-to-one RBT aide, Student’s placement should be in a regular education classroom.

IV. FINDINGS OF FACT

The Hearing Officer makes the following Findings of Fact:

1. Student is an [REDACTED]-year-old boy who was diagnosed with a disability, autism spectrum disorder (“autism”), among other diagnoses, when he was 18 months old. (Trans. at 54:5-:18).
2. Due to the severity of his disability, Student began early intervention services as a baby and had an IEP established for him through [REDACTED] District at the age of 3. (Trans. 55:10- 56:19).

[REDACTED] District

3. In second grade in [REDACTED] District, Student was provided with an RBT as the result of a mediated settlement agreement. (Trans. at 57:23-58:1, 80:6-10).

4. An RBT credential is awarded by the Behavior Analyst Certification Board, a private entity, and certification requires completion of 40 hours of training in behavior analysis, supervision by a BCBA for 5 percent of hours worked, adherence to professional standards, and completion of an exam. (Trans. at 144:7-145:24).

5. RBTs are not required in a school setting. (Trans. at 141:18-20).

6. In [REDACTED] District, Student exhibited maladaptive behaviors including eloping from the school, stripping, inappropriate urination, exposing himself to other students, throwing objects, and occasionally hitting. (Trans. at 104:16-105:1).

7. In general, testimony demonstrated that Student's behavior improved under the supervision of an RBT in [REDACTED] District. Student's maladaptive behaviors such as elopement and stripping did not cease, but they improved as the RBT continually corrected the behaviors. (Trans. at 105:1-9).

8. Dr. [REDACTED] was retained by [REDACTED] District to evaluate Student, create a behavior plan, and provide supervision to the RBTs working with Student. (Trans. at 81:21-84:13).

9. Dr. [REDACTED] testified that Student's behavior is "dynamic." He can engage in different problematic behaviors "from eloping...to taking his clothes off.... There are moments when he can engage in all of the behaviors" including "the most severe problematic behaviors that can really be challenging for school environments." (Trans. at 147:16-148:6).

10. Dr. [REDACTED] also testified that he saw "sustained and noticeable improvements" after about three months into his work with Student and "found the stability [he] was looking for during th[e] second year" of working with Student. (Trans. at 182:22-183:9). Indeed, he even testified that "some of the more problematic things, like exposure of genitals, public urination and elopement, those were down to near zero rates for weeks at a time, if not months, when we were working in [REDACTED] County." (Trans. at 170:11-16).

11. No raw or school-level data were introduced to support the assertions of Student's progress in ██████████ District, and Petitioner produced no documentary evidence with which to compare progress in Jordan District.

12. The only documents introduced during the Hearing with summary data from ██████████ District were introduced by Respondent: (1) Team Evaluation Summary Report and Written Prior Notice of Eligibility Determination dated September 4, 2019 (Resp. Ex. 9) and (2) Functional Behavior Assessment (FBA) and Behavior Intervention Plan (BIP) dated September 4, 2019. (Resp. Ex. 6).

13. The Team Evaluation Summary Report and Written Prior Notice of Eligibility Determination showed, among other things, Student fell in the extremely low range on his intellectual assessments; Student's receptive vocabulary was severely delayed; and Student's social skills were higher than or equal to only <1% of similarly aged individuals in the Vineland-III norm sample." (*Id.*). No clear data regarding maladaptive behaviors was contained in this report.

14. The Functional Behavior Assessment (FBA) and Behavior Intervention Plan (BIP) contained, among other things, summary descriptions of data related to Student's behavior. Key summary descriptions include:

a. "[Student] has spent an average of 5.08 hours in his general education classroom per week." (Trans. at 115:25-118:18; Resp. Ex. 6 at 1).

b. "[D]ata shows that his behaviors and communication are improving. Historically [sic] [Student's] challenging behaviors and communication include noncompliance, screaming, banging his head, aggression toward staff members, and throwing items on the floor.... Currently, problem behaviors include noncompliance and oppositional behavior." (Respondent Ex. 6).

c. "Incidents of screaming behaviors can range from *1 second to 1 hour*. Incidents of property destruction can range from *1 second to 1 minute*, based on his frustration level. Incidents of head banging typically occur for less than 10 seconds. Incidents of elopement can range from *1 minute to five minutes* [sic]. Incidents of mild aggression typically do not last *longer than 1 minute*." (*Id.* emphasis in original).

d. “According to classroom data, screaming occurs *1 to 5 times per week*, but has the potential to occur both several times in one day and not at all four consecutive days. Noncompliance occurs *1 to 20 times a day*. Property destruction occurs approximately *1 time per week* but is dependent on [Student’s] frustration level. Head banging occurs *1 to 5 times* per week, but student can go several consecutive days without head banging. Elopement occurs approximately *1 to 2 times per month*. Mild aggression occurs *1 to 8 times per day*.” (*Id.* emphasis in original).

e. “[Student’s] noncompliant behaviors significantly limit the amount of time he is engaged in instruction. His behaviors also impact his ability to access reinforcing, appropriate interactions with his peers and adult staff. [Student’s] head banging also impacts his ability to learn and poses potential risk for injury.” (*Id.*).

f. “[Student’s] problem behaviors greatly impact and disrupt his classroom environment. Aggressive episodes, screaming, and property destruction are especially disruptive to his peers as they become quite distracted and are often unable to hear necessary instruction.” (*Id.*).

g. “[Student’s] problem behaviors cause mild disruption in the classroom throughout the day. When problem behaviors occur, they have the potential to be highly disruptive to the classroom, particularly if he is in his general education classroom.” (*Id.*).

h. “Observations revealed the percentage of on task, generally increased across the past year; however there is much variability [sic] in [Student’s] behavior. Generally [sic] scores maintain above 80%. The 2019-2020 school year has shown even more variability, with a slight decreasing trend in on-task behavior.” (*Id.*).

i. “[Student’s] teacher suspects that behaviors are more likely when his medication wears off. Lack of sleep will also affect [Student’s] behaviors.”

Jordan District: Settlement Agreement

15. Student’s family moved from [REDACTED] to [REDACTED] and to a different home, and Student transferred from [REDACTED] District to Jordan District on February 1, 2020. (Trans. at 92:3-9).

16. When Student moved into Jordan District, he was placed at Kauri Sue, a special school within Jordan District. (Trans. at 92:10-14). While at Kauri Sue, Student was not exhibiting high levels of maladaptive behaviors. (*Id.* at 94:9-16).

17. A new IEP and BIP were developed for Student at Kauri Sue on March 23, 2020. Parents and Dr. [REDACTED] participated in those IEP Team meetings remotely. (Resp. Ex. 4 and 5).

18. Ms. [REDACTED] wanted Student transferred from Kauri Sue because she wanted Student “to attend a school that would be more academically challenging, as well as access to general ed peers as he listens to his peers more than he listens to his teachers at times.” (Trans. at 95:14-19).

19. On or about August 10, 2020, Petitioners filed a Request for Due Process Hearing under the IDEA complaining that the District had failed to provide Student with a FAPE in the LRE. The parties participated in mediation with a state-appointed mediator, which resulted in the execution of the Settlement Agreement on October 12, 2020. (Resp. Ex. 1).

20. Student did not attend school between March of 2020 and October 2020 until the Settlement Agreement was signed. Among other provisions, the parties agreed to the following:

a. Change of placement from special school to a school containing a special classroom and a certified BCBA. (Respondent Ex. 1 at 1-2).

b. Implementation of the March 23, 2020 IEP and BIP in Student’s new placement. (*Id.*).

c. The BCBA will supervise the classroom paraprofessionals at the same level that a BCBA would supervise an RBT. (*Id.*, at 2-3).

d. The classroom paraprofessionals will be highly trained, receiving a minimum of 40 hours of training on modules relevant to the needs of students with disabilities, including behavior interventions, positive behavior supports, and data collection. (*Id.* at 3).

e. The District will use reasonable efforts, particularly during the COVID pandemic, to keep Student’s classroom appropriately staffed, but Student’s parents agree

to give the District sufficient time to hire and train new staff. (*Id.*, see also Trans. at 497:10-498:9).

f. If Student exhibited behaviors not covered by the March 23, 2020 BIP, school staff would review [REDACTED] District BIP to determine if other interventions may be appropriate pending the revision of the District's BIP. (*Id.*, at 2).

g. Daily communication between Student's teacher and parent. (*Id.*).

h. After six weeks of regular attendance, the IEP Team will reconvene to look at IEP goals and progress and to determine if any changes are necessary. (*Id.*).

i. If Student requires transportation services, the IEP Team will meet to decide the level of supervision and support necessary to ensure Student can safely ride the bus. (*Id.* at 3).

j. Student's parents "do not have the right to dictate staffing decisions provided that staff meets the requirements" delineated. (*Id.*).

k. No admission of liability by the District, dismissal of the due process with prejudice, and a release of the District from all claims known and unknown as of the date of execution. (*Id.* at 4).

21. Petitioners made no allegations and provided no evidence that Jordan District violated the Settlement Agreement.

Jordan District: Student's Current Placement

22. As part of the Settlement Agreement, Student was assigned to [REDACTED]'s autism support classroom at Rose Creek. (Trans. at 193:24-194:4, 494:25-495:3). Student officially started at Rose Creek on October 15, 2020, but due to fall break and a class-wide quarantine, Student did not truly begin attending regularly until November 2, 2020. (Trans. at 204:1-17).

23. Testimony was offered that Jordan District selected Ms. [REDACTED]'s classroom for Student specifically because she is a strong teacher and she has extensive education, experience, and expertise in working with severely autistic students, tracking and using data, and supervising

programing. (Trans. at 194:24-196:2, 358:24-359:5,495:2-20). Further, Ms. [REDACTED] is currently working to obtain her BCBA. (Trans. at 197:6-198:18).

24. As part of the Settlement Agreement, a BCBA was always assigned to Rose Creek. Jordan District had to hire three separate BCBA's during the school year. [REDACTED] worked until Christmas break before moving to another job. [REDACTED] was the interim BCBA at Rose Creek until [REDACTED] became board certified and took over in February 2020. (Trans. at 255:13-:24). Significant testimony was received regarding the qualifications of each BCBA. (Trans. at 310:6-312:11, 339:13-340:24, 442:12-444:14).

25. Each of the BCBA's provided nearly daily oversight and supervision of Ms. [REDACTED] and the paraeducators working in Ms. [REDACTED]'s class, which exceeded the supervision requirement of the Settlement Agreement (Trans. at 320:1-322:7). The BCBA's tracked their time (Resp. Ex. 36) and provided regular (almost daily) oversight documentation specifically for Student (Resp. Ex. 40).

26. Ms. [REDACTED] and Ms. [REDACTED] conferred daily regarding Student's behaviors. (Trans. at 454:14-18). To ensure that all of the classroom staff had readily accessible guidance on how to implement Student's BIP, Ms. [REDACTED] created a "[Student's] BIP at a Glance." (Trans. at 454:19-456:10; *see* Resp. Ex. 42). This document is based on Student's BIP and boils down all of Student's behaviors and functions, goal/target behaviors, interventions, and consequences. (*Id.*; Trans. at 486:20- 487:19; *see also* Resp. Ex. 8).

27. Significant testimony was heard regarding the efforts of Ms. [REDACTED] and the BCBA's to familiarize themselves with Student's needs, review his files, and incorporate the BIP created by Dr. [REDACTED]. (Trans. at 297:22-298:21, 316:14-317:23).

28. When Student arrived at Rose Creek, Ms. [REDACTED] immediately began collecting data to be used for a new BIP. (Trans. at 205:10-15). Ms. [REDACTED] personally supervised Student because she knew he needed close monitoring, and she wanted to gather accurate data for the new BIP. (Trans. at 301:17-302:7).

29. Ms. [REDACTED] and Mr. [REDACTED] tracked Student's compliance and noted new behaviors outside of the behaviors listed in the March 23, 2020 BIP. (Trans. at 207:2-12). Ms. [REDACTED] recorded Antecedent Behavior Consequence ("ABC") data, which she and Mr. [REDACTED] used to determine the function of Student's behavior (e.g., attention seeking, escape behavior) and replacement strategies (e.g., requesting breaks, planned ignore). (Trans. at 296:19-297:14).

30. Mr. [REDACTED] worked with Ms. [REDACTED] compiling data. He reviewed prior reports, conducted classroom observations, conducted reading assessments, developed rating scales for target behaviors, and interviewed Student's parents to complete functional behavior assessments. Thereafter, a meeting was coordinated with Student's IEP Team to create an updated IEP and BIP. (Trans. 295:22-296:13, 314:13-315:4, 318:1-17). The IEP Team met and developed a new IEP and BIP on December 14, 2020. (*See* Resp. Ex. 7 (IEP) and Resp. Ex. 8 (BIP)).

Jordan District: One-to-One RBT Versus Paraeducators

31. The Settlement Agreement was silent regarding a one-to-one aide for Student. (Resp. Ex. 1). However, Ms. [REDACTED] requested at the December 14, 2020 IEP Team meeting that a one-to-one aide be assigned to Student at all times due to safety concerns, particularly related to elopement and the bus, and due to concerns about clothing removal. (Trans. at 224:22-225:21 430:14-21, 500:20-501:9; Resp. Ex. 7 at 11).

32. The IEP Team considered the request for a one-to-one aide acknowledging Ms. [REDACTED]'s concerns (Trans. at 225:22-25), but they ultimately determined that a one-to-one aide was not necessary because a trained adult supervised Student at all times. (Resp. Ex. 7 at 11 (*see* "Reasons Refused"); Trans. at 327:7-328:16).

33. Nevertheless, Petitioners renewed the request for a one-to-one aid as part of the Request for Due Process Hearing (*see* Request for Due Process Hearing, Due Process Fact Narrative at 10).

34. With regard to transportation, the IEP Team discussed various solutions including having Student wear a safety vest, but they ultimately implemented other, less-restrictive interventions including moving Student's seat to the front of the bus. (Trans. at 240:7-:20; *see also* Resp. Ex. 18 and 19). An aide was always assigned to the bus, and with the exception of the one incident prompting the December 14, 2020 IEP Team meeting, Student did not have a single safety incident on the bus, even when the bus aide was absent on a few occasions. (Trans. at 240:24-242:5).

35. With regard to Student's education, Ms. [REDACTED] believed that a one-to-one aide would be more restrictive and the teacher, paraprofessionals, and BCBA's are qualified to manage Student's behaviors, adequately address safety concerns, and fully implement Student's BIP. She further testified that she was concerned that a one-to-one aide could create prompt dependency and may reinforce Student's inappropriate attention seeking behavior. (Trans. at 226:8-25, 306:6-307:2). Mr. [REDACTED] agreed with the rest of the IEP Team that a one-to-one aide was unnecessary. (Trans. at 327:22-328:17, 330:12-18).

36. Ms. [REDACTED] testified, based on her observations, Student's needs were always taken care of by either Ms. [REDACTED] or an aide. (Trans. at 360:8-13, 361:5-17). Specifically, Ms. [REDACTED] stated that Ms. [REDACTED]'s classroom is currently set up in such a way that there are as few interfering behaviors happening as possible. (Trans. at 377:19-24). Ms. [REDACTED] further opined that a one-to-one aide could create prompt dependence and impede Student from exercising a level of independence that he is capable of in the future. (Trans. at 360:14-361:4).

37. Based on her experience with Student, Ms. [REDACTED] testified she does not think Student requires a one-to-one aid or an RBT. She also expressed concern that Student's prompt dependency would grow, and he would lose independence. (Trans. at 471:17-472:6).

38. The Settlement Agreement specifically allowed for highly trained paraprofessionals rather than RBTs (Resp. Ex. 1 at 3). Further, Petitioners did not make a request for an RBT during the December 14, 2020, IEP Team meeting. (Trans. at 226:4-7; 326:13-19; 430:8-25; 500:16-19). However, Petitioners demanded in the Request for Due Process: "Education will be provided using an ABA model with a licensed RBT and qualified BCBA supervising to insure implementation of the behavior plan." (Request for Due Process Hearing, Due Process Fact Narrative at 10).

39. Respondent produced significant evidence regarding the extensive training Jordan District provides its paraeducators. The paraeducators in Student's classroom receive Canvas modules totaling over 60 hours of instruction (Trans. at 408:24-412:23, 417:12-418:3); staff in-services (Trans. at 260:7-11); constant training, supervision/observation, and correction from qualified individuals, including from a BCBA. (Trans. at 229:18-230:2).

40. During COVID-related school closures in the spring of 2020, Jordan District created a new online training focused on behavioral strategies and small group instructional strategies. (Trans. at 503:13-504:17). Ms. [REDACTED] helped create the trainings and testified that upon hire, all of the paraprofessionals in the classroom were enrolled in the courses to receive in excess of 60 hours of training (at least 25 upon onboarding and 40 additional specialized trainings). (Trans. at 408:24-418:3).

41. Jordan District aligned the training content with the State Paraeducator Manual and included information relevant to behavior instruction. (Trans. at 413:25-414:13; *see generally* Resp. Ex. 54). The modules include content on strategies for specific disabilities, tracking and graphing behavioral data, and using practical behavioral strategies and interventions (e.g., reward systems, precision commands, etc.). (Trans. at 415:3-417:5).

42. Ms. [REDACTED] testified, as of the date of the Hearing, all of the paraprofessionals assigned to work with Student, both in the classroom and on the bus, had completed all training modules assigned to them. (Trans., at 418:15- 419:3).

43. In addition, in the fall of 2018, two of the paraprofessionals currently working with Student completed a two-day, in-person training with an autism specialist and a behavioral specialist learning various techniques and strategies, including precision commands, reward systems, and responding to more difficult behaviors such as elopement. Ms. [REDACTED] spent an additional two weeks in the classroom modeling and teaching the paraprofessionals how to use the techniques and strategies in the classroom. (Trans. at 419:4-21).

44. Ms. [REDACTED] provided further training to the paraprofessionals on "data collection procedure and how to implement the interventions from the Behavior Intervention Plans, and [she] worked with them on instruction and modifications and accommodations to the

instruction.” She also provided ongoing feedback to the paraprofessionals, which included in-the-moment correction. (Trans. at 229:18-231:10).

45. Mr. [REDACTED] testified that Student could benefit from trained staff, and that an RBT might be appropriate. However, he also testified, “It doesn’t mean that just because someone’s an RBT that they’re magically going to be the best fit for Student.” (Trans. 331:16-20).

46. Dr. [REDACTED] testified extensively about Jordan District’s special education paraeducators. Dr. [REDACTED] testified that the paraeducators working with Student were receiving appropriate training and supervision to provide effective support services. They were receiving adequate preparation for a paraeducator to implement a behavior intervention plan. (Trans. 390:13-391:9; *see also* Resp. Ex. 55). Dr. [REDACTED] also testified that an appropriate amount of supervision of the paraeducators was taking place “commensurate with BCBA requirements” for an RBT. (Trans. at 390:1-12; *see also* Resp. Ex. 49, 50, and 51).

47. Ms. [REDACTED] worked providing RBT services in a previous job, and she provided Student with one-to-one speech services for 30 minutes per week during the past school year. She observed Student working with aides in the classroom, during transitions, and at recess, and she testified that she believed Student received appropriate supervision and supports. Based on her prior experience delivering RBT services, Ms. [REDACTED] testified she does not believe that an RBT would add anything meaningful to Student’s education because the paraeducators implemented the same techniques that she would have used as a behavior technician (e.g., priming, token economy, etc.). (Trans. at 428:1-429:9, 432:14-434:24).

Jordan District: LRE and General Education

48. Petitioners did not request additional time for Student to be in a general education environment during the IEP Team meeting on December 14, 2020. (Hearing 234:24-235:4). The Settlement Agreement did not address placing Student in a regular education classroom. (*See* Resp. Ex. 1). However, in the Request for a Due Process Hearing, Petitioners made a demand for Student to be “educated in a regular education classroom with his non-disabled peers.” (*see* Request for Due Process Hearing, Due Process Fact Narrative at 10).

49. During the past school year, Student was not receiving any of his academic coursework in the general education environment (Hearing Trans. Day 2, at 265:5-:8). However, Student was spending 25 percent of his day with nondisabled peers during lunch and recess. (Trans. at 235:9-13). During those times, Student typically chose to sit by himself when eating lunch. (Trans. at 235:23-236:7). Ms. [REDACTED] testified that Student did not interact with same-age peers at recess, but occasionally he interacted with significantly younger peers in parallel play (e.g., swinging or pushing second-grade students on swings). (Trans. at 348:6-15).

50. Ms. [REDACTED] testified that Student was spelling on grade level in the second grade. She attributed this to having an RBT in a regular education setting. (Trans. at 238:1-8). However, that testimony was contradicted by the Team Evaluation Summary Report and Written Prior Notice of Eligibility from 2009 (Exhibit 9). In fourth grade at Rose Creek, Ms. [REDACTED] stated that Student did not perform on grade level in the core curriculum. (Trans. at 237:23-:25). Ms. [REDACTED] further testified that from an academic perspective, she does not believe that Student could access the core curriculum even if he were provided with a one-to-one aid, whether that be a paraprofessional or an RBT. (Trans. at 238:1-8).

51. From a behavioral perspective, Ms. [REDACTED] testified that because Student's maladaptive behaviors are still "pretty frequent" and "pretty significant" combined with a lack of predictability of interventions, she would be concerned with Student accessing the general education environment. (Trans. at 238:9-:20). Ms. [REDACTED] explained that Student's lengthy transitions would also impede him from accessing a general education classroom and transitions would take Student away from classroom instruction. (Trans. at 237:13-22).

52. Ms. [REDACTED] testified that based on her observations of two to four hours per day in Student's classroom, she does not believe that Student could be successful receiving core instruction in a general education classroom, even if Student were accompanied by a one-to-one RBT. (Trans. at 373:14-374:20). Ms. [REDACTED] explained that Student's academic needs are so significant that he would not be able to access the general education curriculum, and that Ms. [REDACTED]'s classroom was the appropriate placement for him to receive instruction. (Trans. at 374:5-375:2).

53. Ms. [REDACTED] testified, based on her observations, she does not believe that Student would be successful in a general education classroom with a one-to-one aide. (Trans. at 472:14-

19, 474:25-475:3). Ms. [REDACTED] explained that from a social perspective, Student does not express interest in same-age peers and will generally turn away from them. (Trans. at 473:3-19).

54. Ms. [REDACTED] was concerned if Student were in the general education environment for more than just lunch or recess, Student would rely on his aide more frequently, thereby increasing his prompt dependence and decreasing his own independence. (Trans. at 473:3-8). Ms. [REDACTED] also opined that because Student does not show an interest in or attend to his same-aged, nondisabled peers, he will likely not derive the benefit of being modeled appropriate social behavior. Additionally, Ms. [REDACTED] did not believe that a one-to-one aide would prevent Student from engaging in behaviors that are disruptive to other Student's in the general education class. (Trans. at 473:24-474:10).

55. Ms. [REDACTED] agreed that a general education classroom is the LRE for any student if that student can be successful with added services or supports. Based on her observations, however, she does not believe Student could be successful in a general education classroom regardless of the services or supports, and his current placement in the autism classroom is the place where he can be most successful. (Trans. at 474:14-10).

Jordan District – Progress Data

56. A significant portion of the Hearing was dedicated to reviewing Student's progress data. Student made "insufficient progress" on a small portion of his goals (e.g., reading comprehension, self-care), but Student made progress on all other goals including his academic and behavior goals. (Trans. at 246:3-247:1; Resp. Ex. 32). Ms. [REDACTED] testified that Student's academic gains have plateaued recently, and she speculated about a correlation with sleep disturbances reported by Ms. [REDACTED] and Student being more tired in school than usual. (Trans. at 248:19-249:23, 275:7-277:7).

57. Ms. [REDACTED] testified that Student has made very good progress on his speech goals since he started at Rose Creek, as evidenced by using on-topic comments and attending better. (Trans. at 434:18-435:2; Resp. Ex. 35).

58. Student's progress related to behavior has been more variable. Since November, Ms. [REDACTED] has input daily behavior data into an Excel spreadsheet at the end of each week,

and the BCBA uses the data to create visual graphs of the information. (Trans. 212:18-213:6, 293:12-295:11; Resp. Ex. 41).

59. Generally, Student's aggression towards others has decreased, although he can become aggressive if volume changes quickly in the class environment. (Trans. 239:1-10).

60. During the time that Ms. [REDACTED] was working with Student, his head banging increased due to a peer screaming more frequently; his elopement was variable but had a decreasing trend; Student's exposing of his body was either decreasing or nonexistent; his physical aggression was variable; and Student had a moderate decrease (improvement) in not following directions. (Trans. at 364:20-369:14; Resp. Ex. 41).

61. Since Ms. [REDACTED] began working with Student, despite some level of variability, Student has had "a decreasing trend with a very low occurrence of elopement per day." (Trans. at 461:16-464:8; *compare e.g.*, Resp. Ex. 41 at JSD_000679 with Resp. Ex. 41, at JSD_000607).

62. On most days, Student did not expose himself, and there was only one day that there were three occurrences. (Trans. at 464:9-:25; *see e.g.*, Resp. Ex. 41 at JSD_000680). The team employed techniques of physical guidance on reclothing, redirection, and planned ignoring of the more minor covarying behaviors. (Trans. at 465:1-24).

63. There was an increasing trend of Student's on-task behavior. (Trans. at 466:15-467:7; *see e.g.*, Resp. Ex. 41 at JSD_000683).

64. The data shows that Student was increasingly requesting breaks (functional communication training), which is a replacement strategy where an increase demonstrates improvement. (Trans. at 467:8-468:2; *see e.g.*, Resp. Ex. 41 at JSD_000686).

65. Ms. [REDACTED] testified that the current BIP is still accurate related to antecedents and maladaptive behaviors. If Ms. [REDACTED] felt a need to modify the BIP, she would simply initiate an IEP Team meeting. (Trans. at 239:14-:23; *see also* Resp. Ex. 8).

66. Dr. [REDACTED] acknowledged that Student's behavior was also variable in [REDACTED] District, and variability can be attributable to biological and environmental factors. (Trans at 175:7-18). Further, Dr. [REDACTED] admitted that Student had undergone a fair bit of change

(e.g., moving from ██████ County to a new home and new school) and that the change could be a factor in Student's variable behavior in Jordan District. (Trans. at 177:7-20).

V. DISCUSSION

Student is an ██████-year-old boy with severe autism. He began receiving specialized services as a baby. Student was placed on an IEP at the age of three, and he has received special education and related services ever since he started school. Petitioners moved from ██████, and Student transferred to Jordan District in February 2020. Student was initially placed in a special school in Jordan District, but parents were unhappy with the placement. They filed a Request for Due Process Hearing with USBE in August 2020. Petitioners mediated the matter and entered into a Settlement Agreement in October 2020. As part of the Settlement Agreement, Student was given a new placement in a special autism classroom at Rose Creek, an otherwise general education elementary school.

Based on reports sent home daily from Rose Creek, it appeared to Petitioners that Student had regressed related to maladaptive behaviors. The daily reports showed, among other things, incidents of elopement, disrobing, exposing genitals, screaming, head banging, and physical aggression. Petitioners claimed that these behaviors were managed better in ██████ District, and Student had clearly regressed with respect to his behavior, demonstrating that Student was being denied a FAPE by Jordan District. Petitioners filed a renewed Request for Due Process Hearing on February 8, 2021.

In the renewed Request for Due Process, Petitioners claimed that Student had been successful in a regular education classroom with adequate support in ██████ District. Petitioners requested during the December 14, 2020 IEP meeting that Jordan District provide a one-to-one aide. Jordan District declined this request determining instead that the current configuration of full-time supervision by multiple adults was sufficient to meet Student's needs. Finally, Petitioners maintained that Student requires the training and expertise of RBTs acting as aides. Denying Student one-to-one RBT aides has caused a regression in behavior effectively denying him a FAPE.

Provision of FAPE

Students with disabilities who are protected by the IDEA are entitled to be appropriately identified, evaluated, placed, and have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs. 20 USC §1400(d); 34 CFR §300.1(a). The IDEA further provides that a party may present a complaint and request for due process hearing with respect to any matter relating to the identification, evaluation, educational placement, or provision of a FAPE to a disabled student. 20 USC §1415(b)(6).

In 2017, the Supreme Court provided some clear guidance for what it means to provide a FAPE in the landmark case *Endrew F. v. Douglas Cnty. Sch. Dist.*, 137 S. Ct. 988 (2017). It stated:

A FAPE, as the Act defines it, includes both special education and related services. Special education is specially designed instruction to meet the unique needs of a child with a disability; related services are the support services required to assist a child to benefit from that instruction. A state covered by the IDEA must provide a disabled child with such special education and related services in conformity with the child's individualized education program, or IEP.

Id. (internal quotes and citations omitted).

The Court went on hold: “To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances.” *Id. at 999* (emphasis added). An appropriate education program requires the expertise of school officials in collaboration with parents as part of an IEP team. *Id.* In addition, “any review of an IEP must appreciate that the question is whether the IEP is reasonable, not whether the court regards it as ideal.” *Id.* (emphasis added). While *Endrew F.* and subsequent court decisions have created a clear standard requiring progress, the cases are less clear on the issues of measuring progress or delineating the setting in which progress must occur.

Progress Toward Goals

A significant portion of the Hearing was dedicated to testimony related to Student's progress. Testimony proffered by Ms. [REDACTED] and Dr. [REDACTED] indicated that Student's behavior issues had been largely resolved in [REDACTED] District by assigning Student a full-time, one-to-one RBT and by placing him in the regular education classroom. Petitioners' position, however,

is a non sequitur; it draws conclusions without sufficient supporting evidence, ignores several possible intervening factors; and contradicts some of the documentary evidence.

Petitioners argued that Student has regressed in Jordan District with respect to his maladaptive behaviors, and the regression can be attributed to a different service pattern in Jordan District that does not include a full-time, one-to-one aide that has been trained as an RBT. However, witnesses for both parties agreed that the nature of Student's behaviors are "dynamic" and his progress variable. (SOF 9). In addition to variability, Ms. [REDACTED] and Dr. [REDACTED] admitted that Student's progress took time, much more time than Student has been attending in Jordan District. (SOF 10). Further, the Team Evaluation and Summary Report and Written Prior Notice of Eligibility demonstrated that Student was functioning nowhere near grade level in any of the academic and behavioral categories, and the 2019 showed highly variable behavior with clear progress in some areas but less progress and even some decline in other areas. (SOF 13, 14 and 50).

Since starting school in Jordan District in 2020, Student has continued to show variability in his maladaptive behaviors, although Jordan District demonstrated at the Hearing that it carefully gathers data and tracks progress toward goals. Based on that data and tracking, testimony demonstrated that Student is making progress in several areas, although not in all areas. (SOF 20 and 56-65). This progress appears very similar to the progress that was recorded in summary form in the [REDACTED] District FBA/BIP.

Concerning to Student's parents, no doubt, were reports of some of the more problematic Student behaviors such as disrobing, exposure of genitals, head banging, physical aggression, and elopement. Fortunately, the data show there is progress in aggression toward other students, exposing genitals, and elopement from the class, although there remains persistent variability in other areas such as head banging. (*Id.*). The data also show, however, that variability may be attributable, in part, to the disruption caused by three new students and added screaming in the class environment. Further, the data notes that a change in medications and sleep patterns may have had a negative effect on Student's behaviors. It is important to note that as very similar observation was made in the [REDACTED] District FBA/BIP. (SOF 14).

Jordan District also demonstrated that Student is making marked progress on his academic goals and almost all the goals contained in his IEP. (SOF 56 and 57). Despite this

progress, none of the professionals that currently work with Student believe Student can currently access the general education curriculum in a general education setting. (SOF 48-55). All agree that Student's current placement in the autism classroom is most appropriate for Student's academic progress. (*Id.*).

This progress is notable in light of the disruptions that have accompanied Student's education over the past 18 months. Student, whose behaviors are dynamic and variable, moved to a new city, to a new city, to a new climate, and to two different schools. Student worked with new teachers, new paraeducators, new specialists, and new support staff. Student missed several weeks of school. Not to mention that the schools were dealing with COVID-19 pandemic protocols, which was a disruption for all students. Dr. [REDACTED] admitted that biological and environmental changes can likely add significantly to the variability of Student's maladaptive behaviors. (SOF 66). Despite these changes, the data show that Student is, indeed making progress toward his goals. (SOF 56-64).

As the *Andrew F.* standard carefully articulates, FAPE is measured by how reasonably the IEP is calculated to enable Student to make progress appropriate in light of his circumstances. (SOF 15-16 and 22) (*see Andrew F.*, 137 S. Ct. at 999). The amount of change experienced by Student from the time he moved from [REDACTED] to the present is significant by any standard, to say nothing of the changes that have occurred during the COVID-19 pandemic. Moreover, before the Settlement Agreement was signed in October 2020, Student had not been in school since March (SOF 20). Respondent's own expert witness admitted environmental changes likely contributed the variability in Student's current behavior. (SOF 66). Given the Student's tendency to exhibit variability in his maladaptive behaviors, added to the amount of change experienced by Student in the past year, it appears clear from the record that Jordan District has made reasonable calculations to enable Student to make progress in his educational program in light of his current circumstances.

One-to-One RBT

The thrust of Petitioner's arguments come down to the perceived need of a one-to-one aide who has an RBT credential. Without far greater expertise and significantly more data, the Hearing Officer is not in a position to determine if such a demand would, indeed, make a qualitative difference in Student's education. Fortunately, once again, as the standard from

Andrew F. makes clear that the Hearing Officer’s role is to simply determine whether the IEP, and Student’s progress in light of that IEP, is reasonable. *Id.* at 999. The Tenth Circuit recently ruled on a case that upheld a District Court ruling that a school district was not required to provide a one-to-one applied behavioral analysis from an ADA certified instructor. *Elizabeth B. v. El Paso City. Sch. Dist.* 11, 2019 U.S. Dist. LEXIS 135425, ¶33 *aff’d* 841 Fed. Appox., ¶44 (10th Cir. 2020). In affirming that decision, the Tenth Circuit made clear that form does not swallow substance, and adherence to particular methodologies is not required. The standard remains “whether the IEP is reasonably calculated to enable a child to make progress in light of the child’s circumstances.” *Elizabeth B.*, 841 Fed. Appox., ¶44. (quoting *Andrew F.*, 137 S. Ct. at 998).

In the present case, Respondent defended its decision not to assign Student a one-to-one aide. In its December 14, 2020 IEP, Jordan District opted to provide full coverage for Student by ensuring that one or more adults were always working with Student to provide instruction and safety. (SOF 31-37). Significant testimony at the Hearing referred to “prompt dependency” or a theory that Student might become overly reliant on the one-to-one aide and fail to develop independence. Respondent’s own expert, however, indicated that this theory is not well established and subject to considerable debate. Regardless, there is no need to prolong a discussion upon that theory any further because Respondent demonstrated that Student is making progress that is reasonable under the circumstances. (SOF 56-64). Again, the data show progress in key areas of self-regulation such as exposing genitals, elopement, and following instructions, which are areas where a one-to-one aide would be needed most. Also, with the exception of one event that occurred prior to the December 14, 2020 IEP Team meeting, Student has not had a single safety incident on the bus. (SOF 34).

Respondent also demonstrated there is nothing magical about requiring aides to be certified RBTs. Respondent questioned witnesses extensively on the extent and quality of training and supervision of its paraeducators. (SOF 39-47). While not entirely relevant to this proceeding, it is worth noting that the Settlement Agreement signed by Petitioners allowed for non-RBT paraeducators so long as they receive commensurate training and supervision (SOF 20). Paraeducators in Jordan District received well over 40 hours of training in behavioral strategies, group instruction strategies, data collection, and other generalized trainings, and all

training is consistent with the State Paraeducators Manual. (*Id.*). BCBAs supervise, correct, and model for paraprofessionals equal to or more than is required for RBTs. (SOF 25 and 39). Again, as the Tenth Circuit observed, Jordan District need not adhere to a specific methodology, or in this case a particular certification. Alternatively, Jordan District demonstrated that its training and supervision of paraeducators is reasonably calculated to meet the needs of Student and his fellow students.

Placement in a General Education Classroom

In the Request for Due Process Hearing and during the Hearing itself, Petitioners insisted that Student's LRE is the regular education classroom, although this demand was not made as part of the Settlement Agreement or the December 2020 IEP. "To the maximum extent appropriate, children with disabilities should be educated with children who are not disabled 'and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.'" *Elizabeth B. v. El Paso City. Sch. Dist.* 11, 2019 U.S. Dist. LEXIS 135425, ¶33 *aff'd* 841 Fed. Appox. 40 (10th Cir. 2020) (quoting 20 U.S.C. § 1412(a)(5)) (citing *L.B. ex rel. K.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 977 (10th Cir. 2004)).

The Tenth Circuit has adopted a two-part test to determine whether a schools comply with the IDEA's LRE requirement: (1) whether "education in the regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily for a given child" and (2) if not, whether the school has "mainstreamed the child to the maximum extent appropriate." *Hernandez v. Grisham*, 2020 U.S. Dist. LEXIS 238477 ¶222 (quoting *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989). "For a child not fully integrated in the regular classroom, an IEP 'must be appropriately ambitious in light of her circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom.'" *Elizabeth B.*, 2019 U.S. Dist. LEXIS 135425 at ¶14 (quoting *Endrew F.*, 137 S. Ct. at 1000).

Petitioners inferred that placement in a regular education classroom with a certified RBT was key to Student's success in ██████████ District. However, as stated previously, the record is not clear whether there was a benefit for Student spending part of his day in the regular education classroom in ██████████ District. Indeed, conflicting testimony was presented at the

Hearing regarding the amount of time that Student was spending in the regular education classroom. While Ms. [REDACTED] testified that student was spending 40 percent of his day in a general education classroom, Dr [REDACTED] recorded in the FBA/BIP from September 2019 that Student was only spending 5.08 hours per week (approximately 1 hour per day) in the general education classroom. (SOF 14). The record is unclear as to whether that time was spent in academics or in other areas, but Petitioners insinuated it was spent on academics. Finally, no data produced by the parties demonstrated that the time spent in a regular education classroom accounted for any progress in academics or behavior. On the contrary, the scant documentary evidence from [REDACTED] District seems to support a conclusion that Student struggled in the general education classroom, and his behavior was a significant distraction for other students in that setting. (SOF 12-14).

On the other hand, last year Student spent recess and lunch with non-disabled peers each day, which was 25 percent of his time—more time than he was spending in [REDACTED] School District. (SOF 52). None of that time was spent on academics, and all instruction occurred in the special classroom. Respondent presented significant testimony that Student’s behavior and academic limitations prevent him from accessing the curriculum in the regular education classroom. (SOF 50-55). The data presented by Jordan District, based on the variability of Student’s behavior and his low academic performance, support the current placement. Further, despite the persistent variability, Jordan District’s data demonstrates that Student is, indeed, making progress.

Petitioners argued that affording services in the general education classroom works well for Student because he identifies himself more with nondisabled peers. Ms. [REDACTED] testified that she wanted to transfer Student from Kauri Sue, in part, so he could have access to general education peers “as he listens to his peers more than he listens to his teachers at times.” (SOF 18). Ms. [REDACTED]’s testimony was directly contradicted by Ms. [REDACTED] who testified that Student generally keeps to himself at lunch and at recess. She indicated when Student interacts with non-disabled peers, he only interacts with significantly younger students. (SOF 49). Further, Ms. [REDACTED] explained that from a social perspective, Student does not express interest in same-age peers and will generally turn away from them. (SOF 53).

Once again, it appears that Jordan District made a reasonably calculated determination that Student's placement should not be in a general education classroom. However, it is also true that Jordan District has a continuing obligation to pursue an ambitious IEP, and to the extent possible, integrate Student into the regular education environment. Therefore, Jordan District must continually look for opportunities to integrate Student to a greater extent with his non-disabled peers as his behavior improves and if he is able to meaningfully access the curriculum.

VI. CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and analysis of applicable law, the Hearing Officer makes the following Conclusions of Law on substantive issues:

1. Petitioners made no claims or allegations of procedural errors and the Hearing Officer, therefore, finds none.
2. Petitioners did not meet their burden of proof of demonstrating that Jordan District failed to offer an IEP reasonably calculated to enable Student to make progress appropriate in light of his circumstances. *Andrew F.*, 137 S. Ct at 999.
3. Petitioners did not meet their burden of proof demonstrating that Student requires a one-to-one aide or that paraeducators working with Student must be certified as RBTs. *Elizabeth B.*, 841 Fed. Appox., ¶44.
4. Petitioners did not meet their burden of proof demonstrating that Student's placement should be in a regular education classroom. *Hernandez*, 2020 U.S. Dist. LEXIS 238477 ¶222 and *Elizabeth B.*, 2019 U.S. Dist. LEXIS 135425 at ¶14.
5. Jordan District has a continuing obligation to seek for appropriate opportunities to integrate Student to a greater extent with his non-disabled peers. *Elizabeth B.*, 2019 U.S. Dist. LEXIS 135425 at ¶14.
6. Petitioners are not a prevailing party, and no costs are awarded in this matter. State Rules, IV.R. Attorneys' Fees (CFR §300.517; UCA 53E-7-208(4)(b)).

VII. ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby ORDERED that Petitioners' request for relief articulated in the Request for Due Process filed February 8, 2021 (dated February 3, 2020), is hereby DENIED. However, it is also hereby ORDERED that Respondent shall continue working with the IEP Team, including Ms. [REDACTED], to seek for appropriate opportunities to integrate Student to a greater extent with his non-disabled peers as his behavior improves and if he is able to meaningfully access the curriculum. All other relief not specifically ordered herein is expressly DENIED.

Dated this 22nd day of June, 2021.

/s/ Douglas R. Larson
Douglas R. Larson
Hearing Officer

CERTIFICATE OF SERVICE

On the 22nd Day of June, 2021, a copy of the foregoing DECISION AND ORDER was sent by electronic email to the following:

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